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No.: ICC-02/05-01/12

Date: 26 June 2015

PRE-TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. ABDEL RAHEEM MUHAMMAD HUSSEIN

Public

**Decision on the Prosecutor's Request for a finding of non-compliance against the
Republic of the Sudan**

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

James Stewart, Deputy Prosecutor

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 Sudan

Others

Presidency

Bureau of the Assembly of States Parties

REGISTRY

Registrar

Herman von Hebel

Deputy Registrar

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 the “ICC”) issues this decision on the “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” (the “Prosecutor’s Request” or “Application”).¹

I. PROCEDURAL HISTORY

1. On 31 March 2005, the Security Council (the “SC” or the “Council”) acting under Chapter VII of the Charter of the United Nations (the “UN”) adopted Resolution 1593(2005), referring the situation in Darfur, Sudan to the Court.²
2. On 1 March 2012, Pre-Trial Chamber I (“PTC I”) issued a warrant of arrest against Abdel Raheem Muhammad Hussein (“Hussein”) for seven counts of crimes against humanity and six counts of war crimes.³
3. On 13 March 2012, the Registry informed PTC I that the warrant and the requests for arrest and surrender of Hussein had been transmitted to Sudan, all states parties and the members of the UNSC⁴, calling for their cooperation pursuant to, *inter alia*, articles 89(1) and 91 of the Rome Statute (the “Statute”).
4. This warrant of arrest remains to be executed.

II. APPLICABLE LAW

5. The Chamber notes articles 21(1)(a) and (b), 86, 87(7) 89 and 97 of the Statute, rule 195(1) of the Rules of Procedure and Evidence (the “Rules”), regulation

¹ ICC-02/05-01/12-32.

² S/RES/1593 (2005).

³ ICC-02/05-01/12-2.

⁴ ICC-02/05-01/12-4; ICC-02/05-01/12-5; ICC-02/05-01/12-6.

109(2), (3) and (4) of the Regulations of the Court (the “Regulations”) and article 17(3) of the Negotiated Relationship Agreement between the ICC and the UN (the “Relationship Agreement”).

III. DETERMINATION BY THE CHAMBER

6. Hussein was, at the time of the issuance of the warrant and until early June 2015, the Minister of Defence of the Republic of Sudan, a key minister in the cabinet of President Omar al-Bashir. To this day, following his recent appointment as Governor of Khartoum, he continues to hold public office and remains a high-profile official in Sudan. The issuance of the warrant of arrest has had no impact either on his senior position within the Sudanese administration or on his willingness and ability to travel beyond Sudanese borders, including on behalf of Omar Al-Bashir. On three occasions, upon receiving notification of Hussein’s imminent travel to Chad⁵, Central African Republic⁶ and South Sudan⁷, PTC I issued decisions⁸ reminding those States of their outstanding obligation to implement UNSC Resolution by arresting Hussein and instructing the Registrar to prepare and transmit requests for arrest and surrender when necessary. Those decisions and requests were issued to no avail: in all instances, as related in the reports submitted by the Registrar⁹, Hussein was able to complete his travels unhindered.

7. Sudan’s failure to arrest Hussein is only one instance of its by now long history of determined and consistent failure to comply with UNSC Resolution

⁵ ICC-02/05-01/12-11.

⁶ ICC-02/05-01/12-13.

⁷ ICC-02/05-01/12-22-Conf.

⁸ ICC-02/05-01/12-12; ICC-02/05-01/12-14; ICC-02/05-01/12-16; ICC-02/05-01/12-20; ICC-02/05-01/12-21; ICC-02/05-01/12-23-Conf.

⁹ ICC-02/05-01/12-15 (Chad); ICC-02/05-01/12-18-Conf (Chad); ICC-02/05-01/12-19-Conf (Chad); ICC-02/05-01/12-17 (CAR); ICC-02/05-01/12-25-Conf (South Sudan).

1593. This failure dates back to the first warrants of arrest issued in the situation in Darfur, has emerged as a constant feature ever since, and has found its most controversial expression in its persistent refusal to surrender President Al-Bashir.

8. The Chamber recalls that, as early as 25 May 2010, PTC I issued the “Decision informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan” in the context of the case of the *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*.¹⁰ As recently as 9 March 2015, Sudan’s repeated refusal to arrest and surrender its most senior suspect led the Chamber (acting upon a request by the Prosecutor) to issue a finding of non-cooperation of Sudan and to transmit it to the UN Security Council for the adoption of appropriate measures¹¹.

9. Since the adoption of UNSC Resolution 1593, Sudan has made it clear that it would not surrender any of its nationals to the jurisdiction of the Court. Particularly significant, in this respect, appears a statement by the Sudanese presidential assistant quoted by the Prosecutor in the context of the Office’s ninth report to the SC on 5 June 2009, pursuant to resolution 1593(2005), to the effect that “[n]o Sudanese, not Al-Bashir and not a non-Al-Bashir, will appear before the [Court], and we will not even send a lawyer to represent us there”. Since the issue of the warrant of arrest, the country’s unwillingness to submit to the jurisdiction of the Court has been repeatedly reiterated by senior Sudanese officials. On 5 June 2013, in an assertion which stands out for its resolute tone, the Sudanese representative stated before the Security Council that the “Prosecutor’s demand that [the Sudanese government] implement the arrest warrants issued against [Omar Al Bashir] and other Sudanese officials is unacceptable because it

¹⁰ Pre-Trial Chamber I, [ICC-02/05-01/07-57](#).

