



Original: **English**

No.: **ICC-02/05-01/09**
Date: **4 September 2015**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN DARFUR, SUDAN

THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR

Public

**Order requesting submissions from the Republic of South Africa for the purposes
of proceedings under article 87(7) of the Rome Statute**

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 Republic of South Africa

Others

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” or the “ICC”) issues this order requesting submissions from the Republic of South Africa (“South Africa”) for the purposes of proceedings under article 87(7) of the Rome Statute (“Statute”) in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*.

I. PROCEDURAL HISTORY AND BACKGROUND

1. On 31 March 2005, the Security Council, acting under Chapter VII of the Charter of the United Nations (the “UN”) adopted Resolution 1593(2005), referring the situation in Darfur, Sudan to the Court.¹
2. On 4 March 2009 and 12 July 2010 Pre-Trial Chamber I issued two warrants of arrest against Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”).² These warrants of arrest remain to be executed.
3. On 31 March 2009³ and on 15 September 2010⁴ respectively, the Registry filed its reports on the transmission of the requests for arrest and surrender pursuant to the two warrants. As a State Party to the Statute, South Africa was among the recipients of both transmissions.
4. On 15 April 2015, the Chamber issued its “Orders to the Registrar concerning action to be taken in case of information relating to travel of suspects”, *inter alia* ordering “the Registrar, each and every time that information of travel, whether planned or ongoing, as regards persons at large who are the subject of a warrant

¹ S/RES/1593 (2005).

² Pre-Trial Chamber I, “[Warrant of Arrest for Omar Hassan Ahmad Al Bashir](#)”, 4 March 2009, ICC-02/05-01/09-1; “[Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir](#)”, 12 July 2010, ICC-02/05-01/09-95.

³ ICC-02/05-01/09-18-US-Exp and its annexes.

⁴ ICC-02/05-01/09-113-Conf-Exp.

of arrest issued by the Court is relayed to the Court or one of its organs, to notify any and all States Parties to the Statute affected by such travel, to which a request for arrest and surrender of the relevant person has already been transmitted, with a *Note verbale* containing a reminder of their obligation to cooperate with the Court in the arrest and surrender of that person in accordance with articles 86 and 89 of the Statute”.

5. On 28 May 2015, acting in compliance with the Chamber’s orders and on the basis of media reports of Omar Al Bashir’s potential travel to South Africa for the purposes of attending the African Union summit scheduled from 7 to 15 June 2015, the Registrar notified the Embassy of South Africa with a *Note verbale*. This *Note verbale* also reminded South Africa of its obligation to consult with the Court, should it foresee any difficulties in implementing the request for cooperation.

6. On Friday 12 June 2015, the Registrar informed the Chamber that the Embassy of South Africa had requested a meeting between the Registrar and the Chief State of Law Adviser from the Ministry of Justice, with a view to engaging into consultations pursuant to article 97 of the Statute. The Prosecutor requested that the consultations take place on the same day “in the form of a hearing before Pre-Trial Chamber II with the legal representative of South Africa, the Prosecution and the Registry in attendance” as the arrival of Omar Al Bashir to the Republic of South Africa was imminent.

7. In light of the urgency, Judge Cuno Tarfusser scheduled a meeting with the representatives of South Africa for the same day, Friday 12 June 2015, at 17 hours. Representatives of the Office of the Prosecutor and of the Registry were also attending.

8. During this meeting, the representative of the Republic of South Africa read out a *Note verbale* he had received from his government making the argument that there was “lack of clarity” in the law and that the Republic of South Africa was subject to “competing obligations”. Judge Cuno Tarfusser pointed out that all of the issues tabled by South Africa had already been decided upon by the Court and that there was no ambiguity in the law. He also clarified that the consultations had no suspensive effect on South Africa’s outstanding obligations.

9. On Saturday 13 June 2015, at 22.49 hours, following a request from the Prosecutor making reference to the fact that Omar Al Bashir had actually arrived in South Africa to attend the African Union summit, Judge Cuno Tarfusser issued a decision (the “13 June 2015 Decision”)⁵ stating that there was no need for any further reminder or clarification to the Republic of South Africa as regards the existence of its obligation to immediately arrest and surrender Omar Al Bashir to the Court.

10. On Sunday 14 June 2015, international media reported that an application requesting the South African authorities to arrest Omar Al Bashir had been filed before the High Court of Justice in Pretoria. Pending the deliberation of the application, the Court issued a provisional order compelling the South African authorities to prevent Omar Al Bashir from leaving the country until the issue could be adjudicated by the Court.

11. According to information initially revealed in the media, which have since been confirmed by Government sources and also mirrored in a decision of the South African High Court, on 15 June 2015 Omar Al Bashir flew out of South

⁵ ICC-02/05-01/09-242.

Africa from a military base while the hearings relating to the adjudication of the application were taking place before the South African bench.

12. A report summarising the events and circumstances surrounding the meeting held on Friday 12 June 2015, as well as relevant subsequent developments, was filed by the Registrar on 17 June 2015⁶.

13. On 23 June 2015, in Pretoria, the Gauteng Division of the High Court of South Africa issued a judgment and found *inter alia* that the departure of Omar Al Bashir from the country “in the full awareness of the explicit order of Sunday 14 June 2015, objectively viewed, demonstrates non-compliance with that order”.

II. APPLICABLE LAW

14. The Chamber notes 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, regulation 109(2), (3) and (4) of the Regulations of the Court (the “Regulations”) and article 17(3) of the Negotiated Relationship Agreement between the ICC and the UN .

III. DETERMINATION BY THE CHAMBER

15. Pursuant to article 87(7) of the Statute, “[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”.

16. The Chamber believes that the events recounted above warrant the opening of proceedings pursuant to article 87(7) of the Statute.

⁶ ICC-02/05-01/09-243 and confidential annexes thereto.

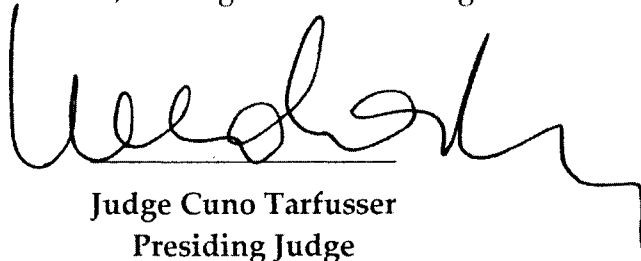
17. It is therefore necessary that, in accordance with regulation 109(3) of the Regulations and prior to making its finding, the Chamber hear from South Africa. The Chamber finds it appropriate that South Africa submit its views in writing.

FOR THESE REASONS, THE CHAMBER HEREBY


REQUESTS the competent authorities of the Republic of South Africa to submit, no later than **Monday 5 October 2015**, their views on the events surrounding Omar Al Bashir's attendance of the African Union summit in Johannesburg on 13, 14 and 15 June 2015, with particular reference to their failure to arrest and surrender Omar Al Bashir, for the purposes of the Chamber's determination pursuant to article 87(7) of the Statute;

ORDERS the Registrar to transmit this decision to the competent authorities of the Republic of South Africa.


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



Judge Cuno Tarfusser
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated this Friday, 4 September 2015
At The Hague, The Netherlands