



Original: **French**

No.: ICC-02/05-01/09
Date: 13 December 2011

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR***

Public Document

Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir

Decision to be notified in accordance with regulation 31 of the Regulations of the Court to:

Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

The competent authorities of the
Republic of Chad

Amicus Curiae

Other

The President of the Court

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I (“the Chamber”) of the International Criminal Court (“the Court”) hereby renders a decision on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”).

Background and submissions by the Republic of Chad

1. Where applicable to the present case, the Chamber refers to the background in its *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* (“Decision on Malawi”).

2. On 6 March 2009 and 21 July 2010, respectively, the Registry transmitted to the States Parties to the Statute, at the request of the Chamber, the “Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Al Bashir”¹ and the “Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Al Bashir”² (“Cooperation Requests”). The Republic of Chad has been a State Party to the Statute since 1 January 2007 and was accordingly notified of the Cooperation Requests. It has already allowed Omar Al Bashir to enter its territory, around 21-23 July 2010, without arresting him. The Chamber informed the United Nations Security Council and the Assembly of States Parties of this visit in a decision rendered on 27 August 2010.³

3. The Registry informed the Chamber in its “Report on the second visit of Omar Al Bashir to Chad” dated 9 August 2011 (“First Report of the Registry”)⁴ that, according to media reports, Omar Al Bashir had visited the Republic of Chad on 7 and 8 August 2011 for the purposes of attending the inauguration ceremony of Chad’s Head of State, Idriss Deby Itno. In her note verbale, annexed to the First

¹ ICC-02/05-01/09-7.

² ICC-02/05-01/09-96.

³ ICC-02/05-01/09-109.

⁴ ICC-02/05-01/09-131-Conf.

Report of the Registry, the Registrar reminded the Republic of Chad on 5 August 2011 that it had the “[TRANSLATION] obligation to arrest and surrender to the Court persons against whom a warrant of arrest has been issued by the International Criminal Court, an obligation which applies as much for President Al Bashir as for any other person against whom a warrant of arrest has been issued by the Court”.⁵

4. On 18 August 2011, the Chamber rendered its *Decision requesting observations about Omar Al-Bashir’s recent visit to the Republic of Chad*,⁶ in which it requested the competent authorities of the Republic of Chad to submit observations no later than Friday, 9 September 2011, on the First Report of the Registry, in particular on their alleged failure to meet the obligation to comply with the Cooperation Requests issued by the Court.

5. In her confidential “*Rapport du Greffe relatif aux observations de la République du Tchad*” submitted on 9 September 2011 (“Second Report of the Registry”),⁷ the Registrar informed the Chamber (i) that the Embassy of Chad in Brussels had transmitted the observations of the Ministry of Foreign Affairs to the Registry on 7 September 2011; (ii) that the Republic of Chad’s observations proved to be in reference to the note verbale of 5 August 2011 transmitted by the Registrar in advance of Omar Al Bashir’s visit to Chad and not to the Chamber’s 18 August 2011 decision; and (iii) that, on 9 September 2011, the authorities of the Republic of Chad had indicated informally that they sought an extension of time to respond to the Chamber’s 18 August 2011 decision.

6. On 21 September 2011, the Chamber rendered the *Decision amending the time limit for the submission of observations on Omar Al Bashir’s recent visit to the Republic of Chad*,⁸ in which it decided to extend until 30 September 2011 the time limit for the competent authorities of the Republic of Chad to submit their observations.

⁵ ICC-02/05-01/09-131-Conf, Annex 2.

⁶ ICC-02/05-01/09-132.

⁷ ICC-02/05-01/09-133-Conf.

⁸ ICC-02/05-01/09-134-tENG.

7. On 30 September 2011, the Registry submitted its “*Rapport du Greffe relatif aux observations de la République du Tchad*”,⁹ classified as public with a public annex. In the annex (“Observations of the Republic of Chad”), the Republic of Chad submitted the following considerations:

[TRANSLATION] Recalling the provisions of article 87(1) regarding requests for cooperation and legal assistance;

Considering the common position adopted by the African Union in respect of the international warrant of arrest issued by the Prosecutor against Mr Omar Al Bashir;

Considering further that in this case, as a member of the African Union, the Republic of Chad cannot accede to the Prosecutor’s request and that, under regulation 109(3) of the Regulations, the Republic Chad is entitled to the opportunity to be heard;

Therefore, the provisions of article 87(7) of the Statute referred to in report ICC-02/05-01/09 of 18 August 2011, which stipulate, “Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council” are not triggered.¹⁰

Applicable law and discussion by the Chamber

8. The Chamber notes articles 13, 21, 27, 86, 87, 89 and 119 of the Statute and rule 195 of the Rules of Procedure and Evidence (“the Rules”).

