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

Date: **17 March 2017**

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF**

***The Prosecutor v Omar Hassan Ahmad AL BASHIR***

**Public**

**With public annex 1 and public annexes A to H**

**Prosecution's Submissions in advance of the public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa in the case of *The Prosecutor v Omar Hassan Ahmad AL BASHIR***

**Source:** Office of the Prosecutor

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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**The Office of Public Counsel for the  
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Competent authorities of the Republic of  
South Africa

*Amicus Curiae*

Southern Africa Litigation Centre

**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

United Nations  
Secretariat of the Assembly of States  
Parties

## Introduction

1. The Prosecution requests that Pre-Trial Chamber II (the “Chamber”) find the Republic of South Africa (“South Africa”) in non-compliance under article 87(7) of the Rome Statute (the “Statute”). As a State Party to the Statute, South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Mr Omar Al Bashir (“Mr Al Bashir”) to the International Criminal Court (the “Court”) whilst he was on South African territory from 13 to 15 June 2015.
2. South Africa’s failure to arrest and surrender Mr Al Bashir, a person subject to two warrants of arrest issued by the Court<sup>1</sup> (the “Arrest Warrants”) for the most serious crimes under the Statute, prevented the Court from exercising its statutory functions and powers. Therefore, the Prosecution further requests the Chamber, should it find South Africa in non-compliance, to exercise its discretion and refer the matter to the Assembly of States Parties (“ASP”) and the United Nations Security Council (“UNSC”).
3. There are compelling reasons for such a finding and a referral by the Chamber, in particular, the gravity of the failure by South Africa to execute the Arrest Warrants, in circumstances where it knew and was reminded of its obligation to arrest and surrender Mr Al Bashir to the Court, had the ability to do so, and yet chose not to.
4. The Court did everything it could to enable South Africa to comply with the pending requests. Under time pressure, the Single Judge of the Chamber (the “Single Judge”) held consultations with South Africa, considered South Africa’s submissions, set out the applicable law and guiding jurisprudence with precision

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<sup>1</sup> ICC-02/05-01/09-1 and ICC-02/05-01/09-95.

and thereby removed any ambiguity with respect to South Africa's obligations under the Statute.

### **Statement of Facts**

#### *The Arrest Warrants for Mr Al Bashir were notified to South Africa*

5. On 31 March 2005, the UNSC, acting under Chapter VII of the Charter of the United Nations (the "UN Charter"), adopted Resolution 1593 (2005) ("UNSCR 1593") and referred the situation in Darfur to the Court.<sup>2</sup>
  
6. On 4 March 2009, Pre-Trial Chamber I ("PTC I") issued an arrest warrant for Mr Al Bashir for seven counts of crimes against humanity and war crimes.<sup>3</sup> On 5 March 2009, as a State Party to the Statute, South Africa was notified by the Registry of the request for arrest and surrender pursuant to the arrest warrant.<sup>4</sup>
  
7. On 12 July 2010, PTC I issued a second arrest warrant for Mr Al Bashir for three counts of genocide.<sup>5</sup> On 16 August 2010, South Africa was notified by the Registry of the request for arrest and surrender of Mr Al Bashir to the Court pursuant to this second arrest warrant.<sup>6</sup>

#### *Events immediately preceding Mr Al Bashir's arrival in South Africa*

*May 2015: South Africa was provided with further reminders of its obligation to arrest and surrender Mr Al Bashir to the Court*

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<sup>2</sup> Resolution 1593 (2005), adopted by the UNSC at its 5158<sup>th</sup> meeting, on 31 March 2005, S/RES/1593 (2005).

<sup>3</sup> ICC-02/05-01/09-1.

<sup>4</sup> ICC-02/05-01/09-274, para.2.

<sup>5</sup> ICC-02/05-01/09-95.

<sup>6</sup> ICC-02/05-01/09-274, para.2.

