

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/09

Date: 29 April 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR

**Public
URGENT**

**Decision Regarding the Visit of Omar Hassan Ahmad Al Bashir to the Federal
Republic of Ethiopia**

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Competent authorities of
the Federal Republic of Ethiopia

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”) renders this decision on the “Prosecution’s Urgent Notification of Travel in the Case of *The Prosecutor v. Omar Al Bashir*” (the “Prosecutor’s Notification”).¹

1. On 31 March 2005, the Security Council (the “SC”), acting under Chapter VII of the Charter of the United Nations (the “UN”), adopted Resolution 1593 (2005) referring the situation in Darfur to the Court.²

2. On 4 March 2009 and 12 July 2010, Pre-Trial Chamber I (the “PTC I”), formerly seized of the present case, issued two warrants of arrest against Omar Hassan Ahmad Al Bashir (“Mr. Al Bashir”).³ These warrants of arrest remain to be executed.

3. On 6 March 2009 and 21 July 2010, acting upon PTC I’s request,⁴ the Registrar prepared and transmitted to all UN Security Council members that are not parties to the Rome Statute two requests for the arrest and surrender of Mr. Al Bashir for the purposes of the execution of the two warrants of arrest.⁵

¹ ICC-02/05-01/09-198 and its annex A.

² S/RES/1593 (2005).

³ Pre-Trial Chamber I, “Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-1; Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/04-01/09-3; Pre-Trial Chamber I, “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 12 July 2010, ICC-02/05-01/09-95; Pre-Trial Chamber I, “Second Decision on the Prosecution’s Application for a Warrant of Arrest”, 12 July 2010, ICC-02/05-01/09-94.

⁴ Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/04-01/09-3, p. 93; Pre-Trial Chamber I, “Second Decision on the Prosecution’s Application for a Warrant of Arrest”, 12 July 2010, ICC-02/05-01/09-94, p. 29.

⁵ ICC-02/05-01/09-8; ICC-02/05-01/09-97.

4. On 15 March 2012, the Presidency issued the “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d’Ivoire situations”, in which it re-assigned, *inter alia*, the situation of Darfur, Sudan to this Chamber.⁶

5. On 10 October 2013, the Chamber issued, upon notification by the Prosecutor,⁷ the “Decision Regarding Omar Al-Bashir’s Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia” (the “10 October 2013 Decision”).⁸ In that decision, the Chamber also ordered that the requests for arrest and surrender be transmitted to the competent authorities of the Federal Republic of Ethiopia.⁹

6. On 24 October 2013, the Chamber received the Registry’s report on the 10 October 2013 Decision.¹⁰ According to this report, no reply was received by the Court in response to a Note Verbale transmitted by the Registrar concerning the visit of Mr. Al Bashir to the Federal Republic of Ethiopia at the time.¹¹ Moreover, according to media reports, this visit actually took place notwithstanding the Court’s Note Verbale.¹²

⁶ Presidency, ICC-02/05-01/09-143.

⁷ ICC-02/05-01/09-163 and annex A.

⁸ Pre-Trial Chamber II, ICC-02/05-01/09-164.

⁹ *Ibid.*, p. 6.

¹⁰ ICC-02/05-01/09-167 with two confidential and two public annexes.

¹¹ ICC-02/05-01/09-167, p. 4, para. 3.

¹² ICC-02/05-01/09-167, p. 4, para. 4.

7. On 30 January 2014, the Chamber issued, upon notification by the Prosecutor,¹³ the “Decision on the ‘Prosecution’s Urgent Notification of Travel in the Case of *The Prosecutor v Omar Al Bashir*’” (the “30 January 2014 Decision”).¹⁴

8. On 10 February 2014, the Chamber received the Registry’s report on the 30 January 2014 Decision.¹⁵ According to this report, no reply was received by the Court in response to a Note Verbale transmitted by the Registrar concerning the visit of Mr. Al Bashir to the Federal Republic of Ethiopia at the time.¹⁶ Moreover, according to media reports, this visit took actually place notwithstanding the Court’s Note Verbale.¹⁷

9. On 17 February 2014, the Chamber issued the “Decision on the ‘Prosecution’s Urgent Notification of Travel in the Case of *The Prosecutor v Omar Al Bashir*’” (the “17 February 2014 Decision”).¹⁸

10. On 29 April 2014, the Chamber received the Prosecutor’s Notification.¹⁹ In this filing, the Prosecutor avers that Mr. Al Bashir travelled on 25 April 2014 to the Federal Republic of Ethiopia with a view to participating “in the 3rd Forum on Security in Africa which was held from 26 to 27 April 2014”.²⁰ She also alleges that, according to credible media reports, Mr. Al Bashir continues his presence on the territory of the Federal Republic of Ethiopia for a “four-day private visit to

¹³ ICC-02/05-01/09-179 and annex A.

¹⁴ Pre-Trial Chamber II, ICC-02/05-01/09-180.

