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**PRE-TRIAL CHAMBER II**

**Before:** Judge Cuno Tarfusser, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Chang-ho Chung

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

***THE PROSECUTOR V. ABDEL RAHEEM MUHAMMAD HUSSEIN***

**Public**

**Prosecution's request for a finding of non-compliance against the Republic  
of the Sudan in the case of *The Prosecutor v Abdel Raheem Muhammad  
Hussein* 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. An arrest warrant issued by the ICC against Mr Abdel Raheem Muhammad HUSSEIN ("HUSSEIN") for crimes against humanity and war crimes has been outstanding since 1 March 2012.<sup>1</sup> The Republic of the Sudan ("Sudan") has repeatedly failed to implement the Court's orders to arrest and surrender HUSSEIN. This refusal to cooperate has frustrated the Court's mandate of combating impunity and providing justice to victims. Accordingly, the Prosecution requests the Court to make a finding of non-compliance against Sudan.
2. The Court should make a finding of non-compliance pursuant to article 87(7) as it has done regarding Omar Hassan Ahmad Al Bashir ("AL BASHIR")<sup>2</sup> and Saif Al-Islam Gaddafi ("GADDAFI").<sup>3</sup>

## II. Background

3. On 31 March 2005, the United Nations Security Council ("UNSC") acting under Chapter VII of the Charter of the United Nations 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 this 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.<sup>4</sup>

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<sup>1</sup> ICC-02/05-01/12-1-Red.

<sup>2</sup> ICC-02/05-01/09-227 ("*Bashir* Decision").

<sup>3</sup> ICC-01/11-01/11-577 ("*Gaddafi* Decision").

<sup>4</sup> Resolution 1593 (2005), adopted by the UNSC at its 5158<sup>th</sup> meeting, on 31 March 2005, S/RES/1593 (2005), Operative Paragraph 2.

4. On 1 March 2012, Pre-Trial Chamber I (“PTC I”) issued an arrest warrant for HUSSEIN for seven counts of crimes against humanity and six counts of war crimes.<sup>5</sup> PTC I directed the Registrar to prepare, *inter alia*, a request for cooperation seeking the arrest and surrender of HUSSEIN and transmit such request to the competent Sudanese authorities.<sup>6</sup> On 13 March 2012, the Registrar submitted three filings to PTC I, detailing transmission of the warrant of arrest and the requests for its implementation to Sudan,<sup>7</sup> to all States Parties,<sup>8</sup> and to the members of the UNSC.<sup>9</sup>
  
5. Sudan has a long history of refusal to cooperate with the Court. On 25 May 2010, PTC I informed the UNSC about the lack of cooperation by Sudan in relation to Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman.<sup>10</sup> The decision stressed “that the obligation of the Republic of the Sudan to cooperate with the Court stems directly from the Charter of the United Nations and Resolution 1593.”<sup>11</sup> 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.<sup>12</sup>
  
6. More recently, on 9 March 2015, PTC I issued a decision on the Prosecutor’s request for a finding of non-compliance against Sudan in relation to AL BASHIR. PTC I found that Sudan had failed to cooperate with the Court by deliberately refusing to liaise with the relevant organs of the Court and execute the pending requests for the arrest and surrender of AL BASHIR, thus

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<sup>5</sup> ICC-02/05-01/12-1-Red.

<sup>6</sup> ICC-02/05-01/12-1-Red, pp.31-32.

<sup>7</sup> ICC-02/05-01/12-4.

<sup>8</sup> ICC-02/05-01/12-5.

<sup>9</sup> ICC-02/05-01/12-6.

<sup>10</sup> ICC-02/05-01/07-57.

<sup>11</sup> ICC-02/05-01/07-57, p.6.

