



## **SUMMARY OF THE DECISION OF PRE-TRIAL CHAMBER I ON THE PROSECUTION'S APPLICATION FOR A WARRANT OF ARREST FOR OMAR HASSAN AHMAD AL BASHIR**

### **1. INTRODUCTION**

On 4 March 2009, Pre-Trial Chamber I of the International Criminal Court ("ICC") issued a warrant of arrest for President Omar Al Bashir for war crimes and crimes against humanity, including intentionally directing attacks against an important part of the civilian population of Darfur, Sudan, murdering, exterminating, raping, torturing, forcibly transferring large numbers of civilians and pillaging their property. This is the first warrant of arrest ever issued for a sitting Head of State by the ICC.

### **2. JURISDICTION OF THE COURT OVER THE CASE**

The Chamber found that, insofar as the Darfur situation was referred to the Court by United Nations Security Council ("UNSC") resolution 1593 adopted under Chapter VII of the Charter of the United Nations (article 13(b) of the Statute), this case falls within the jurisdiction of the Court despite the fact that it refers to the alleged criminal responsibility of a national of a State that is not party to the Statute, for crimes allegedly committed on the territory of a State not party to the Statute.

### **3. IRRELEVANCE OF OFFICIAL CAPACITY AS HEAD OF STATE**

In light of the material presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, Pre-Trial Chamber I found that the current position of Omar Al Bashir as Head of a State not a party to the Statute has no effect on the Court's jurisdiction over this case.

Pre-Trial Chamber I reached this conclusion on the basis of the following considerations:

First, it noted that, according to the Preamble of the Statute, one of the fundamental goals of the Statute is to put an end to impunity for the perpetrators of the most

serious crimes of concern to the international community as a whole, which “must not go unpunished”.

Second, Pre-Trial Chamber I observed that, in order to achieve this goal, articles 27(1) and (2) of the Statute set down the following core principles:

- (i) “This Statute shall apply equally to all persons without any distinction based on official capacity.”
- (ii) “[...] official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”
- (iii) “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

Finally, Pre-Trial Chamber I recalled that by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the UNSC also accepted that the investigation into the situation, as well as any prosecution arising therefrom, will be conducted in accordance with the framework provided for in the Statute, the *Elements of Crimes* and the *Rules of Procedure and Evidence* as a whole.

#### **4. ADMISSIBILITY OF THE CASE**

Pre-Trial Chamber I declined to use its discretionary *proprio motu* power to determine, at this stage, the admissibility of the case against Omar Al Bashir because: (i) the Prosecution Application was filed *ex parte* and still remains *confidential*; and (ii) there is no ostensible cause or self-evident factor impelling the Chamber to exercise its discretion pursuant to article 19(1) of the Statute.

#### **5. RESPONSIBILITY OF OMAR AL BASHIR FOR CRIMES AGAINST HUMANITY AND WAR CRIMES**

Pre-Trial Chamber I<sup>[1]</sup> found that there are reasonable grounds to believe that:

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<sup>[1]</sup> Judge Anita Ušacka partially dissented in relation to the definition of the civilian population that was attacked by GoS forces as part of the GoS counter-insurgency campaign.

- (i) the Sudanese Liberation Movement/Army (“SLM/A”) and the Justice and Equality Movement (“JEM”) were (a) the two main groups opposing the Government of Sudan (“the GoS”) in Darfur; (b) organised themselves between 2001 and 2002; (c) began to resort to acts of armed violence in 2002; and (d) from March 2003 to at least 14 July 2008, controlled part of the territory of Darfur and had the ability to carry out sustained military operations for a prolonged period of time;
- (ii) soon after the April 2003 attack on the El Fasher airport, a common plan to carry out a counter-insurgency campaign against the SLM/A, the JEM and other armed groups opposing the GoS in Darfur was agreed upon at the highest level of the GoS by Omar Al Bashir and other high-ranking Sudanese political and military leaders;
- (iii) a core component of the counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur;
- (iv) according to the common plan, the said civilian population was to be subjected to unlawful attacks, forcible transfers and acts of murder, extermination, rape, torture, and pillaging by GoS forces, including the Sudanese Armed Forces and their allied *Janjaweed* Militia, the Sudanese Police Force, the National Intelligence and Security Service (“NISS”) and the Humanitarian Aid Commission (“HAC”);
- (v) the implementation of the GoS counter-insurgency campaign started soon after the April 2003 attack on El Fasher airport with a general call by the GoS for the mobilisation of the *Janjaweed* Militia;
- (vi) the implementation of the GoS counter-insurgency campaign lasted until at least 14 July 2008, the date of filing of the Prosecution Application; and
- (vii) as a core component of the GoS counter-insurgency campaign, GoS forces committed crimes against humanity within the meaning of articles 7(1)(a), (b), (d), (f) and (g) of the Statute and war crimes within the meaning of article 8 (2)(e)(i) and (v) of the Statute, in particular:

- a. carried out numerous unlawful attacks, followed by systematic acts of pillaging, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups;
- b. subjected thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of murder, as well as to acts of extermination;
- c. subjected thousands of civilian women, belonging primarily to the said groups to acts of rape;
- d. subjected hundreds of thousands of civilians belonging primarily to the said groups to acts of forcible transfer; and
- e. subjected civilians belonging primarily to the said groups to acts of torture.

Pre Trial Chamber I<sup>[2]</sup> also found that there are reasonable grounds to believe that:

- (i) Omar Al Bashir, as the *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the above-mentioned common plan;
- (ii) in the alternative, Omar Al Bashir also (a) played a role that went beyond coordinating the implementation of the common plan; (b) was in full control of all branches of the “apparatus” of the State of Sudan, including the Sudanese Armed Forces and their allied *Janjaweed* Militia, the Sudanese Police Force, the NISS and the HAC, and (c) used such control to secure the implementation of the common plan.