8. On or about January 2015, South Africa agreed to host an African Union (“AU”) summit during 2015.<sup>7</sup>
9. On 21 May 2015, the Southern African Litigation Centre (“SALC”) addressed a letter to various authorities of the South African government, including the Minister of Police and the Chief State Law Adviser.<sup>8</sup> These letters reminded these authorities of South Africa’s obligation to execute the Arrest Warrants against Mr Al Bashir if he were to accept the invitation and attend the AU summit in Johannesburg scheduled for 7-15 June 2015.<sup>9</sup> The Chief State Law Adviser provided SALC with an acknowledgement of this letter on 25 May 2015.<sup>10</sup>
10. On 28 May 2015, the Registry submitted a request for cooperation to South Africa in accordance with rule 176(2) of the Rules of Procedure and Evidence (the “Rules”), to arrest and surrender Mr Al Bashir to the Court, pursuant to articles 86 and 89 of the Statute, should he enter South African territory. The request also stated, that in case of any difficulties in implementing the request for cooperation, South Africa should consult with the Court without any delay in accordance with article 97 of the Statute.<sup>11</sup>

<sup>7</sup> Annex A: Answering Affidavit of Director-General: Justice and Constitutional Development, para.3.1.

<sup>8</sup> ICC-02/05-01/09-275-AnxKRK3. This document is an annex to ICC-02-05-01-09-275 (SALC’s Request for leave to submit *Amicus Curiae* Observations, dated 27 January 2017). The Prosecution notes that the submission of substantive observations by *amicus curiae* is only permissible after a Chamber has decided to invite or grant leave to do so, pursuant to ICC-01/05-01/08-602 OA2, 9 November 2009, para.9. For expediency, the Prosecution is proceeding on the basis that this filing, and its annexes, are in the public record of the case, and can be referenced accordingly.

<sup>9</sup> ICC-02/05-01/09-275-AnxKRK3. In this correspondence SALC reminded the addressees that “[i]n 2009, the former Director-General of the Department of International Relations and Co-operation issued a public statement indicating: ‘If today, President al Bashir landed in terms of the provision [of the Rome Statute], he would have to be arrested.’”

<sup>10</sup> ICC-02/05-01/09-275-AnxKRK4. In his letter the Chief Law Adviser stated: “Although I do not purport to speak on behalf of the Government of the Republic of South Africa, I am aware that the Government is mindful of its international obligations which it takes seriously. However, should I be required to do so, I shall provide the ministers concerned with advice on the issue raised by you.”

<sup>11</sup> ICC-02/05-01/09-242, para.3 and ICC-02/05-01/09-240, para.9.

*June 2015 - South Africa prepared for Mr Al Bashir's travel to and from South Africa*

11. In the week that followed the Registry's request for cooperation, dated 28 May 2015, South Africa took a number of steps to prepare for Mr Al Bashir's unimpeded travel to the country.
12. "On or about the beginning of June 2015", the South African cabinet was made aware that Mr Al Bashir had been invited by the African Union to the AU summit in South Africa and had confirmed his attendance.<sup>12</sup> This confirmation was accompanied by a request from the Republic of Sudan ("Sudan") that Mr Al Bashir be accorded all the privileges and immunities of a delegate attending an AU summit.<sup>13</sup> The cabinet sought advice from the Chief State Law Adviser and decided that South Africa, as hosting country, was foremost "obliged to uphold and protect the inviolability of President Bashir in accordance with the AU terms and conditions and to consequently not arrest President Bashir in terms of the ICC arrest warrants whilst he is attending the AU summit."<sup>14</sup>
13. On or about 4 June 2015, South Africa entered into a host agreement with the AU to facilitate the hosting of the summit (the "Host Agreement")<sup>15</sup> and a day later published the specific part of the Host Agreement that set out certain diplomatic immunities and privileges.<sup>16</sup> The government "thereby incorporated the privileges and immunities accorded to delegates and attendees of the AU summit as provided for in the host agreement, as domestic law in South Africa."<sup>17</sup>

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<sup>12</sup> Annex B: Supporting Affidavit of Director-General of the Presidency and the Secretary of the Cabinet, para.3.1.

<sup>13</sup> Annex B, para.3.2.

<sup>14</sup> Annex B, paras.3.6 and 3.7. *See also* Annex A, paras.3.12 to 3.19.

<sup>15</sup> Annex A, para.3.2.

<sup>16</sup> Annex C: Government Gazette, 5 June 2015; Annex A, para.3.11.

<sup>17</sup> Annex A, para.3.11.