9. At the outset, the Chamber notes that the Chadian authorities, although they received a warning from the Registry prior to the visit of Omar Al Bashir, nevertheless decided neither to respond to the Court nor to arrest the suspect. The Chamber thus concludes that the Republic of Chad failed to comply with its obligation under article 86 of the Statute to cooperate fully with the Court.

10. The Republic of Chad did not respect the sole authority of the Court to decide whether immunities are applicable in a particular case. This is established by article 119(1) of the Statute, which provides that “[a]ny dispute concerning the judicial

⁹ ICC-02/05-01/09-135, with public annex 1.

¹⁰ ICC-02/05-01/09-135, annex 1, p. 3.

functions of the Court shall be settled by the decision of the Court". Moreover, rule 195(1) states:

When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

11. Therefore, the Chamber concludes that, in this respect, the Republic of Chad did not cooperate with the Court in order to resolve the matter, which it should have brought to the Chamber's attention, together with any available information, in order to assist the Chamber to make its decision.

12. Nonetheless, owing to the significance of the issues before the Court, the Chamber will decide the issue of the Republic of Chad's non-cooperation on the merits. The Republic of Chad does not state what position of the African Union it is referring to, but various African Union resolutions have required its members not to cooperate with the Court regarding the warrant of arrest issued against Omar Al Bashir.¹¹ The sole legal justification the African Union advances for why its position is compatible with the Statute is a reference to "the provisions of article 98 of the Rome Statute of the ICC relating to immunities".¹² The Chamber considers the specific provision referenced by the African Union to be article 98(1) of the Statute.

13. The Chamber notes that the Republic of Malawi also invoked the aforementioned position of the African Union to explain why it had not arrested Omar Al Bashir. In

¹¹ African Union, Assembly, "Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(XIII)", 3 July 2009, Assembly/AU/Dec.245(XIII) Rev. 1 ("3 July 2009 AU Decision"), para. 10; African Union, Assembly, "Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV)", 27 July 2010, Assembly/AU/Dec.296(XV), paras. 5-6; African Union, Assembly, "Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/639(XVIII)", 30-31 January 2011, Assembly/AU/Dec.334(XVI), para. 5; African Union, Assembly, "Decision on the Implementation of the Assembly Decisions on the International Criminal Court - Doc. EX.CL/670(XIX)", 30 June-1 July 2011, Assembly/AU/Dec.366(XVII) ("30 June-1 July 2011 AU Decision"), para. 5.

¹² 3 July 2009 AU Decision, para. 10; 30 June-1 July 2011 AU Decision Decision, para. 5.

the Decision on Malawi, the Chamber held that the Republic of Malawi and the African Union could not rely on article 98(1) of the Statute. The Chamber includes herein the reasoning from the relevant paragraphs of the Decision on Malawi,¹³ notably:

36. [...] the Chamber finds that the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction [...]

37. The Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.

38. First, [...] immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War I.

39. Second, there has been an increase in Head of State prosecutions by international courts in the last decade. Only one international prosecution of a Head of State had been initiated when the judgment in the "Arrest Warrant Case" was rendered; this trial (Slobodan Milosevic) began only two days before this judgment was issued and its existence is not even referenced by the ICJ majority. Subsequent to 14 February 2002, international prosecutions against Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and the present case show that initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.

40. Third, the Statute now has reached 120 States Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials. All of these states have renounced any claim to immunity by ratifying the language of article 27(2): "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person". Even some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution.

41. Fourth, all the States referenced above have ratified this Statute and/or entrusted this Court with exercising "its jurisdiction over persons for the most serious crimes of international concern". It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.

¹³ Decision on Malawi, paras. 22-43.

42. The Chamber considers that the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context.

43. [...] [T]he Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.

14. The Chamber is of the view that the Republic of Chad may not validly rely on article 98(1) of the Statute to justify its failure to comply with the Cooperation Requests. The Chamber therefore notes, in accordance with article 87(7) of the Statute, that the Republic of Chad has failed to comply with the Cooperation Requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under the Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.

FOR THESE REASONS, THE CHAMBER

NOTES, in accordance with articles 86, 87(7) and 89 of the Statute, that the Republic of Chad: (i) failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination and (ii) failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute; and

REFERS, pursuant to regulation 109(4) of the Regulations of the Court, the present decision to the President of the Court for transmission to the Security Council, through the Secretary General of the United Nations, and to the Assembly of States Parties.

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

[signed]

Judge Sanji Mmasenono Monageng
Presiding Judge

[signed]

Judge Sylvia Steiner

[signed]

Judge Cuno Tarfusser

Dated this 13 December 2011

At The Hague, The Netherlands