¹¹ ICC-02/05-01/09-227.

is based on faulty logic” and “[w]hat is based on wrong is of necessity wrong itself”.¹² The lack of cooperation by Sudan in respect of all suspects in the situation, including Hussein, has been repeatedly exposed by the Prosecutor’s reports submitted to the Security Council pursuant to resolution 1593, most recently on 15 December 2014¹³. Representatives of Sudan have refused to receive documents emanating from the Court relating to the execution of the warrant, including the request for Hussein’s arrest and surrender¹⁴.

10. Finally, the extent of Sudan’s determination to systematically evade the obligations stemming from UNSC Resolution 1593 emerged most prominently on the recent occasion of the African Union summit held in South Africa on 13 and 14 June 2015.

11. Against this scenario, which has already prompted the ICC Prosecutor to denounce Sudan’s “consistent pattern of non-cooperation” in front of the Security Council¹⁵, a renewed sense of urgency demands that the Court does not remain silent or inane. The Court has heard from Sudanese representatives that the country’s position vis-à-vis the Court “will not change”.¹⁶

12. The Chamber wishes to reiterate that, whilst only States Parties to the Statute are under an obligation to cooperate with the Court, a resolution adopted by the Security Council acting under Chapter VII of the UN Charter creates an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. As a UN member since 12 November 1956, Sudan is bound

¹² S/PV.6974, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6974, page 17.

¹³ Twentieth report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593(2005), paragraph 28.

¹⁴ ICC-02/05-01/12-10-US-Exp, paragraph 5 and Annex 1 thereto.

¹⁵ Nineteenth report of the prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593(2005), 23 June 2014, paragraph 8.

¹⁶ ICC-02/05-01/09-113-Conf-Exp-Anx3; also ICC-02/05-01/09-113-Conf-Exp, para. 8.

by the terms of the UN Charter, including its article 25 according to which “[m]embers of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the [...] Charter”. As stated by the International Court of Justice in its advisory opinion on *Namibia*, “when the Security Council adopts a decision under article 25 in accordance with the Charter, it is for member States to comply with that decision [...]. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter”.¹⁷

13. The SC adopted resolution 1593(2005), in which it was *decided* that the “Government of Sudan [...] *shall* cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”.¹⁸ The legal effect of this resolution is twofold. First, Part 9 of the Statute and the relevant Rules governing State Party cooperation become applicable vis-à-vis Sudan. Second, Sudan is expected to provide the necessary cooperation envisaged in said resolution including the implementation of the requests calling for the arrest and surrender of Hussein in accordance with the Court’s cooperation regime set out in Part 9 and its national laws. Only in the event that Sudan should face any legal impediment to comply with these requests, the Sudanese authorities should consult or notify the Court in accordance with article 97 of the Statute and rule 195 of the Rules.

14. In view of the foregoing, the Chamber considers that Sudan not only disregarded the Request for cooperation to arrest and surrender Hussein, pursuant to articles 86 and 89 of the Statute, but also SC Resolution 1593(2005). It

¹⁷ ICJ, “[*Legal Consequences for States of the Continued Presence of South Africa in Namibia \(South West Africa\) notwithstanding Security Council Resolution 276 \(1970\)*](#)”, Advisory Opinion, 21 June 1971, para. 116.

¹⁸ SC Res 1593(2005), para. 2.

also failed to discharge its obligations to consult or notify the Court of any impediment to execute the pending requests. This course of action calls upon the SC to take the necessary measures they deem appropriate.

15. It is well-known that, unlike domestic courts, the ICC has no direct enforcement mechanism in the sense that it lacks a police force of its own. As such, the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate. When the SC, acting under Chapter VII of the UN Charter, refers the situation in Darfur, Sudan to the Court as constituting a threat to international peace and security, it might be expected that the Council might also consider deciding on a follow-up.

16. Having stated the above, the Chamber recalls article 87(7) of the Statute according to which, "[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of 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".

17. Under the present circumstances, regulation 109(3) of the Regulations, dictating that the "Chamber shall hear [first] from the requested State", is no obstacle to the making of such finding at this stage. As already noted in the decision on the failure to cooperate in the Bashir case, Sudan has constantly refused to engage in any sort of dialogue with the responsible organs of the Court, as of 2009 and for over six years. As such, the Chamber considers that Sudan has waived its right to be heard on the matter. Accordingly, it shall now proceed to the next step regarding Sudan's non-cooperation with the Court and refer the matter to the SC for the Council to take appropriate measures. The

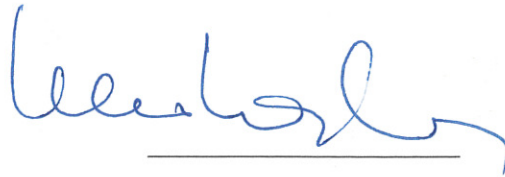
Chamber deems it appropriate to also notify the competent authorities of Sudan, the Prosecutor, the participants in relation to the present case, as well as the Assembly of States Parties to the Statute, of this decision for their information.

FOR THESE REASONS, THE CHAMBER HEREBY

a) finds that the Republic of Sudan: (1) has 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 Hussein, thus preventing the Court from exercising its functions and powers under the Statute; and (2) has 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 Hussein, or to bring to the attention of the Court relevant information which would have assisted it in deciding on any such problem; and

b) refers, in accordance with regulation 109(4) of the Regulations, the present decision to the President of the Court for transmission to the Security Council, through the Secretary General of the United Nations, pursuant to article 17(3) of the Relationship Agreement.

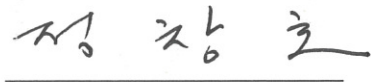
Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated this Friday, 26 June 2015

At The Hague, The Netherlands