



Original: **English**

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

Date: **18/09/2013**

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN DARFUR, SUDAN**

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

**Public Document**

**URGENT**

**Request to make observations regarding Omar al-Bashir's potential visit  
to the 68<sup>th</sup> Session of the United Nations General Assembly**

**Source: Legal Representative for Victims a/0443/09, a/0444/09, a/0445/09, a/0446/09,  
a/0447/09, a/0448/09, a/0449/09 & a/0450/09**

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

**The Office of the Prosecutor**  
Ms. Fatou Bensouda, Prosecutor

**Counsel for the Defence**

**Legal Representatives of the Victims**  
Mr. Nick Kaufman

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

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

Mr. Xavier-Jean Keita

**States' Representatives**

**Amicus Curiae**

## **REGISTRY**

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**Registrar**  
Mr. Herman von Hebel

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

The Legal Representative for Victims a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09, a/0448/09, a/0449/09 & a/0450/09 ("the Victims") hereby requests that Pre-Trial Chamber II permit him to express observations and concerns regarding the potential visit of Omar Hassan Ahmad al-Bashir ("the Suspect") to the 68<sup>th</sup> session of the United Nations General Assembly in New York.

### Procedural Background

1. On 31 March 2005, despite voicing its policy of objecting to the Court's jurisdiction over nationals of non-State parties to the Rome Statute, the United States of America abstained from Security Council Resolution 1593 on the referral of the Situation in Darfur, Sudan. Following the vote, the representative of the United States stated that "*her country strongly supported bringing to justice those responsible for the crimes and atrocities that had occurred in Darfur and ending the climate of impunity there. Violators of international humanitarian law and human rights law must be held accountable. Justice must be served in Darfur. By adopting today's resolution, the international community had established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur. The resolution would refer the situation in Darfur to the International Criminal Court (ICC) for investigation and prosecution...*".

2. On 10 December 2009, the Single Judge of Pre-Trial Chamber I granted the Victims the right to participate in the pre-trial stage of the case against the Suspect.<sup>1</sup>

3. On 3 February 2010, the Appeals Chamber reversed the first decision of Pre-Trial Chamber I which denied the Prosecutor a warrant of arrest charging the Suspect with the crime of genocide.<sup>2</sup>

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<sup>1</sup> ICC-02/05-01/09-62 (decision notified on 15 December 2009).

<sup>2</sup> ICC-02/05-01/09-72.

4. On 12 July 2010, after reconsideration of the evidence and the appropriate standard of proof, Pre-Trial Chamber I issued an arrest warrant charging the Suspect with genocide ("the Arrest Warrant").<sup>3</sup>

5. For more than three years, the Suspect has brazenly played "cat and mouse" with the international community by either fleeing or avoiding travel to those countries liable to enforce the Arrest Warrant.

6. On 16 October 2013, or thereabouts, at a press briefing held at the United States State Department, the following exchange took place between the State Department spokesperson – Ms Marie Harf and members of the media:

*"QUESTION: There are some reports in the Sudanese press that President Bashir is planning to travel to the UN. What's your plan on that? Do you intend to give him a visa? Are there any - is there any possibility of any ICC involvement, given your responsibility as host nation?"*

*MS. HARF: Well, we can confirm that we have received a visa application for President Omar al-Bashir of Sudan to attend events related to the opening of the UN General Assembly. We condemn any potential effort by President Bashir to travel to New York, given that he stands accused of genocide, war crimes, and crimes against humanity by the International Criminal Court. We would say that before presenting himself to UN headquarters, President Bashir should present himself to the ICC in The Hague to answer for the crimes of which he's been accused. I would obviously refer you to the Government of Sudan for more details about his potential travel.*

*QUESTION: But what about granting him a visa?"*

*MS. HARF: Mm-hmm.*

*QUESTION: I mean, I know it's your responsibility as host nation to generally provide visas, but that's not 100 percent. Like, you're not 100 percent required to provide him a visa. Is that right?"*

*MS. HARF: Well, I obviously can't discuss specific details of individual visa cases. In terms of our requirements as the host country, I'm happy to take the question and ask our legal folks what our requirements are and then get back to you with those details.*

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<sup>3</sup> ICC-02/05-01/09-94 & 95.

