

## **Decision on the Prosecutor's Request for a finding of non-compliance against the republic of Sudan in the *Prosecutor v. Abdel Raheem Muhammed Hussein (ICC-02/05-01/12, 26 June 2015)***

### **Introduction:**

On 26 June 2015, the Pre-Trial Chamber II of the International Criminal Court (ICC) found that the State of Sudan has failed to arrest Abdel Raheem Muhammad Hussein against whom the ICC had issued an arrest warrant on 1 March 2012, pursuant to article 87(7) of the Rome Statute, that he should be surrender to the Court. She also found that Sudan failed to consult with the Court and to collaborate with its relevant organs to execute the pending arrest warrant against Mr. Abdel Hussein. The Chamber decided to refer the finding of Sudan's non-cooperation to the United Nations Security Council (UNSC) Resolution, which might decide to take the measures they deem necessary.

This piece will assume a binary structure. The procedural history and the applicable law and the determination by the Chamber of Sudan's refusal to cooperate with the Court to surrender Mr. Hussein who is still holding a public office.

### **I. A History of the Procedure and the Applicable Law**

The Pre-Trial Chamber I building on the evidence gathered, reasonably believe that Mr Hussein is criminally responsible for the following: crimes against humanity (persecution, murder, forcible transfer, rape, inhumane acts, imprisonment or severe deprivation of liberty and torture) and war crimes (murder, attacks against civilian population, destruction of property, rape, pillaging and outrage upon personal dignity). These crimes the Chamber alleged was committed against the Fur populations of the towns of Kodoom, Bindisi, Mukjar, Arawala and the surrounding areas by the Sudanese armed forces and the Militia/Janjaweed in the context of a counter-insurgency campaign against the Sudanese Liberation Movement/Army (SLM/A), the Justice and Equality Movement (JEM) and other groups opposing the Government.<sup>1</sup> The incisive plan to disquiet the civilian population perceived by the Government as being associated with the rebel groups was a counter-insurgency campaign allegedly formulated at the highest levels of the Government of the Republic of the Sudan.

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<sup>1</sup> ICC, [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1123.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1123.aspx), [Access on 08 July 2015].

Against this backdrop, on March 31 2005, the Security Council (the "SC" or the Council) acting under Chapter VII of the Charter of the United Nations adopted Resolution 1593 (2005), referring the situation in Darfur, Sudan to the Court.<sup>2</sup>

The Pre-Trial Chamber I ("PTC" I) on 1 March 2012, issued a warrant of arrest against Abdel Raheem Muhammad Hussein for seven counts of crimes against humanity and six counts of war crimes.<sup>3</sup> The Registry On 13 March 2012, informed the PTC I that the requests for arrest and surrender of Mr. Abdel Hussein had been transmitted to Sudan, all states parties and members of the UNSC<sup>4</sup>, calling for their cooperation pursuant to articles 89(1) and 91 of the Rome Statute, however, the arrest warrant is yet to be executed.<sup>5</sup>

The following provisions the Chamber notes will be useful: 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, regulations 109(2), (3) and (4) of the Regulations of the Court, and article 17(3) of the Negotiated Relationship Agreement between the ICC and the UN (the "Relationship Agreement")

## **II. The Determination of non-cooperation of Sudan by the Chamber**

Before the issuance of the warrant of arrest until early June 2015, Mr. Hussein was the Minister of Defence of the Republic of Sudan. He presently occupies a key position in president Bashir's government and has recently been appointed the Governor of Khartoum. On three occasions, Mr. Hussein has travelled to Central African Republic<sup>6</sup>, Chad<sup>7</sup> and South Sudan<sup>8</sup> despite decisions issued by the Pre-Trial Chamber I to the various countries reminding them of their obligation to enforce the United Nations Security Council Resolution by arresting him<sup>9</sup> and also the failure of Sudan to implement UNSC Resolution 1593(2005) to hand over President Al-Bashir to the Court.<sup>10</sup> It is worth mentioning that as early as 25 May

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<sup>2</sup> S/RES/1593 (2005); ICC-02/05-01/12- 33, para. 1.