*Thursday, 11 June 2015 – South Africa requested article 97 consultations*

14. On 11 June 2015, South Africa requested that an urgent meeting take place in The Hague on the next day, 12 June 2015 at 17:00, between the ICC Registrar, the Chief State Law Adviser and a delegation from the South African Embassy to engage in consultations pursuant to article 97.<sup>18</sup>

*Friday, 12 June 2015 – article 97 consultations took place at the Court*

15. On 12 June 2015, the Registry submitted to the Chamber a notification regarding consultations requested by South Africa and sought its guidance.<sup>19</sup>
16. On the same day the Prosecution filed an urgent response. The Prosecution requested the Chamber to issue a decision that day confirming South Africa's obligation to arrest Mr Al Bashir on the basis that the law establishing South Africa's obligations was clear, thereby obviating the need for article 97 consultations.<sup>20</sup> The Prosecution also requested that in the alternative, if the Chamber deemed that consultations were necessary, then these should take place during a hearing before the Chamber with legal representatives of South Africa, the Prosecution and the Registry.<sup>21</sup> Given that Mr Al Bashir was due to travel to South Africa the following day, the Prosecution submitted that the circumstances required a hearing that same day, 12 June 2015, at 17:00.<sup>22</sup>
17. Between 17:00 and 17:58, pursuant to the request for article 97 consultations, the Single Judge convened a meeting between South Africa, the Registry and the Prosecution.<sup>23</sup> Although South Africa had stated in its request that its Chief State Law Adviser would attend the consultations, South Africa's Ambassador to the

<sup>18</sup> ICC-02/05-01/09-240, para.10.

<sup>19</sup> ICC-02/05-01/09-240, para.10 and ICC-02/05-01/09-241, para.11.

<sup>20</sup> ICC-02/05-01/09-240, para.16.

<sup>21</sup> ICC-02/05-01/09-240, para.17.

<sup>22</sup> ICC-02/05-01/09-240, paras.1-3 and 17.

<sup>23</sup> ICC-02/05-01/09-243-Anx.2.

Netherlands attended alone with the legal counsel of the Embassy.<sup>24</sup> The Ambassador explained that the arrival of the Minister of Justice had been delayed.<sup>25</sup>

18. The Ambassador, in presenting a request for consultations, submitted the formal position of South Africa - as set out in a *Note Verbale*<sup>26</sup> which was read into the record.<sup>27</sup> The communication from South Africa explained that the immunities attached to representatives of AU member states attending the forthcoming AU summit prevented it under article 98(2) of the Statute from arresting and surrendering Mr Al Bashir. It called for a “flexible interpretation”<sup>28</sup> of South Africa’s conflicting obligations under the Statute and the Constitutive Act of the AU.

*The Single Judge informed South Africa that under ICC law it was obliged to arrest and surrender Mr Al Bashir and that this obligation was not suspended by article 97 consultations*

19. In response, the Single Judge made clear that South Africa was obliged to arrest Mr Al Bashir should he arrive in South Africa.<sup>29</sup> The Single Judge explained that there was no possibility for a flexible interpretation in the matter of the pending arrest warrant, nor any ambiguity in the law, since the conflicting obligations raised by South Africa had previously been decided upon by the Court.<sup>30</sup> The

<sup>24</sup> ICC-02/05-01/09-243-Anx6, para.10.

<sup>25</sup> ICC-02/05-01/09-243-Anx2, p.16, l.4 to 10. Although South Africa initially indicated that the Chief State Law Adviser would attend the article 97 consultations, during the consultations the Ambassador referred to the Minister of Justice being unable to travel to attend the consultations due to a visa problem.

<sup>26</sup> ICC-02/05-01/09-243-Anx1.

<sup>27</sup> ICC-02/05-01/09-243-Anx2, p.4, l.5 to p.7, l.3.

<sup>28</sup> ICC-02/05-01/09-243-Anx2, p.6, l.11 to 17.

<sup>29</sup> ICC-02/05-01/09-243-Anx2, p.8, l.16 to p.9, l.13.

<sup>30</sup> ICC-02/05-01/09-243-Anx2, p.8, l.16 to p.9, l.13.

Single Judge also confirmed that the meeting should be understood as article 97 consultations and that the consultations were not negotiations as such.<sup>31</sup>

20. Moreover, the Single Judge expressly stated that the article 97 consultations, whether they were to continue at some point in the future or not, did not suspend South Africa's obligation to arrest and surrender Mr Al Bashir to the Court should he arrive on its territory.<sup>32</sup>

21. Lastly, the Single Judge asked the Registrar to provide the South African Ambassador with the 9 April 2014 Decision on Cooperation of the Democratic Republic of Congo<sup>33</sup> ("DRC Decision") regarding Mr Al Bashir's arrest and surrender where all the issues raised by South Africa had been decided upon.<sup>34</sup>

*Saturday, 13 June 2015 - South Africa was informed by the Registry that article 97 consultations had concluded*