<sup>12</sup> ICC-02/05-01/07-57, p.7.

preventing the Court from exercising its functions and powers under the Statute. PTC I found further that Sudan had failed to consult the Court in accordance with article 97 of the Statute and rule 195(1) of the Rules on any problem(s) which could have impeded the execution of the requests for arrest and surrender of AL BASHIR.<sup>13</sup>

### **III. Sudan has continually refused to cooperate with the Court in relation to HUSSEIN**

7. Sudan has not cooperated with the Court in the execution of the outstanding arrest warrant against HUSSEIN. This lack of cooperation is shown by numerous statements and actions of high level officials of the Sudanese government, HUSSEIN's unobstructed travel across international borders, and by the lack of a response from Sudan to the Prosecution's efforts to encourage cooperation.

#### ***i) Official statements and actions underscore Sudan's refusal to cooperate with the Court***

8. Sudan's repeated statements and actions against the ICC demonstrate a State policy of deliberate non-cooperation with the Court. For example, after the ICC Prosecutor's 17<sup>th</sup> briefing to the UNSC on 5 June 2013, Sudan's Ambassador to the UN, Daffa-Alla 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 unacceptable because it is based on faulty logic. What is based on wrong is of necessity wrong itself."<sup>14</sup> In addition, in a statement to the UNSC on 11

<sup>13</sup> ICC-02/05-01/09-227, p.10.

<sup>14</sup> UNSC, 6974<sup>th</sup> 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](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6974) (last visited on 20 April 2015), p.17. The Permanent Representative also stated that: "Other claims that the Sudanese Government is not making the

December 2013, Mr 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.”<sup>15</sup> Similarly, in December 2014, after the Prosecutor’s address to the UNSC on the situation in Darfur, AL BASHIR was quoted as saying “it is the people of Sudan who stood firm and said that no Sudanese official shall surrender to colonial courts at The Hague or anywhere else.”<sup>16</sup>

9. After the Court issued the warrant of arrest against HUSSEIN, AL BASHIR was quoted to have stated in front of a crowd in March 2012: “Why did they look the other way for all that time and now say this? They want to undermine a symbol of the Sudanese armed forces.”<sup>17</sup>
10. From the information above, there can be no question as to Sudan’s wilful non-cooperation with the Court in relation to the outstanding arrest warrant against HUSSEIN.

*ii) HUSSEIN continues to travel across international borders*

11. Since the issuance of the warrant of arrest on 1 March 2012, Sudan has continued to flout the Court’s orders by allowing HUSSEIN to travel across international borders. The Prosecution and Registry have notified Pre-Trial Chamber II of visits of HUSSEIN to States Parties Chad and the Central

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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”, p.18.

<sup>15</sup> UNSC, 7080<sup>th</sup> 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](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7080) (last visited on 20 April 2015), p.4.

<sup>16</sup> BBC, news article, ‘Sudan President Bashir hails ‘victory’ over ICC charges’ <http://www.bbc.com/news/world-africa-30467167> (last visited on 20 April 2015).

<sup>17</sup> “Sudan’s Bashir slams ICC warrant for defense minister” <http://english.alarabiya.net/articles/2012/03/04/198413.html> (last visited on 20 April 2015).

African Republic (“CAR”).<sup>18</sup> Following these notifications, the Chamber issued an order regarding his travel to Chad,<sup>19</sup> a decision requesting observations from CAR<sup>20</sup> and decisions on cooperation regarding Chad and CAR.<sup>21</sup> HUSSEIN’s travel to these countries, unhindered by Sudan, also demonstrates Sudan’s non-cooperation with the Court.

*iii) Efforts by the Prosecution to encourage cooperation from Sudan have failed*

12. In all briefings before the UNSC since the issuance of the warrant of arrest against HUSSEIN, the Prosecutor of the ICC has sought to highlight the lack of cooperation from Sudan. For instance, in her report before the 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.”<sup>22</sup> In her 23 June 2014 report to the UNSC, the Prosecutor noted that “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”.<sup>23</sup>

13. In her 20<sup>th</sup> Report to the UNSC on 15 December 2014, the Prosecutor stated that she is “deeply troubled that the four main suspects (Omar Al Bashir, Abdel Raheem Hussein, Ahmad Harun and Ali Kushayb) with outstanding arrest warrants against them issued by the Pre-Trial Chamber remain at large

<sup>18</sup> ICC-02/05-01/12-11 (Chad) and ICC-02/05-01/12-13 (CAR).

<sup>19</sup> ICC-02/05-01/12-12.

<sup>20</sup> ICC-02/05-01/12-14.

<sup>21</sup> ICC-02/05-01/12-20; ICC-02/05-01/12-21.

<sup>22</sup> 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 20 April 2015), para.25.

<sup>23</sup> 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 20 April 2015), para.56.

in the Sudan, still in high positions within the Government of the Sudan (GoS)."<sup>24</sup>

14. These statements have not resulted in any cooperation by Sudan. On the contrary, as shown above, Sudan has specifically rebuffed these efforts to secure cooperation.<sup>25</sup>

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

15. When issuing the arrest warrant for HUSSEIN, PTC I foreshadowed the possibility of making a finding of non-compliance under article 87(7) of the Statute should Sudan fail to execute the arrest warrant. The Chamber stated that "if the Government of the Republic of the Sudan continues to fail to comply with the above-mentioned cooperation obligations with the Court, the competent Chamber, pursuant to article 87(7) of the Statute, 'may make a finding to that effect' and decide to 'refer the matter [...] to the Security Council' to take appropriate measures pursuant to the United Nations Charter."<sup>26</sup> Such a finding and referral is now necessary.

16. 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

<sup>24</sup> Twentieth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), <http://www.icc-cpi.int/iccdocs/otp/20th-UNSC-Darfur-report-ENG.PDF> (last visited on 20 April 2015) para.1.

<sup>25</sup> Paras.8, 9, above.

<sup>26</sup> ICC-02/05-01/12-1-Red, p.32.



cooperation, applies.<sup>27</sup> Prior to making a finding of non-compliance against a State and referring the matter to the Assembly of States Parties or the UNSC, regulation 109(3) of the Regulations of the Court requires the Chamber to hear from the requested State. However, given Sudan's demonstrated deliberate policy of non-recognition of the ICC, let alone its obstructive non-cooperation, Sudan's right to be heard has been waived.<sup>28</sup>

17. In the *Gaddafi* Decision, the Court made a formal finding of non-compliance against a non-State party for the failure to surrender a person against whom there is an outstanding arrest warrant.<sup>29</sup> Libya was found to be in non-compliance for, *inter alia*, not surrendering GADDAFI since 31 May 2013 (a shorter time than in the present case).<sup>30</sup> Critically, this finding was made despite the fact that the Chamber accepted that Libya had exhibited commitment to the Court<sup>31</sup> – a situation that is opposite to the position of Sudan.

18. Unlike Libya, 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 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. In light of the above, the Chamber should proceed to make a judicial determination that 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.<sup>32</sup> Such a referral

<sup>27</sup> ICC-01/11-01/11-72, para.12; ICC-01/11-01/11-163, paras.28-30.

<sup>28</sup> See in this context ICC-02/05-01/09-227, para.19.

<sup>29</sup> ICC-01/11-01/11-577.

<sup>30</sup> Also, for not returning originals of privileged documents seized from GADDAFI's former counsel.

<sup>31</sup> ICC-01/11-01/11-577, para.31.

<sup>32</sup> Regulation 109(4) of the Regulations of the Court.

would not preclude consultation in the future with Sudan should it choose to engage with the Court on the arrest and surrender of HUSSEIN.

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

19. For the above reasons, the Prosecution requests that the Chamber issue a finding of non-compliance by Sudan in the case of *The Prosecutor v Abdel Raheem Muhammad Hussein*, pursuant to article 87(7), and notify its decision to the President of the Court for transmission to the UNSC.



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Fatou Bensouda,  
Prosecutor

Dated this 5<sup>th</sup> day of June 2015  
At The Hague, The Netherlands