<sup>3</sup> ICC-02/05-01/12- 33, para. 2.

<sup>4</sup> ICC-02/05-01/12- 33, para. 3; ICC-02/05-01/12- 4; ICC-02/05-01/12- 5; ICC-02/05-01/12- 6.

<sup>5</sup> ICC-02/05-01/12- 33, para. 3 – 4.

<sup>6</sup> ICC-02/05-01/12-13.

<sup>7</sup> ICC-02/05-01/12-11.

<sup>8</sup> ICC-02/05-01/12-22-Conf.

<sup>9</sup> 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 (Central African Republic), ICC-02/05-01/12-25-Conf (South Sudan).

<sup>10</sup> ICC-02/05-01/12-33, para. 6 – 7.

2010 the Pre-Trial Chamber I had issued a Decision informing the Security Council of the lack of cooperation on the part of Sudan over the cases of the *Prosecutor v. Ahmad Muhammed Harun and Ali Muhammed Ali Abd-Al-Rahman*, this stands by Sudan not to cooperate with the Court by handing any of its national is eminent in the statement of the Sudanese presidential assistant, he said: "[n]o Sudanese, not Al-Bashir and not a non-Bashir, will appear before the [Court], and we will not even send a lawyer to represent us there"<sup>11</sup>, also, a representative of Sudan told the SC that the "Prosecutor's demand that [the Sudanese government] should implement the arrest warrants issued against [Omar Al Bashir] and other Sudanese officials is unacceptable because it based on faulty logic" and "[w]hat is based on wrong is of necessity wrong itself".<sup>12</sup> This defiance against the UN Resolution 1593 was recently obvious during the African Union Summit held in South Africa on 13 and 14 June 2015.<sup>13</sup>

The Pre-Trial Chamber reiterate that States Parties to the Statute are under the obligation to cooperate with the Court based on a resolution adopted by the Security Council acting under Chapter VII of the UN Charter, that create an obligation to cooperate with the Court on those UN Member States which are not Parties to the Statute. Based on this reason, Sudan who is a member of the UN since 12 November 1956, is bound to observe the terms of the UN Charter especially article 25 that provides that: "[m]embers of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with [...] the Charter".<sup>14</sup> This position is consonant to the stance of the International Court of Justice in its advisory opinion on Namibia in which she stated that "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".<sup>15</sup>

From the foregoing, it is obvious to the Chamber that Sudan does not only disregard the Request to cooperate with the Court by arresting Mr. Hussein, pursuant to articles 86 and 89

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<sup>11</sup> ICC-02/05-01/12-33, para. 8 – 9.

<sup>12</sup> ICC-02/05-01/12-33, para. 9.

<sup>13</sup> ICC-02/05-01/12-33, para. 10.

<sup>14</sup> ICC-02/05-01/12-33, para. 12.

<sup>15</sup> International Court of Justice, "Legal Consequences for States of the Continuous Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) ", Advisory Opinion, 21 June 1971, para. 116.

of the Statute, but also defying the Security Council Resolution 1593 (2005); she has also failed to inform the Court on any impediment to implement the request by the Court, on these grounds, the SC can now take necessary measures it deems appropriate.<sup>16</sup> The Chamber further recall that article 87(7) of the Rome Statute provides that, "[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".<sup>17</sup>

To dovetail our discussion on this issue, it is worthwhile to mention as stated already that Sudan has failed to comply with the relevant organs of the Court pursuant to article 97 of the Rome Statute and rule 195(1) of the Rules regarding any difficulties if any to cooperate with the Court concerning this case and in accordance with regulation 109(4) of the Regulations, the present decision to transmit 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.<sup>18</sup>

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<sup>16</sup> ICC-02/05-01/12-33, para. 14.

<sup>17</sup> ICC-02/05-01/12-33, para. 16.

<sup>18</sup> ICC-02/05-01/12-33, p. 9.