22. On 13 June 2015 at 12:40, the Registry met with South Africa's Chief State Law Adviser, who had arrived from South Africa. The Prosecution was not present. The Chief State Law Adviser indicated that he was representing the South African government and wished to engage in article 97 consultations. The Registry informed the Chief State Law Adviser that consultations had ended the day before and that, according to the Single Judge, South Africa was under an obligation to arrest Mr Al Bashir. As requested by the Single Judge the previous day, the Registry provided the Chief State Law Adviser with a copy of the transcripts from the 12 June 2015 consultation and the DRC Decision.<sup>35</sup>

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<sup>31</sup> ICC-02/05-01/09-243-Anx2, p.9, l.24 to p.10, l.8.

<sup>32</sup> ICC-02/05-01/09-243-Anx2, p.19, l.11 and p.23, l.15 to 19. *See also* p.14, l.1 to 6 (the Prosecution asserted its view that any pending litigation on the matter, which may start during the weekend, should not be considered a valid reason for not executing the arrest of Mr Al Bashir).

<sup>33</sup> ICC-02/05-01/09-195.

<sup>34</sup> ICC-02/05-01/09-243-Anx2, p.23, l.12-14.

<sup>35</sup> ICC-02/05-01/09-243, para.3.

*Events following Mr Al Bashir's arrival in South Africa*

*Saturday, 13 June 2015 - The Prosecution filed an urgent request with the Chamber*

23. At 20:52, after learning from news reports that Mr Al Bashir had arrived or would imminently arrive in South Africa,<sup>36</sup> the Prosecution filed an urgent request<sup>37</sup> (“Urgent Request”) for an order to clarify whether article 97 consultations with South Africa had concluded and on South Africa’s obligation to immediately arrest and surrender Mr Al Bashir.<sup>38</sup>
24. The Prosecution endeavoured to provide immediate notice of this filing to South Africa. Given the urgency of the situation, the Prosecution decided to provide a courtesy copy of the Urgent Request to South Africa via email.
25. At 20:58, the Prosecution attempted to send a courtesy copy of its Urgent Request to the Chief State Law Adviser, using an email address for him provided by the Registry. The email did not go through as the email address was invalid.<sup>39</sup>
26. At 21:11, the Prosecution emailed a courtesy copy of its Urgent Request to the Ambassador because it had been unable to email a copy to the Chief State Law Adviser.<sup>40</sup>
27. At 21:13, the Prosecution telephoned the Chief State Law Adviser and informed him that it had just made the filing with the Chamber and had attempted to email him a copy of the Urgent Request but that the email address provided was not functioning. The Prosecution stated that a courtesy copy had been emailed to the South African Ambassador. The Prosecution offered to email the Chief State Law

<sup>36</sup> ICC-02/05-01/09-241, footnote 2.

<sup>37</sup> ICC-02/05-01/09-241.

<sup>38</sup> ICC-02/05-01/09-241, para.4.

<sup>39</sup> ICC-02/05-01/09-244, para.11.

<sup>40</sup> The contact information was received by the Registry; *see* ICC-02/05-01/09-243, para.4.

Adviser a courtesy copy if he would provide a valid email address. He chose not to provide his email address, stating that he would liaise with the Ambassador regarding the Urgent Request.<sup>41</sup>

28. South Africa did not file a response to the Urgent Request or request additional time to file a response.

*The Chamber issued an urgent decision*

29. At 22:49 that same day, the Single Judge issued an urgent decision<sup>42</sup> (the “Urgent Decision”) denying the Prosecutor’s request. The Single Judge observed:

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.<sup>43</sup>

30. The Single Judge also clarified that since there existed no issue that remained unclear or that had not already been discussed and settled by the Court, consultations under article 97 between the Court and South Africa had therefore ended.<sup>44</sup> Lastly, the Registry was directed to immediately notify the decision to the competent South African authorities.<sup>45</sup>

31. At 23:45, the Registry notified both the Urgent Request and the Urgent Decision of the same day to the South African Embassy.<sup>46</sup>

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<sup>41</sup> ICC-02/05-01/09-244, paras.13 and 14.

<sup>42</sup> ICC-02/05-01/09-242.

<sup>43</sup> ICC-02/05-01/09-242, para.10.

<sup>44</sup> ICC-02/05-01/09-242, para.8.

<sup>45</sup> ICC-02/05-01/09-242, para.11.

