



Original: English

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

Date: 13 June 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR

URGENT

Public

Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the 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 Republic of
South Africa

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Cuno Tarfusser, Presiding Judge of Pre-Trial Chamber II, issues this urgent decision following the Prosecutor's urgent request for an order clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, who has entered today the territory of the Republic of South Africa for the purposes of attending an African Union summit (ICC-02/05-01/09-241-Conf).

1. In the present circumstances, any further reminder or clarification to the Republic of South Africa is unnecessary. *In claris not fit interpretatio*. Indeed, it is plain from the following that there exists no ambiguity or uncertainty with respect to the obligation of the Republic of South Africa to immediately arrest and surrender Omar Al Bashir to the Court, and that the competent authorities Republic of South Africa are already aware of this obligation.

2. Omar Al Bashir is subject to two warrants of arrest, issued by the Chamber on 4 March 2009 and 12 July 2010, respectively, for seven counts of war crimes and crimes against humanity and three counts of genocide. Immediately after their issuance, both warrants of arrest, together with cooperation requests for the arrest and surrender to the Court of Omar Al Bashir, have been transmitted, *inter alia*, to all States Parties to the Rome Statute, including the Republic of South Africa.

3. On 28 May 2015, the Court, via the Registrar, notified a *note verbale* to the Embassy of South Africa in the Kingdom of the Netherlands reminding it of South Africa's obligation to arrest Omar Al Bashir and surrender him to the Court, and, in case of any difficulties in implementing the request for cooperation, to consult with the Court without any delay in accordance with article 97 of the Statute.

4. On 12 June 2015, upon request of the Republic of South Africa, the Presiding Judge, in the presence of representatives of the Registrar and the

Office of the Prosecutor, met with the Ambassador of South Africa to the Netherlands and an accompanying legal advisor, for consultations under article 97 of the Statute. The Ambassador of South Africa to the Netherlands read out a *note verbale* making the argument that there was lack of clarity in the law and that the Republic of South Africa was subject to competing obligations.

5. In response to this, the representatives of South Africa were explained that there is no ambiguity in the law and that the Republic of South Africa is under the obligation to arrest and surrender to the Court Omar Al Bashir. In particular, they were reminded of the decision (which is publicly available) issued on 9 April 2014, in which the Chamber settled the very same matters, at that time raised by the Democratic Republic of the Congo.¹

6. In particular, in that decision, the Chamber stated:

[B]y issuing Resolution 1593(2005) the SC decided that the “Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”. Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless. Accordingly, the “cooperation of that third State [Sudan] for the waiver of the immunity”, as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. (paragraph 29)

7. In this sense, the Chamber clarified that “there also exists no impediment at the horizontal level” regarding the arrest and surrender to the Court of Omar Al Bashir (paragraph 29). In addition, the Chamber stated that

¹ [Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court](#), 9 April 2014, ICC-02/05-01/09-195 (*see, in particular*, paras 28 to 31).

since the Security Council, acting under Chapter VII of the UN Charter, had lifted the immunities of Omar Al Bashir by virtue of Resolution 1593(2005), the Republic of the Democratic Republic of Congo could not invoke any other decision, including that of the African Union, providing for any obligation to the contrary (paragraph 31).

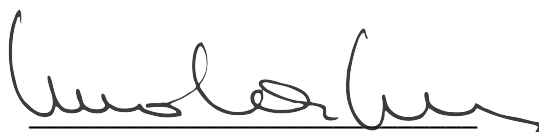
8. The same applies squarely to the Republic of South Africa as well. The delegation from the Republic of South Africa was reminded of this during the meeting of 12 June 2015. In particular, the Presiding Judge repeatedly made clear, in unequivocal terms, that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir as soon as on its territory and that the consultation between the Court and the Republic of South Africa under article 97 (or any other further discussion on the point at any later stage) do not trigger any suspension or stay of this standing obligation. As there exists no issue which remains unclear or has not already been explicitly discussed and settled by the Court, the consultations under article 97 of the Statute between the Court and the Republic of South Africa have therefore ended.

9. In conclusion, the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court, as it is aware of the Court's explicit position (as publicly expressed, most recently, on 9 April 2014 and reiterated during the consultations with the South African delegation on 12 June 2015) that the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005) referring the situation in Darfur, Sudan to the Prosecutor of the Court, and that the Republic of South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.

10. Accordingly, it is unnecessary to further clarify that the Republic of South Africa is under the duty under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court, as the existence of this duty is already clear and needs not be further reiterated. The Republic of South Africa is already aware of this statutory duty and a further reminder is unwarranted.

11. The Registrar is hereby directed to immediately notify the present decision to the competent authorities of the Republic of South Africa.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser
Presiding Judge of Pre-Trial Chamber II

Dated this 13 June 2015

At The Hague, The Netherlands