

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 May 2013

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 Document

Decision on the Reclassification of Document ICC-02/05-01/09-150-Conf-Anx1

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Ade Omofade, Trial Lawyer

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 Republic of Chad

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Deputy Registrar

Didier Preira

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” or “ICC”) issues this decision on the reclassification of document: ICC-02/05-01/09-150-Conf-Anx1.

I. PROCEDURAL HISTORY

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

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

3. 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.³

4. On 14 February 2013, the Chamber received the “Prosecution’s notification of possible travel in the case of *The Prosecutor v. Omar Al Bashir*, pursuant to Article 97 of the Rome Statute”,⁴ in which the Prosecutor averred, based on media

¹ S/RES/1593 (2005).

² ICC-02/05-01/09-1; ICC-02/05-01/09-95.

³ ICC-02/05-01/09-143.

⁴ ICC-02/05-01/09-144 and its annex.

reports, that Omar Al-Bashir might visit the Republic of Chad and the State of Libya during the weekend of 16-17 February 2013.⁵

5. On the same day, the Chamber requested the Registry to send notes verbales to the Republic of Chad and the State of Libya, enquiring about said visit, and reminding the former of its obligations with respect to the arrest and surrender of Omar Al-Bashir to the Court. This was reiterated in the Chamber's "Order Regarding Omar Al-Bashir's Potential Visit to the Republic of Chad and to the State of Libya" of 15 February 2013.⁶

6. On 22 February 2013, the Chamber issued the "Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad", in which it, *inter alia*, requested the Republic of Chad to submit observations, no later than Thursday 14 March 2013, on: "1) the alleged failure to execute the requests for arrest and surrender of Omar Al-Bashir to the Court and; 2) the alleged failure to consult with the Court in case of any problems identified which might have impeded the execution of the requests for arrest and surrender of Omar Al-Bashir during his visit".⁷

7. On 21 March 2013, the Chamber received the "Report of the Registry on the observations submitted by the Republic of Chad on Omar Al-Bashir's visit to the Republic of Chad",⁸ in which it is mentioned that on 20 March 2013 the Registry received the requested observations lacking any explanation regarding their late submission.

⁵ ICC-02/05-01/09-144.

⁶ Pre-Trial Chamber II, ICC-02/05-01/09-145.

⁷ Pre-Trial Chamber II, ICC-02/05-01/09-147, p. 6.

⁸ ICC-02/05-01/09-150 and its annex.

8. On 26 March 2013, the Chamber issued the “Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmed Al-Bashir”.⁹

9. On 18 April 2013, the Chamber issued the “Decision Requesting Observations from the Republic of Chad on the Possible Reclassification of Document ICC-02/05-01/09-150-Conf-Anx 1” (the “18 April 2013 Decision”), in which it set 1 May 2013 as a deadline for the receipt of the Government’s observations.¹⁰

10. On 3 May 2013, the Chamber received the “Report of the Registry on the execution of the ‘Decision Requesting Observations from the Republic of Chad on the Possible Reclassification of Document ICC-02/05-01/09-150-Conf-Anx 1’”, in which the Registrar stated that as of 1 May 2013, his office has not received “a response from the Republic of Chad [...]”, although an ICC representative contacted the Embassy via phone one week prior to the expiry of the deadline.¹¹

II. APPLICABLE LAW

11. The Chamber notes articles 21(1)(a), (3) and 67(1) of the Rome Statute, rule 15(1) of the Rules of Procedure and Evidence and regulations 20, 23 *bis* (3) and 29 of the Regulations of the Court (the “Regulations”).

III. DETERMINATION BY THE CHAMBER

12. The Chamber recalls the 18 April 2013 Decision in which it stated:

⁹ Pre-Trial Chamber II, ICC-02/05-01/09-151.

¹⁰ Pre-Trial Chamber II, ICC-02/05-01/09-152.

¹¹ ICC-02/05-01/09-153, p. 4; ICC-02/05-01/09-153- Conf-Anx1.

[T]hat one of the fundamental aspects guaranteeing the fairness of the proceedings lies in the transparency of these proceedings. As such transparency is reflected in the principle that all hearings and the records related there to should be public, unless there are compelling reasons which justify a deviation from said principle.¹²

13. In the same decision, the Chamber noted that document ICC-02/05-01/09-150-Conf-Anx1 was classified as confidential due to the request of the Republic of Chad and without providing reasons for said classification.¹³ Therefore, for the purpose of ensuring the fairness of the proceedings in terms of its transparency and publicity, the Chamber requested the Government to submit observations on the reasons for retaining said classification and the possibility of reclassifying it as public, by no later than Wednesday 1 May 2013.¹⁴ According to the Registry's Report, the Republic of Chad has not responded to the Chamber's request and refrained from submitting any observations within the time frame specified in the 18 April 2013 Decision.¹⁵

14. In this regard, the Chamber notes regulation 29(1) of the Regulations, which stipulates that "[i]n the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice".

15. The Republic of Chad is considered to be a party for the limited purpose of these proceedings, and therefore, the terms of regulation 29 of the Regulations apply to the case *sub judice*. In light of the non-compliance with the Chamber's request specified in the 18 April 2013 Decision, the Chamber is of the view that

¹² Pre-Trial Chamber II, ICC-02/05-01/09-152, para. 10.

¹³ Pre-Trial Chamber II, ICC-02/05-01/09-152, para. 11.

¹⁴ Pre-Trial Chamber II, ICC-02/05-01/09-152, p. 5.

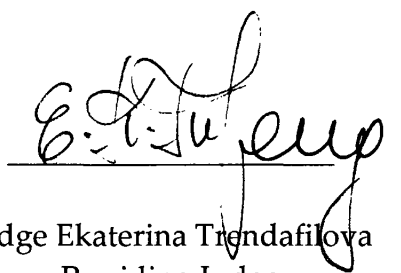
¹⁵ ICC-02/05-01/09-153, p. 4.

the Republic of Chad has waived its right to be heard on the matter, and accordingly, the appropriate remedy is that it proceeds *proprio motu* with the reclassification of said document pursuant to regulation 23 *bis* of the Regulations.

16. According to regulation 23 *bis* (3) of the Regulations, “[w]here the basis for the classification [of a document filed by a party or participant to the proceedings] no longer exists, [...] [the] Chamber may also reclassify [such document] [...] on its own motion”. Since the Republic of Chad has not presented any reason in support of retaining said classification, the Chamber sees no valid reason to maintain it.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **orders** the Registry to reclassify document: ICC-02/05-01/09-150-Conf-Anx1 as public;
- b) **orders** the Registry to notify this decision to the competent authorities of the Republic of Chad through the appropriate channels of communication.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul



Judge Cuno Tarfusser

Dated this Monday, 6 May 2013

At The Hague, The Netherlands