<sup>46</sup> ICC-02/05-01/09-243, para.5 and Anx4.

*Sunday, 14 June 2015 – the High Court in South Africa issued an order prohibiting Mr Al Bashir from leaving South Africa*

32. In South Africa, SALC made an urgent application to the High Court of South Africa (North Gauteng High Court, Pretoria) (the “High Court”),<sup>47</sup> requesting the High Court to compel the relevant officials of the South African government to comply with their domestic and international legal obligations to arrest and/or detain Mr Al Bashir.<sup>48</sup>
33. Before the High Court, South Africa argued, in summary, that: “the Cabinet had taken a decision to grant President Bashir immunity from arrest, and that this decision “trumped” the government’s duty to arrest the President on South African soil in terms of two arrest warrants issued by the ICC [...].”<sup>49</sup>
34. At around 15:00 on the same day the High Court made an order to South Africa that “President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and the Respondents are directed to take all necessary steps to prevent him from doing so.”<sup>50</sup>
35. In The Hague, the Registry remained on stand by for a possible filing by South Africa.<sup>51</sup> Nothing was filed or provided to the Registry by South Africa.<sup>52</sup>

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<sup>47</sup> Annex E: Founding Affidavit of Applicant - SALC.

<sup>48</sup> Annex E, para. 10.

<sup>49</sup> ICC-02/05-01/09-275-AnxKRK8, para. 5.

<sup>50</sup> ICC-02/05-01/09-275-AnxKRK7, *see also* ICC-02/05-01/09-275-AnxKRK8, para. 6.

<sup>51</sup> ICC-02/05-01/09-243, para. 6.

<sup>52</sup> Approximately 17 months after the Urgent Decision, South Africa stated that it was considering filing an appeal against the decision, *see* ICC-02/05-01/09-273-Anx1.

*Monday, 15 June 2015 – Mr Al Bashir left South Africa*

36. In The Hague, South Africa submitted a *Note Verbale*, filed by the Registry, setting out its observations on the interpretation of certain procedural issues.<sup>53</sup> In this *Note Verbale*, South Africa acknowledged that Mr Al Bashir was in South Africa at the time the *Note Verbale* was drafted,<sup>54</sup> and that it accepted the Court’s invitation to consult under article 97.<sup>55</sup> South Africa described the 12 June 2015 meeting as a request for consultation, and stated its view that actual consultations had not taken place.<sup>56</sup> It further stated that the Prosecution’s Urgent Request was submitted to the Court, and the Urgent Decision made “without any notice whatsoever” to South Africa.<sup>57</sup>
37. In South Africa, the High Court found that South Africa’s conduct in allowing Mr Al Bashir to depart the country was unconstitutional and handed down an order which stated that “the conduct of the Respondents, to the extent that they have failed to take steps to arrest and/or detain [Mr Al Bashir] is inconsistent with the Constitution of the Republic of South Africa 1996, and invalid.”<sup>58</sup> It was only after this order was handed down at about 15:00 that the High Court was informed that Mr Al Bashir had left the country.<sup>59</sup>
38. In its judgment dated 23 June 2015 (the “High Court Judgment”) the High Court posed the following questions, before concluding that the “answers suggest themselves”:

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<sup>53</sup> ICC-02/05-01/09-243-Anx6.

<sup>54</sup> ICC-02/05-01/09-243-Anx6, para.5

<sup>55</sup> ICC-02/05-01/09-243-Anx6, paras.7-8.

<sup>56</sup> ICC-02/05-01/09-243-Anx6, para.17.

<sup>57</sup> ICC-02/05-01/09-243-Anx6, paras.12 and 15.

<sup>58</sup> ICC-02/05-01/09-275-AnxKrk8, para.2.

<sup>59</sup> ICC-02/05-01/09-275-AnxKrk8, para.9.

36.1 how was it possible that President Bashir would, with his whole entourage, travel from Sandton to Waterkloof Airbase, without any of the Respondents' [South Africa's] knowledge?

36.2 how was it possible that the Sudanese plane would take off from the airbase without the Respondents knowing whether the President was on board or not?