As a result, Pre-Trial Chamber I found that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible, under article 25(3)(a) of the Statute, as an indirect (co) perpetrator to the above-mentioned war crimes and crimes against humanity.

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<sup>[2]</sup> Judge Anita Ušacka partially dissented in relation to the Majority’s finding that there are reasonable grounds to believe that Omar Al Bashir was criminally liable as an indirect co-perpetrator.

## 6. FINDINGS CONCERNING GENOCIDE

The majority of Pre-Trial Chamber I, Judge Anita Ušacka dissenting, found that the materials provided by the Prosecution in support of the Prosecution Application failed to provide reasonable grounds to believe that the GoS acted with *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups. Consequently, counts 1 to 3 of the Prosecution Application concerning the crime of genocide are not included in the warrant for the arrest of Omar Al Bashir.

Nevertheless, the majority of Pre-Trial Chamber I emphasised that, if, as a result of the ongoing Prosecution investigation into the crimes allegedly committed by Omar Al Bashir, additional evidence on the existence of a GoS genocidal intent is gathered, the majority's opinion in this decision would not prevent the Prosecution from requesting, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir in order to include the crime of genocide.

## 7. NEED FOR THE ARREST OF OMAR AL BASHIR

Pre-Trial Chamber I found that the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes against humanity and war crimes.

## 8. TRANSMISSION OF COOPERATION REQUEST

Pre-Trial Chamber I decided that, as soon as practicable, the Registry:

- (i) shall prepare a request for cooperation seeking the arrest and surrender of Omar Al Bashir and containing the information and documents required by articles 89(1) and 91 of the Statute, and by rule 187 of the *Rules of Procedure and Evidence*; and
- (ii) shall transmit such request in accordance with rule 176(2) of the *Rules of Procedure and Evidence* to (a) the competent Sudanese authorities; (b) all States Parties to the Statute; and (c) all United Nations Security Council members that are not States Parties to the Statute.

Pre-Trial Chamber I also directed the Registrar, as appropriate, to prepare and transmit to any other State any additional request for arrest and surrender which may be necessary for the arrest and surrender of Omar Al Bashir to the Court pursuant to articles 89 and 91 of the Statute and, if the circumstances so require, to

prepare and transmit a request for provisional arrest in accordance with article 92 of the Statute.

## **9. OBLIGATIONS OF THE STATE OF SUDAN TO COOPERATE WITH THE COURT IN THE EXECUTION OF THE COOPERATION REQUEST FOR THE ARREST AND SURRENDER OF OMAR AL BASHIR**

Pre-Trial Chamber I noted that the State of Sudan is not a party to the Statute and has not made any declaration pursuant to article 12(3) of the Statute and rule 44 of the *Rules of Procedure and Evidence*. Nevertheless, the Chamber emphasised that the State of Sudan has the obligation to fully cooperate with the Court.

In this regard, Pre-Trial Chamber I noted that the case against Omar Al Bashir arose out of the investigation into the Darfur situation, which was the subject of a UNSC referral pursuant to article 13(b) of the Statute, made in UNSC resolution 1593. This resolution was adopted on 31 March 2005 under Chapter VII of the Charter of the United Nations.

Furthermore, Pre-Trial Chamber I emphasised that the United Nations Security Council, after expressly determining that “the situation in Sudan continues to constitute a threat to international peace and security”, decided, in the dispositive part of its resolution 1593, that “the Government of Sudan and all other parties to the conflict in Darfur *shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution*”.

In this regard, Pre-Trial Chamber I stressed that, according to articles 24(1) and 25 of the Charter of the United Nations, the members of the United Nations, including the State of Sudan (i) “confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”; and (ii) “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Furthermore, according to article 103 of the Charter of the United Nations, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

As a result, Pre-Trial Chamber I found that the obligations of the State of Sudan, pursuant to UNSC resolution 1593, to *cooperate fully with and provide any necessary assistance to the Court* shall prevail over any other obligation that the State of Sudan may have undertaken pursuant to “any other international agreement”.

Pre-Trial Chamber I also noted that the Government of Sudan has systematically refused to cooperate with the Court since the issuance of arrest warrants for Ahmad Harun and Ali Kushayb on 2 May 2007. Furthermore, Pre-Trial Chamber I recalled that, upon the issuance of the warrant of arrest for Ahmad Harun, Omar Al Bashir appears to have personally maintained the suspect in his position as Federal Minister for Humanitarian Affairs. Moreover, it noted that, since the filing of the public summary of the Prosecution Application for a warrant of arrest for Omar Al Bashir on 14 July 2008, it appears that Omar Al Bashir himself has been particularly defiant of the jurisdiction of the Court in several of his public statements.

As a result, Pre-Trial Chamber I emphasised that, according to article 87(7) of the Statute, if the Government of Sudan continues to fail to comply with the above-mentioned cooperation obligations to the Court, the competent Chamber “may make a finding to that effect” and decide to “refer the matter [...] to the Security Council.”

#### **10. OBLIGATIONS OF STATES OTHER THAN SUDAN, AS WELL AS REGIONAL AND INTERNATIONAL ORGANISATIONS, TO COOPERATE WITH THE COURT IN THE EXECUTION OF THE COOPERATION REQUEST FOR ARREST AND SURRENDER OF OMAR AL BASHIR**

The Chamber finally stressed that, in relation to States other than Sudan, as well as regional and international organisations, the dispositive part of UNSC resolution 1593 expressly states the following concerning their cooperation with the Court: “While recognizing that States not party to the Rome Statute have no obligation to the Statute, [the United Nations Security Council] urges all States and concerned regional and other international organisations to cooperate fully”.