

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 March 2014

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
URGENT**

Decision Regarding Omar Al-Bashir's Potential Travel to the State of Kuwait

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 State of Kuwait

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 urgent 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 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 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.⁴

4. On 18 November 2013, the Chamber issued the “Decision Regarding Omar Al-Bashir’s Potential Travel to the State of Kuwait” (the “18 November 2013 Decision”)⁵ in which it, *inter alia*, invited the State of Kuwait, in light of the SC Resolution 1593 (2005) to cooperate with the Court in the arrest and surrender

¹ ICC-02/05-01/09-191 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; 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 Presidency, ICC-02/05-01/09-143.

⁵ Pre-Trial Chamber II, ICC-02/05-01/09-169.

of Mr. Al-Bashir.⁶ In that decision, the Chamber also ordered the Registrar, *inter alia*, to (i) transmit to the competent authorities of the State of Kuwait the requests for arrest and surrender issued by the Registry on 6 March 2009 and 21 July 2010, and (ii) remind the State of Kuwait of the SC Resolution 1593 (2005).⁷

5. On the same day, the Registrar of the Court transmitted the request for arrest and surrender for Mr. Al-Bashir to the competent authorities of the State of Kuwait, together with a copy of the two warrants of arrest.⁸

6. On 24 March 2014, the Chamber received the Notification, in which the Prosecutor avers that, on the basis of media reports, Mr. Al-Bashir, as head of the Sudanese delegation, “is on his way” to Kuwait City to attend an Arab League summit scheduled to take place there on 25-26 March 2014.⁹ 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. The Prosecutor also requests the Chamber to (i) seek information from the relevant authorities of the State of Kuwait regarding the possible visit of Mr. Al-Bashir; (ii) remind those authorities of the existence of the warrants of arrest, and of SC Resolution 1593 (2005); and (iii) inform the UNSC of the situation in order to enable the Council to take appropriate action.¹⁰

7. The Chamber notes articles 21(1)(a) and (b), 87(5) and 89(1) of the Rome Statute (the “Statute”).

⁶ Pre-Trial Chamber II, ICC-02/05-01/09-169, p. 6.

⁷ Pre-Trial Chamber II, ICC-02/05-01/09-169, pp. 5-6.

⁸ ICC-02/05-01/09-170.

⁹ ICC-02/05-01/09-191, para. 8 and ICC-02/05-01/09-191-AnxA.

¹⁰ ICC-02/05-01/09-191, para. 10.

8. As highlighted in the 18 November 2013 Decision, 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.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 UN Member States which are not parties to the Statute. In such a case, the obligation to cooperate stems directly from the UN Charter.

9. Accordingly, the State of Kuwait, 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 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).¹² Thus, having been provided already with the Court's request for arrest and surrender, the State of Kuwait may *decide* to execute the outstanding warrants of arrest.

¹¹ UNTS, Vol. 1155, art. 34; 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; 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, para. 7; Pre-Trial Chamber II, "Decision Regarding Omar Al-Bashir's Potential Travel to the United States of America", 18 September 2013, ICC-02/05-01/09-162, para. 10.

¹² S/RES/1593 (2005).

10. 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.

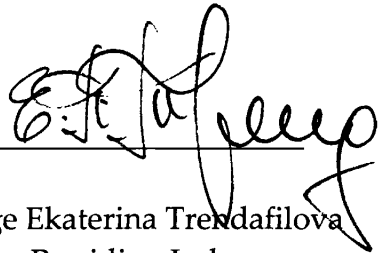
11. Considering that the visit is supposed to take place in the coming two days and the fact that the State of Kuwait may decide to provide assistance to the Court within the meaning of article 87(5) of the Statute, the Chamber considers it premature to accede to the Prosecutor's request and "inform the UN SC of the situation in order to enable the Council to take appropriate action".

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **renews its invitation** to the competent authorities of the State of Kuwait to arrest Omar Hassan Ahmad Al Bashir and surrender him to the Court, in the event he enters its territory;
- b) **orders** the Registrar to remind the State of Kuwait of the request for the arrest and surrender of Omar Hassan Ahmad Al Bashir and the two warrants of arrest as already transmitted to the competent authorities of that country on 18 November 2013;
- c) **orders** the Registrar to send a Note Verbale to the State of Kuwait, enquiring about Omar Hassan Ahmad Al-Bashir's visit;
- d) **orders** the Registrar to notify the present decision to the competent authorities of the State of Kuwait;

- e) **orders** the Registrar to prepare a report to be filed with the Chamber in due course concerning said visit; and
- f) **rejects** the Prosecutor's request to inform the Security Council.

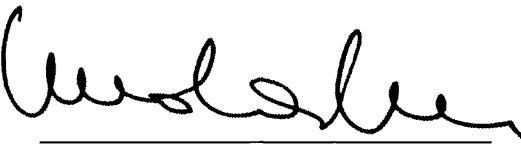
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul



Judge Cuno Tarfusser

Dated this Monday, 24 March 2014

At The Hague, The Netherlands