¹⁵ ICC-02/05-01/09-182 with one confidential and one public annex.

¹⁶ ICC-02/05-01/09-182, p. 4, para. 2.

¹⁷ ICC-02/05-01/09-182, p. 4, para. 3 and ICC-02/05-01/09-182-AnxA2.

¹⁸ Pre-Trial Chamber II, ICC-02/05-01/09-184. No Registry report was submitted in the aftermath of the 17 February 2014 Decision to the Chamber.

¹⁹ ICC-02/05-01/09-198 and annex A.

²⁰ ICC-02/05-01/09-198, para. 1.

Bahr Dar state”.²¹ As a result, the Prosecutor requests the Chamber to “inform the authorities of Ethiopia about the visit and, in light of United Nations Security Council Resolution 1593, urge them to arrest Omar Al Bashir”.²² She further requests that the Chamber “take any measures [it] deems appropriate to secure execution of the pending warrants of arrest against Omar Al Bashir”.²³

11. The Chamber notes articles 21(1)(a) and (b), 87(5), 89(1), 91 and 92 of the Rome Statute (the “Statute”).

12. The Chamber reiterates that only States Parties to the Statute are under an obligation to cooperate with the Court. Given that the Statute is an international treaty governed by the rules set out under the Vienna Convention on the Law of Treaties, it is only with the State’s consent that the Statute can impose obligations on a non-State Party.²⁴ Thus, non-States Parties may decide to cooperate with the Court on an *ad hoc* basis, as foreseen in article 87(5)(a) of the Statute. This principle may be altered by the SC which may, by means of a resolution adopted under Chapter VII of the UN Charter, create an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. In such a case, the obligation to cooperate stems directly from the UN Charter.

13. Accordingly, the Federal Republic of Ethiopia, as a non-State Party to the Statute, has no obligations *vis-à-vis* the Court arising from the Statute. In this regard, the Chamber recalls that the situation in Darfur was referred to the Court

²¹ ICC-02/05-01/09-198, paras 1 and 9.

²² ICC-02/05-01/09-198, para. 2.

²³ *Ibid.*

²⁴ UNTS, Vol. 1155, art. 34; See also Pre-Trial Chamber I, “Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council”, 28 August 2013, ICC-01/11-01/11-420, para. 12.

by way of SC Resolution 1593 (2005), which also recognizes that States not parties to the Statute (apart from Sudan) have no obligation under the Statute. However, SC Resolution 1593(2005) still “urge[d] *all States* and concerned regional and other international organizations to cooperate fully” with the Court (emphasis added).²⁵

14. In this context the Chamber wishes to point out that, as reflected in the procedural history above, it has issued three decisions in relation to past visits of Mr. Al Bashir on the territory of the Federal Republic of Ethiopia. It is recalled that the Court has no enforcement mechanism and thus relies on the States’ cooperation, without which it cannot fulfil its mandate and contribute to ending impunity.

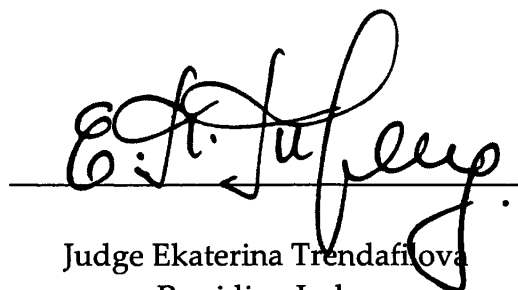
FOR THESE REASONS, THE CHAMBER HEREBY

- a) **orders** the Registrar to remind the Federal Republic of Ethiopia of the requests for arrest and surrender of Omar Hassan Ahmad Al Bashir transmitted to the competent authorities of that country on 10 October 2013;
- b) **orders** the Registrar to send a Note Verbale to the Federal Republic of Ethiopia, enquiring about the visit of Omar Hassan Ahmad Al Bashir, reminding it of the SC Resolution 1593(2005) and inviting said State to cooperate with the Court in the arrest and surrender of Omar Hassan Ahmad Al Bashir to the Court;

²⁵ S/RES/1593 (2005).

- c) **orders** the Registrar to notify the present decision, to the competent authorities of the Federal Republic of Ethiopia;
- d) **orders** the Registrar to prepare a report to be filed with the Chamber in due course concerning said visit; and
- e) **invites** the competent authorities of the Federal Republic of Ethiopia to arrest Omar Hassan Ahmad Al Bashir and surrender him to the Court.

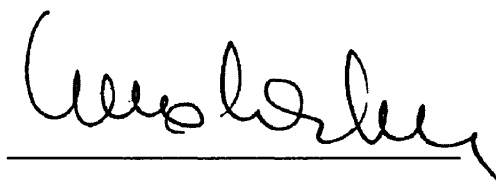
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul



Judge Cuno Tarfusser

Dated this Tuesday, 29 April 2014

At The Hague, The Netherlands