

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/09
Date: 18 September 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
URGENT**

**Decision Regarding Omar Al-Bashir's Potential Travel to the United States of
America**

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 United States of America

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”) renders this decision on the “Prosecution’s urgent notification of travel in the case of *The Prosecutor v Omar Al Bashir*” (the “Prosecutor’s 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 to the Court.²

2. On 4 March 2009 and 12 July 2010, Pre-Trial Chamber I (the “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 the instruction of PTC I,⁴ the Registrar transmitted to the competent authorities of all United Nations Security Council members that are not States Parties to the Rome Statute, including the United States of America (the “United States”), two requests for the arrest and

¹ ICC-02/05-01/09-160 and its 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, *id.*, “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; *id.*, “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.

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 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 18 September 2013, the Chamber received the Prosecutor’s Notification, in which she avers that, on the basis of media reports,⁷ Mr. Al-Bashir might travel to the United States of America (the “United States”) to attend the 68th regular session of the General Assembly of the United Nations at the UN headquarters, which started on 17 September 2013. To this end, it is alleged, that Mr. Al Bashir “has applied for a U.S. visa”.⁸ Accordingly, the Prosecutor requests the Chamber to take steps “to ensure that the arrest warrants are executed” and in particular (i) seek information from the relevant authorities of the United States; (ii) remind those authorities of the existence of the warrants against Mr. Al Bashir; (iii) reminding those authorities of the SC Resolution 1593 (2005); and (iv) to consider informing the UN Security Council of the situation.⁹

6. On the same day, the legal representative of some victims participating in the case submitted the “Request to make observations regarding Omar al-Bashir’s potential visit to the 68th Session of the United Nations General Assembly” (the “Request of Victims”) in which he requested “to permit the Legal

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

⁶ ICC-02/05-01/09-160.

⁷ See ICC-02/05-01/09-160, Annex A.

⁸ ICC-02/05-01/09-160, para. 7.

⁹ ICC-02/05-01/09-160, para. 10.

Representative to express the concerns and observations of the [v]ictims regarding the [s]uspect's potential visit to the 68th session of the United Nations General Assembly".¹⁰

7. On the same day, the Chamber instructed the Registrar via email to send a *note verbale* to the Embassy of the United States to the Kingdom of the Netherlands with a view to reminding the competent authorities of the United States "of the requests for arrest and surrender sent by the Court in 2009 and 2010 to member States of the Security Council not parties to the Rome Statute (...) and inviting them to cooperate with the Court in this respect".

8. The Chamber notes articles 86, 87(1)(a) and (5) and 89(1) of the Rome Statute (the "Statute").

9. The Chamber highlights that only States Parties to the Statute are under an obligation to cooperate with the Court. Likewise, the Court has the authority to make requests to States Parties for cooperation.

10. The Statute of this Court is an international treaty. Therefore, it is only with the State's consent that the Statute can impose obligations on a non-State Party.¹¹ 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 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

¹⁰ ICC-02/05-01/09-161, para. 13.

¹¹ 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.

UN member States which are not members of the Statute. In such a case, the obligation to cooperate stems directly from the UN Charter.

11. Accordingly, the United States, as a non-State Party to the Statute, has no obligations *vis-à-vis* the Court arising from the Statute. The Chamber notes, however, that the situation in Darfur was referred to the Court by the SC and that SC Resolution 1593 (2005), 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” with the Court (emphasis added).¹²

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

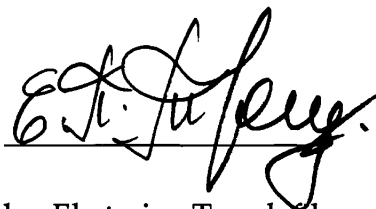
FOR THESE REASONS, THE CHAMBER HEREBY

- a) **Reminds** the United States of America of the two outstanding warrants of arrest issued against Omar Hassan Ahmad Al Bashir and the requests for arrest and surrender transmitted by the Registry on 6 March 2009 and 21 July 2010;
- b) **Invites** the competent authorities of the United States of America to arrest Omar Hassan Ahmad Al Bashir and surrender him to the Court, in the event he enters their territory;

¹² S/RES/1593 (2005).

- c) **Orders** the Registrar to immediately notify the present decision to the competent authorities of the United States of America;
- d) **Rejects** the Request of Victims, considering the urgency of the matter.

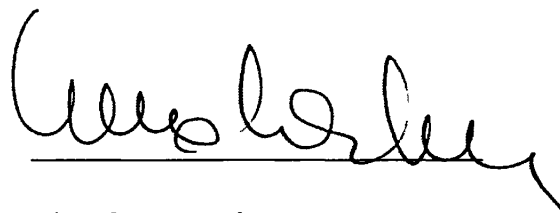
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul



Judge Cuno Tarfusser

Dated this Wednesday, 18 September 2013

At The Hague, The Netherlands