QUESTION: *Do you anticipate him traveling to New York if that's his desire?*

MS. HARF: *I don't want to get ahead of where we are here. I don't want to make a prediction. I know that we've received a visa application, and again, we would condemn any effort by him to do so. But if we have an update on that, I can certainly let you know.*

QUESTION: *Can you take this particular question? Rather than just a general question about what your host nation --*

MS. HARF: *Mm-hmm.*

QUESTION: *-- obligations are with regard to people applying for visas, could you take the question of - or maybe in addition, could you take the question of whether someone being accused of genocide, crimes against humanity, is sufficient basis for denying someone - not President Bashir - a visa, or are they regarded as innocent until proven guilty and therefore it's not a basis for denial?*

MS. HARF: *I can certainly take the question, see what our legal folks come back to me with.*

QUESTION: *Thank you.*

QUESTION: *Couldn't you arrest him if he comes in?*

MS. HARF: *I don't want to even make a hypothetical --*

QUESTION: *No, but, I mean, you expect other countries, if he goes there, to arrest him because there is a warrant for his arrest. Right?*

MS. HARF: *Again, the UN is a little different, as we all know. I don't want to venture any more guesses as to what might happen hypothetically if he comes here. Clearly, we have a visa application right now and would condemn any potential travel by him, but I just don't have anything further than that.*

QUESTION: *There is a visa application (inaudible) --*

MS. HARF: *Correct. Yes. I can confirm that we've received one."*<sup>4</sup>

### Relevant Legal Provisions

7. Article 68(3) of the Rome Statute regulates the modalities for victim participation as follows:

*"Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings*

<sup>4</sup> <http://allafrica.com/stories/201309170986.html>.

*determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence".*

8. On a more general note, Rules 86 and 93 of the Rules of Procedure and Evidence provide as follows:

*A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.*

.....

*A Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, inter alia, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.*

### Submission

9. The Victims' general right to participate in the pre-trial stage of the proceedings against the Suspect has already been recognized. The rationale for such participation is the Victims' right to highlight matters of pressing concern to their personal interests. The Victims are of the opinion that the United States and the United Nations – both of which champion the rule of law – should do all in their power to ensure that the Arrest Warrant is enforced should the Suspect enter their respective territories.

10. It should be noted that Pre-Trial Chamber I has previously issued an order to a non-State party to the Rome Statute requesting that it cooperate fully in the process of arrest and surrender of the Suspect:<sup>5</sup>

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<sup>5</sup> ICC-02/05-01/09-145 at paragraphs 12 and 13.

"With respect to non-State Parties to the Statute, the Chamber recalls SC Resolution 1593 (2005), according to which, the SC availed itself of a different language, and "urge[d] all States and concerned regional and other international organizations to cooperate fully" with the Court (emphasis added).

Libya is a non-State Party to the Statute, yet, it is still "urge[d]" by the SC to "cooperate fully" with the Court in the process of arrest and surrender of Omar al Bashir".

11. Should the Victims be afforded the opportunity to make observations regarding the Suspect's potential visit to the United Nations General Assembly, they will petition the Pre-Trial Chamber to issue an order inviting the United States to address the following issues:

- 1) Whether it has granted the Suspect a visa in order to enter its territory and, if so, on what legal basis. In particular, the United States should be invited to state whether it regards the duty to surrender the Suspect to the ICC – arising out of UNSCR 1593 - as having primacy over Section 11 of UN-US Headquarters Agreement<sup>6</sup> by virtue of Article 103 of the United Nations Charter;
- 2) Whether it will enforce the Arrest Warrant and, if not, whether it views the Suspect as protected by immunity *ratione personae*;
- 3) Whether it has taken measures, in the event of the Suspect attending the United Nations in New York, to ensure that assets belonging to the Suspect and his entourage, which are not required for "*transit to or from the headquarters district*" and which may be brought onto United States territory, are seized and frozen for future forfeiture for the benefit of the Victims in the eventuality that the Suspect be convicted at the ICC.

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<sup>6</sup> Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, Signed June 26, 1947, and Approved by the General Assembly October 31, 1947.

12. The Victims will also seek to persuade the Court to invite the United Nations to comment on whether or not it views itself as obliged to enforce the Arrest Warrant in light of Section 15(1) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.<sup>7</sup>

Relief Sought

13. In light of all the aforementioned, the learned Pre-Trial Chamber is respectfully requested to permit the Legal Representative to express the concerns and observations of the Victims regarding the Suspect's potential visit to the 68<sup>th</sup> session of the United Nations General Assembly.



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Nick Kaufman

Legal Representative for Victims a/0443/09, a/0444/09, a/0445/09, a/0446/09,  
a/0447/09, a/0448/09, a/0449/09 & a/0450/09

Done in Jerusalem, Israel

Wednesday, September 18, 2013

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<sup>7</sup> [http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf)