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No.: **ICC-02/05-01/09**
Date: **19 December 2014**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van Den Wyngaert

**SITUATION IN DARFUR, THE SUDAN
IN THE CASE OF**

The Prosecutor v Omar Hassan Ahmad AL BASHIR (“Omar Al Bashir”)

Public

**Prosecution’s request for a finding of non-compliance against the Republic
of the Sudan in the case of *The Prosecutor v Omar Hassan Ahmad AL
BASHIR* pursuant to Article 87 (7) of the Rome Statute**

Source: Office of the Prosecutor

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

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I. Introduction

1. The Republic of the Sudan (“the Sudan”), as a member state of the United Nations (“UN”), is required by the UN Charter and United Nations Security Council (“UNSC”) Resolution 1593 (2005) to cooperate with the International Criminal Court (“ICC or Court”). Arrest warrants for intentionally directing attacks against civilians as a war crime, pillage, murder, extermination, rape, torture and forcible transfer as crimes against humanity and three counts of genocide, issued by the Court against Mr Omar Hassan Ahmad AL BASHIR (“AL BASHIR”), have been outstanding since 4 March 2009 and 12 July 2010 respectively.

2. The Sudan has repeatedly and continuously failed to cooperate with the Court by refusing to implement the Court’s orders to arrest and surrender AL BASHIR to the Court. The Sudan’s wilful failure to cooperate has frustrated the Court’s mandate to investigate and prosecute AL BASHIR.

3. Despite repeated attempts by the Court to seek information from the Sudan on the implementation of the arrest warrants, and repeated calls by the Prosecutor for the immediate arrest and surrender of AL BASHIR, notably at the biannual UNSC briefings on the situation in Darfur,¹ the Sudan has steadfastly refused to cooperate.

4. The Sudan has not exhibited even a pretence of cooperation; rather, as President of the Sudan, AL BASHIR has rejected the ICC’s jurisdiction, publicly derided the Court, and continued to travel across international borders.

5. The Sudan’s non-cooperation directly undermines the Court’s central purpose of ensuring that perpetrators of the most serious crimes of concern to the international community do not go unpunished. The rights of the hundreds of

¹ Most recently at the 12 December 2014 UNSC Briefing.

victims of crimes attributed to AL BASHIR are also affronted by the Sudan's failure to arrest and surrender AL BASHIR. For this, and the deleterious effect it has on the Court's functions, the Office of the Prosecutor ("Prosecution or Office") submits that a finding of non-compliance and referral to the UNSC is warranted.

6. As it has recently done in *Prosecutor v Saif Al-Islam Gaddafi* ("*Gaddafi*"),² the Court should make a formal finding of non-compliance against the Sudan pursuant to Article 87(7) of the Rome Statute ("*Statute*") for the Sudan's failure to arrest and surrender AL BASHIR. The Prosecution recognises that pursuant to Regulation 109(3) of the Regulations of the Court ("*Regulations*") the Sudan should be provided an opportunity to be heard prior to a finding of non-compliance. Given the entrenched and notorious nature of the Sudanese state's policy of non-recognition of the Court and non-cooperation, the length of time the arrest warrants have been outstanding, and the lack of any prospect of cooperation, the Prosecution submits that the Sudan's right to be heard has been waived. Providing a further opportunity for it to be heard will have no impact on the execution of the outstanding arrest warrants.

7. In the alternative to proceeding under Article 87(7) of the Statute, the Court may elect to exercise its inherent powers stemming from UNSC Resolution 1593, and directly inform the UNSC of the Sudan's non-cooperation, as it did in *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman* ("*Harun and Kushayb case*").³ This pattern of deliberate non-cooperation by the Sudan in relation to outstanding arrest warrants is not new. On 25 May 2010, the Court found the Sudan to be in non-cooperation with the Court for failing to execute arrest warrants against suspects Mr Ahmad Muhammad Harun and Mr Ali Muhammad Al Abd-Al-Rahman ("*Harun and Kushayb Decision*"). The Court directly informed the UNSC

² ICC-01/11-01/11-577 ("Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council"), 10 December 2014.

³ ICC-02/05-01/07-57 ("Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan").

of this non-cooperation.⁴ The Sudan's refusal to comply in the current case is no different, except that the duration of the non-compliance is even longer than in the Harun and Kushayb case. Accordingly, the Court can directly inform the UNSC of the Sudan's deliberate non-cooperation so that it can take any necessary action it may deem appropriate. Taking this route obviates the need to hear from the requested State pursuant to Regulation 109(3) of the Regulations, which, in the Prosecution's view, would be futile.

II. Procedural history

8. On 31 March 2005, the UNSC acting under Chapter VII of the UN Charter adopted Resolution 1593 (2005) referring the situation in Darfur to the Court. The UNSC decided in the context of cooperation with and assistance to the Court that:

“the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to th[e] resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urge[d] all States and concerned regional and other international organizations to cooperate fully.”⁵

9. On 4 March 2009, Pre-Trial Chamber I (“PTC I”) issued an arrest warrant for AL BASHIR for seven counts of crimes against humanity and war crimes.⁶ In the arrest warrant decision, PTC I found that “under Article 58(1) of the Statute, the arrest of AL BASHIR appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes.”⁷ PTC I

⁴ ICC-02/05-01/07-57, page 7.

⁵ Resolution 1593 (2005), adopted by the UNSC at its 5158th meeting, on 31 March 2005, S/RES/1593 (2005), Operative Paragraph 2.

⁶ ICC-02/05-01/09-1.

⁷ ICC-02/05-01/09-1.

directed the Registrar to prepare and transmit to any State any request for transit which may be necessary for the surrender of AL BASHIR to the Court.⁸

10. On 5 and 6 March 2009, the Registrar submitted three filings to PTC I, detailing transmission of the warrant of arrest and the requests for its implementation to the Sudan,⁹ to all States Parties,¹⁰ and to the members of the UNSC.¹¹

11. On 25 May 2010, PTC I issued the Harun and Kushayb Decision. In the decision, PTC I considered that the Court has taken “*all possible measures to ensure the cooperation of the Republic of the Sudan*”.¹² The decision stressed “*that the obligation of the Republic of the Sudan to cooperate with the Court stems directly from the Charter of the UN and Resolution 1593 [...]*”.¹³ PTC I concluded that “*the Republic of the Sudan is failing to comply with its cooperation obligations stemming from Resolution 1593 (2005) in relation to the enforcement of the warrants of arrest issued by PTC I against Ahmad Harun and Ali Kushayb*” and communicated this decision to the UNSC.¹⁴

12. On 12 July 2010, PTC I issued a second arrest warrant for AL BASHIR for three counts of genocide.¹⁵ The Registry subsequently transmitted the new and supplementary requests for the arrest and surrender of AL BASHIR to States Parties¹⁶ and Non-state Parties Members of the UNSC.¹⁷

III. Factual Background – The Sudan has persistently refused to cooperate with the Court

⁸ ICC-02/05-01/09-3, page 93.

⁹ ICC-02/05-01/09-5.

¹⁰ ICC-02/05-01/09-7.

¹¹ ICC-02/05-01/09-8.

¹² ICC-02/05-01/07-57, page 7.

¹³ ICC-02/05-01/07-57, page 6.

¹⁴ ICC-02/05-01/07-57, page 7.

¹⁵ ICC-02/05-01/09-95.

¹⁶ ICC-02/05-01/09-96; ICC-02/05-01/09-98.

¹⁷ ICC-02/05-01/09-97.

13. The record unambiguously shows that the Sudan has not cooperated with the Court in the execution of the outstanding arrest warrants against AL BASHIR. The Sudan's repeated public statements against the legitimacy of the ICC exhibit a policy of deliberate non-cooperation with the Court.

i) Consistent official statements and actions underscore the Sudan's refusal to cooperate with the Court

14. On 29 January 2009, AL BASHIR underlined the Sudan's refusal to engage with the Court. He stressed that the Court has no jurisdiction in Sudan as Sudan is not a signatory of the Statute. He described what was happening as "*a mosquito [buzzing] in an elephants' ear.*"¹⁸

15. On 9 March 2009, following issuance of the arrest warrant against him, AL BASHIR stated: "*in reference to the ICC decision they can cancel it, or they can boil it and drink the water, we are ready for you...Mark my words - the Prosecutor, his court and all its members are under my shoes*".¹⁹ On 23 April 2009, following a meeting in Paris with French and British officials, the Sudan's presidential assistant Nafie Ali Nafie stated that "*No Sudanese, not Al-Bashir and not a non-Al-Bashir, will appear before the International Criminal Court, and we will not even send a lawyer to represent us there.*"²⁰

16. The Minister of State for Foreign Affairs Ali Ahmed Karti confirmed in March 2009: "*We want a clear rejection of the arrest warrant; trying to stop the decision [delaying it by using Article 16 of the Statute] is not what we want.*"²¹ The Minister said that his

¹⁸ Asharq Al-Awsat, news article, "Bashir: International Criminal Court 'A Mosquito in an Elephant's Ear'", at <http://www.aawsat.net/2009/01/article55256139> (last visited on 18 December 2014).

¹⁹ Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), at http://www.icc-cpi.int/NR/rdonlyres/B97B3A9C-0C83-4884-881C-70C1C1EEEA53/280448/9th_UNSCReport_Eng1.pdf (last visited on 12 December 2014), para. 35.

²⁰ *Ibid.*, para. 37.

²¹ Sudan Tribune, news article, "Sudan's Bashir makes it to Doha in defiance of ICC warrant", http://www.sudantribune.com/spip.php?page=imprimable&id_article=30691 (last visited on 12 December 2014).

country has managed to ignore all UNSC resolutions with little repercussions as *“they amounted to nothing but ink on paper”*.²² In March 2009, the Sudan's ambassador to the UN Abdel-Haleem Abdel-Mahmood shrugged off the news, saying *“[f]or us, the ICC doesn't exist.”*²³

17. In August 2009, AL BASHIR told TIME magazine in an interview: *“I have not felt [any] restrictions of movement, [...] I have travelled all necessary travels. [...] [the Court] is a tool to terrorize countries that the West thinks are disobedient.”*²⁴

18. In a more recent Sudanese statement to the UNSC on 11 December 2013, the Sudan's Ambassador to the UN, Daffa-Alla Elhag Ali Osman (*“Elhag Ali Osman”*) asserted: *“I should like to say, for the purposes of the record of this meeting, that our participation today does not mean that we recognize the International Criminal Court (ICC) or that we are going to cooperate with it, since the Sudan is not a party to the Rome Statute.”*²⁵

19. The Sudan has continuously failed and refused to implement UNSC decisions and cooperate with the Court. This has bolstered AL BASHIR's resolve to ignore the UNSC, prompting him to even publicly boast in a 13 October 2011 speech that the Sudan did not implement the UNSC resolutions.²⁶

20. Lastly, just a few days ago, after the Prosecutor's most recent address to the UNSC on the situation in Darfur, AL BASHIR is quoted as saying *“it is the people of*

²² Sudan Tribune, news article, *“Sudan angered by Arab League position on ICC's Bashir warrant”*, at http://www.sudantribune.com/spip.php?page=imprimable&id_article=30674 (last visited on 12 December 2014).

²³ TIME, news article, *“Sudanese President Omar Hassan al-Bashir”* by Randy James, <http://content.time.com/time/world/article/0,8599,1883213,00.html> (last visited on 12 December 2014).

²⁴ TIME, news article, *“Omar al-Bashir: Sudan's Wanted Man”* by Sam Dealey: <http://content.time.com/time/world/article/0,8599,1916107,00.html>.

²⁵ UNSC, 7080th meeting, 11 December 2013 (S/PV.7080), Reports of the Secretary-General on the Sudan and South Sudan, at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7080 (last visited on 12 December 2014), page 4.

²⁶ Eighteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), at <http://www.icc-cpi.int/iccdocs/otp/OTP-18ReportUNSCDafurDecember2013.pdf> (Last visited on 12 December 2014).

Sudan who stood firm and said that no Sudanese official shall surrender to colonial courts at The Hague or anywhere else.”²⁷

21. From the information outlined above, there can be no questioning of Sudan’s non-cooperation with the Court and certainly none more so than in relation to the outstanding arrest warrants against AL BASHIR.

ii) AL BASHIR continues to travel across international borders

22. Since the issuance of the warrant of arrest on 4 March 2009, the Sudan and AL BASHIR have continued to flout the Court’s arrest warrant orders by AL BASHIR’s persistent travel across international borders. AL BASHIR’s continued travel unequivocally demonstrates the Sudan’s non-cooperation with the Court. The Registry and Prosecution have notified Pre-Trial Chamber II (the Chamber) and PTC I of a series of visits of AL BASHIR to a number of states, most recently to Ethiopia.²⁸ The Sudan’s continued defiance of the outstanding arrest warrant against AL BASHIR prompted the Prosecutor, in her 17 June and 12 December 2014 briefings to the UNSC, to underscore the obligations of the Sudan and of States Parties to the Statute.

iii) Efforts by the Prosecution to encourage cooperation have failed

23. Since 2005, following the opening of the Darfur investigation, the Office has endeavoured to establish a working relationship with the Sudan. The Sudan initially provided a degree of cooperation at least up to February 2007. Some judicial records

²⁷ BBC, news article, ‘Sudan President Bashir hails ‘victory’ over ICC charges’ <http://www.bbc.com/news/world-africa-30467167> (last visited on 18 December 2014).

²⁸ ICC-02/05-01/09-217. In 2011 - to Djibouti (ICC-02/05-01/09-129), Malawi (ICC-02/05-01/09-136-Conf); in 2013- to Chad (ICC-02/05-01/09-144, ICC-02/05-01/09-155), Nigeria (ICC-02/05-01/09-156), Ethiopia and Saudi Arabia (ICC-02/05-01/09-163); in 2014 - to Ethiopia (ICC-02/05-01/09-179; ICC-02/05-01/09-183; ICC-02/05-01/09-198; ICC-02/05-01/09-214; ICC-02/05-01/09-217), Democratic Republic of Congo (ICC-02/05-01/09-185; ICC-02/05-01/09-187), Kuwait (ICC-02/05-01/09-191), Chad (ICC-02/05-01/09-193), Qatar (ICC-02/05-01/09-203), Saudi Arabia (ICC-02/05-01/09-207) and Egypt (ICC-02/05-01/09-210).

were shared, individuals were interviewed in Khartoum under Article 55 of the Statute, and documents were provided to the Office under Article 53 of the Statute. However, this cooperation took place before arrest warrants were issued against AL BASHIR.

24. The former Prosecutor regularly reported on the status of the Sudan's cooperation to the Council. In his 15 April 2009 statement, the former Prosecutor emphasised that "*[t]he Sudan is obliged under international law to execute the warrant on its territory. If it does not enforce the warrant, the United Nations Security Council, that referred the case to the ICC, will need to ensure compliance*".²⁹

25. In all briefings before the UNSC since the issuance of the warrant of arrest against AL BASHIR, the Prosecutor of the ICC has noted the lack of cooperation from the Sudan. For instance, in her report before UNSC in December 2013, the Prosecutor noted that "*[t]he lack of arrest and cooperation from the Government of the Sudan has presented an on-going challenge for the Office*".³⁰ More recently, in her 17 June 2014 briefing to the UNSC, the Prosecutor noted that "*[t]he Sudan, as the territorial State, has the primary responsibility and is fully able to implement the warrants, consistent with its sovereign authority. It has consistently failed to do so. At the same time, it has also failed to provide any meaningful measure of justice at the national level*".³¹

26. After the ICC Prosecutor's 17th briefing to the UNSC on 5 June 2013, Elhag Ali Osman stated that: "*[t]he Prosecutor's demand that we implement the arrest warrants issued against President Omer Hassan A. Al-Bashir and other Sudanese officials is*

²⁹ Overview of situations and cases before the ICC, linked with a discussion of the recent Bashir arrest warrant: <http://www.icc-cpi.int/NR/rdonlyres/243B605F-5940-4ADD-8E3A-530B371D696E/280280/20090414Pretoria.pdf> (last visited on 12 December 2014).

³⁰ Eighteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), at <http://www.icc-cpi.int/iccdocs/otp/OTP-18ReportUNSCDafurDecember2013.pdf> (last visited on 12 December 2014).

³¹ Nineteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), at <http://www.icc-cpi.int/iccdocs/otp/otp-19th-UNSC-Dafur-06-14-Eng.pdf> (last visited on 12 December 2014), para. 56.

unacceptable because it is based on faulty logic. What is based on wrong is of necessity wrong itself.”³²

IV. The Chamber should make a finding of non-compliance against the Sudan and refer the matter to the UNSC and/or inform the UNSC of Sudan’s non-cooperation

27. Pursuant to Article 87(7) of the Statute, the Chamber may make a finding on non-compliance and transmit it to the Assembly of States Parties or, where the matter has been referred to the Court, to the UNSC. The Court has already found that once there has been a UNSC referral of a situation of a non-State party, the entire legal framework of the Statute, particularly Part IX on cooperation, applies.³³ Prior to making a finding of non-compliance against a State and referring the matter to the Assembly of State Parties or the UNSC, Regulation 109(3) of the Regulations requires the Chamber to hear from the requested State. Given the Sudan’s demonstrated deliberate policy of non-recognition of the ICC, let alone non-cooperation, the Prosecution submits that providing the Sudan with an opportunity to be heard would be futile.

28. In its decision in *Gaddafi*,³⁴ the Court demonstrated that it can make a formal finding of non-compliance against a non-State party for the failure to arrest and surrender persons against whom there is an outstanding Court arrest warrant.³⁵ Libya was found to be in non-compliance for, *inter alia*, not arresting and

³² UNSC, 6974th meeting, 5 June 2013 (S/PV.6974), Reports of the Secretary-General on the Sudan, at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6974 (last visited on 12 December 2014), page 17. The Permanent Representative also stated that: “Other claims that the Sudanese Government is not making the required effort to cooperate are false. We are cooperating in removing all obstacles facing the Office of the Prosecutor. The visit of Ms. Valerie Amos, Under-Secretary-General for Humanitarian Affairs Emergency Relief Coordinator, to the Sudan in May is proof of that cooperation” (see page 18).

³³ ICC-01/11-01/11-72-Conf, para. 12; ICC-01/11-01/11-163, paras 28-30.

³⁴ ICC-01/11-01/11-577.

³⁵ ICC-01/11-01/11-577, paras 27-29.

surrendering *Gaddafi* since 31 May 2013³⁶ (a much shorter time than in the present case). Critically, this finding was made despite the fact that the Chamber accepted that Libya had exhibited commitment to the Court – something that is inapplicable to the situation with the Sudan.

29. As mentioned, and unlike Libya, the Sudan continues its policy of non-recognition of the Court and total non-cooperation. There is no prospect for consultation and no prospect for cooperation. A formal finding of non-compliance pursuant to Article 87(7) of the Statute and concomitant referral to the UNSC is the only avenue left to the Court at this juncture to effect cooperation and to enable the Court to discharge its functions.

30. Further, in its arrest warrant decision against AL BASHIR, PTC I foreshadowed the possibility of making a finding of non-compliance under Article 87(7) of the Statute should the Sudan fail to execute the arrest warrant. The Chamber stated that *“according to article 87(7) of the Statute, if the GoS continues failing to comply with the above-mentioned cooperation obligations to the Court, the competent Chamber ‘may make a finding to that effect’ and decide to ‘refer the matter [...] to the Security Council.’”*³⁷

31. In light of the above discussion, the Chamber should proceed to make a judicial determination that the Sudan has failed to comply with its cooperation obligations towards the Court pursuant to UNSC Resolution 1593, to enable the President of the Court to refer the matter to the UNSC.³⁸

32. As demonstrated above, the Sudan has been given more than sufficient time to comply with its obligation to arrest and surrender AL BASHIR to the Court. It has been more than five years since the arrest warrant and the accompanying requests for arrest and surrender for AL BASHIR were issued. Given the repeated statements

³⁶ Also for not returning originals of privileged documents seized from Gaddafi’s former counsel.

³⁷ ICC-02/05-01/09-3, para. 248.

³⁸ Regulation 109(4) of the Regulations.

and actions taken by the Sudan demonstrating its intention not to cooperate, the Chamber should conclude that the Sudan's actions, as well as its inactions, are intended to impede the fair and expeditious conduct of proceedings. They have certainly prevented the Court from exercising its functions and powers under the Statute.

33. Accordingly, a decision from the Court on the Sudan's continuing failure to comply with requests to cooperate by the Court, and a referral of the matter by the President to the UNSC is necessary, proportionate and timely. Such a referral would not preclude consultation in the future with the Sudan should it choose to engage with the Court on the arrest and surrender of AL BASHIR.

Informing the UNSC of the Sudan's non-cooperation is an alternative remedy

34. As demonstrated by PTC I in the Harun and Kushayb Decision,³⁹ the Court also has inherent powers stemming from the UNSC 1593 to ensure cooperation with it by the Sudan. As indicated, the situation in relation to AL BASHIR is no different to that of the Harun and Kushayb case, except that it has been longer since the Sudan has not executed the arrest warrants against AL BASHIR. Accordingly, and in the alternative to proceeding under Article 87(7) of the Statute, the Chamber may elect to utilise its inherent powers in this instance to inform the UNSC of Sudan's persistent non-cooperation so that UNSC can take any necessary action it may deem appropriate.⁴⁰

³⁹ ICC-02/05-01/07-57.

⁴⁰ It is noted that under Articles 41 and 42 of the UN Charter, the UNSC has the power to apply measures "to give effect to its decisions".

V. Relief Sought - Request for a finding of non-compliance

35. For the above reasons, the Prosecution requests that the Chamber:

- i. Issue a finding on non-compliance by the Sudan in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*, pursuant to Article 87(7) of the Statute; and notify its decision to the Court's President for transmission to the UNSC; and/or
- ii. Find the Sudan in non-cooperation and directly inform the UNSC of its decision.



Fatou Bensouda,
Prosecutor

Dated this 19th day of December 2014

At The Hague, The Netherlands