



Original: **English**

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

Date: **1 October 2014**

PRE-TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR

**Public
URGENT**

Decision on the "Prosecution's Notification of Travel in the Case of *The Prosecutor v Omar Al Bashir*"

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 Kingdom of
Saudi Arabia

Amicus Curiae

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”) renders this decision on the “Prosecution’s Notification of Travel in the Case of *The Prosecutor v Omar Al Bashir*” (the “Notification”).¹

1. On 31 March 2005, the Security Council (the “SC”), 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 4 March 2009 and 12 July 2010, Pre-Trial Chamber I (“PTC I”), formerly seized of the present case, issued two warrants of arrest against Omar Hassan Ahmad Al Bashir (“Mr. Al Bashir”).³ These warrants of arrest remain to be executed.

3. On 6 March 2009 and 21 July 2010, upon instruction of PTC I,⁴ the Registrar transmitted two requests to, *inter alia*, all UN SC members that are not States Parties to the Rome Statute (the “Statute”) for the arrest and surrender of Mr. Al Bashir for the purposes of the execution of the two warrants of arrest.⁵

4. 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

¹ ICC-02/05-01/09-207 and annex A.

² S/RES/1593 (2005).

³ Pre-Trial Chamber I, “Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-1; Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/04-01/09-3; Pre-Trial Chamber I, “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, 12 July 2010, ICC-02/05-01/09-95; Pre-Trial Chamber I, “Second Decision on the Prosecution’s Application for a Warrant of Arrest”, 12 July 2010, ICC-02/05-01/09-94.

⁴ Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/04-01/09-3, p. 93; Pre-Trial Chamber I, “Second Decision on the Prosecution’s Application for a Warrant of Arrest”, 12 July 2010, ICC-02/05-01/09-94, p. 29.

⁵ ICC-02/05-01/09-8; ICC-02/05-01/09-97.

Congo, Darfur, Sudan and Côte d'Ivoire situations", in which it re-assigned, *inter alia*, the situation of Darfur, Sudan to this Chamber.⁶

5. On 10 October 2013, the Chamber issued the "Decision Regarding Omar Al-Bashir's Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia" in which it, *inter alia*, (i) ordered the Registrar to transmit to the Kingdom of Saudi Arabia the requests for arrest and surrender issued by the Registry on 6 March 2009 and 21 July 2010; and (ii) invited the competent authorities of the Kingdom of Saudi Arabia to arrest Mr. Al Bashir and surrender him to the Court, in the event he enters its territory.⁷

6. On the same day, the Registrar transmitted to the Kingdom of Saudi Arabia a request for arrest and surrender against Mr. Al Bashir along with the corresponding warrants of arrest.⁸

7. On 1 October 2014, the Chamber received the Notification in which the Prosecutor avers, on the basis of news reports, that Mr. Al Bashir "arrived in Saudi Arabia on Tuesday, 30 September [2014], to perform the annual hajj pilgrimage".⁹ It was further reported that he "was received in the coastal city of Jeddah by the prince of Mecca province, Mashaal bin Abdullah bin Abdulaziz al-

⁶ Presidency, ICC-02/05-01/09-143.

⁷ Pre-Trial Chamber II, ICC-02/05-01/09-164, p. 6. Subsequent to this decision, a report about said visit was prepared and filed by the Registrar, see ICC-02/05-01/09-167.

⁸ ICC-02/05-01/09-165; ICC-02/05-01/09-167, paras 1 and 2. On 11 October 2013, the original *note verbale* was transmitted in person to the embassy of the Kingdom of Saudi Arabia in the Netherlands.

⁹ ICC-02/05-01/09-207, para. 1.

Saud on 30 September [2014]” and that he later “met with Saudi Crown Prince Salman bin Abdulaziz, Deputy Premier and Minister of Defence”.¹⁰

8. Accordingly, the Prosecutor requests the Chamber to take steps to ensure that the warrants of arrest issued by the Court against Mr. Al Bashir are executed.¹¹ More specifically, she requests the Chamber (i) to seek information from the relevant authorities of the Kingdom of Saudi Arabia regarding the visit of Mr. Al Bashir; (ii) to remind those authorities of the existence of the warrants of arrest against Mr. Al Bashir for serious crimes under the Statute; and (iii) to remind the relevant authorities of Kingdom of Saudi Arabia of the SC Resolution 1593 (2005) urging all States to cooperate fully with the Court.¹²

9. The Chamber notes articles 21(1)(a) and (b), 87(5), 89(1), and 91 of the Statute.

10. As highlighted previously by this Chamber in a number of decisions, only States Parties to the Statute are under an obligation to cooperate with the Court. Given that the Statute is an international treaty governed by the rules set out under the Vienna Convention on the Law of Treaties, it is only with the State’s consent that the Statute can impose obligations on a non-State Party.¹³ Thus, non-States Parties may decide to cooperate with the Court on an *ad hoc* basis, as foreseen in article 87(5)(a) of the Statute. This principle may be altered by the SC

¹⁰ ICC-02/05-01/09-207, para. 9.

¹¹ ICC-02/05-01/09-207, para. 11.

¹² ICC-02/05-01/09-207, para. 11.

¹³ UNTS, Vol. 1155, art. 34; Pre-Trial Chamber II, “Decision Regarding Omar Al-Bashir’s Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia”, 10 October 2013, ICC-02/05-01/09-164, paras 7-8; see also Pre-Trial Chamber I, “Decision on the request of the Defence of Abdullah Al-Senussi to make a finding of non-cooperation by the Islamic Republic of Mauritania and refer the matter to the Security Council”, 28 August 2013, ICC-01/11-01/11-420, para. 12.

which may, by means of a resolution adopted under Chapter VII of the UN Charter, create an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. In such a case, the obligation to cooperate stems directly from the UN Charter.

11. Accordingly, the Kingdom of Saudi Arabia, as a non-State Party to the Statute, has no obligations *vis-à-vis* the Court arising from the *Statute*. In this regard, the Chamber recalls that the situation in Darfur, Sudan was referred to the Court by way of SC Resolution 1593 (2005), which also recognizes that States not parties to the Statute (apart from Sudan) have no obligation under the Statute. However, SC Resolution 1593(2005) still “urge[d] *all States* and concerned regional and other international organizations to cooperate fully” with the Court (emphasis added).¹⁴ Thus, having been provided already with the two warrants of arrest against Mr. Al Bashir and the corresponding request for arrest and surrender,¹⁵ the Kingdom of Saudi Arabia may decide to execute the outstanding warrants of arrest.

12. In this context the Chamber wishes to point out that the Court has no enforcement mechanism and thus relies on the States’ cooperation, without which it cannot fulfil its mandate and contribute to ending impunity.

FOR THESE REASONS, THE CHAMBER HEREBY

a) Renews its invitation to the competent authorities of the Kingdom of Saudi Arabia to arrest Omar Hassan Ahmad Al Bashir and surrender him to the Court;

¹⁴ S/RES/1593 (2005).

¹⁵ ICC-02/05-01/09-165; ICC-02/05-01/09-167, para. 1.

- b) **Orders** the Registrar to send a Note Verbale to the Kingdom of Saudi Arabia, enquiring about said visit, reminding it of the SC Resolution 1593 (2005) and inviting it to cooperate with the Court in the arrest and surrender to the Court of Omar Hassan Ahmad Al Bashir;
- c) **Orders** the Registrar to notify the present decision to the competent authorities of the Kingdom of Saudi Arabia; and
- d) **Orders** the Registrar to prepare a report to be filed with the Chamber in due course concerning said visit.

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



Judge Ekaterina Trendafilova
Presiding Judge



Judge Cuno Tarfusser



Judge Van den Wyngaert

Dated this Wednesday, 1 October 2014

At The Hague, The Netherlands