36.3 how would that plane be able to land in Sudan by late afternoon if it had not departed at about noon that same day?<sup>60</sup>

39. The High Court found that the departure of Mr Al Bashir from South Africa, before the finalisation of the High Court proceedings, and in full awareness of the explicit order of Sunday 14 June 2015, "objectively viewed, demonstrates non-compliance with that order."<sup>61</sup> On this basis, it also found "it prudent to invite the NDPP [National Director of Public Prosecutions] to consider whether criminal proceedings are appropriate."<sup>62</sup>

#### *Events following Mr Al Bashir's departure from South Africa*

40. On 4 September 2015, the Chamber held that South Africa's failure to arrest and surrender Mr Al Bashir warranted the opening of proceedings pursuant to article 87(7) of the Statute and requested, pursuant to regulation 109(3) of the Regulations of the Court that the competent authorities of South Africa submit their views on the events surrounding Mr Al Bashir's attendance at the African Union summit in Johannesburg on 13, 14 and 15 June 2015, with particular reference to their failure to arrest and surrender him.<sup>63</sup>

41. On 2 October 2015,<sup>64</sup> South Africa requested an extension of time to submit its views until finalisation of the domestic legal proceedings in South Africa.<sup>65</sup> South Africa premised its request for an extension "[o]n the basis of the information

<sup>60</sup> ICC-02/05-01/09-275, paras.36 and 37.

<sup>61</sup> ICC-02/05-01/09-275-AnxKRK8, para.39.

<sup>62</sup> ICC-02/05-01/09-275-AnxKRK8, para.39.

<sup>63</sup> ICC-02/05-01/09-247, pp.6 and 7.

<sup>64</sup> Notified to the Prosecution on 5 October 2015, filing ICC-02/05-01/09-248-Anx1.

<sup>65</sup> ICC-02/05-01/09-248-Anx1, para.1.9.

emanating from that process [the finalisation of the domestic litigation], the Chamber will be in a better position to come to a conclusion about the ‘events surrounding the circumstances of Al Bashir’s departure.’”<sup>66</sup>

42. On 15 October 2015, upon South Africa’s request for an extension of the deadline to submit its views, the Chamber granted South Africa “until such time as the currently ongoing relevant judicial proceedings before the courts of South Africa are finalised.”<sup>67</sup> In addition, the Chamber ordered the competent authorities of the Republic of South Africa to promptly report to the Chamber on any developments in the relevant domestic judicial proceedings as they occur.<sup>68</sup>

43. The High Court Judgment was appealed by South Africa to the Supreme Court of Appeal of South Africa (the “SCA”).

44. During February 2016, the SCA heard the appeal. South Africa’s application on appeal was founded on entirely different arguments to those advanced in the High Court.<sup>69</sup> In the appeal, South Africa argued that the general immunity that a head of State enjoys under customary international law and section 4(1) of Diplomatic Privileges and Immunities Act “qualified the obligation of South Africa, that would otherwise exist as a state party to the Rome Statute” to arrest and surrender Mr Al Bashir to the Court.<sup>70</sup>

45. On 15 March 2016,<sup>71</sup> the SCA delivered its judgment (the “SCA Judgment”).<sup>72</sup> The SCA varied the order of the High Court to read as follows:

<sup>66</sup> ICC-02/05-01/09-248-Anx1, para.1.11.

<sup>67</sup> ICC-02/05-01/09-249, p.6.

<sup>68</sup> ICC-02/05-01/09-249. On 21 and 24 December 2015, and 4 May 2016 South Africa submitted reports concerning the progress of the ongoing domestic judicial proceedings before its national courts, *see* ICC-02/05-01/09-256; ICC-02/05-01/09-257, and ICC-02/05-01/09-258.

<sup>69</sup> In the High Court, South Africa had argued that Mr Al Bashir enjoyed immunity based on the Host Agreement.

<sup>70</sup> ICC-02/05-01/09-258-Anx, paras.15 and 16.

<sup>71</sup> ICC-02/05-01/09-258-Anx.

<sup>72</sup> ICC-02/05-01/09-258-Anx.

[t]he conduct of the Respondents [Government] in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union, was inconsistent with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, and unlawful.<sup>73</sup>

46. The SCA also considered the circumstances in which Mr Al Bashir left South Africa on 15 June 2015. It noted that the "Director-General said that President Al Bashir's passport was not among those shown to officials of his department, but that as an explanation is simply risible." The SCA continued:

Senior officials representing Government must have been aware of President Al Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances the assurances that he was still in the country given to the [High Court] at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the [High Court] and misled counsel in giving instructions, or the representatives and counsel misled the [High Court]. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct.<sup>74</sup>

47. On 7 April 2016, South Africa applied to the Constitutional Court of South Africa (the "Constitutional Court") for leave to appeal the judgment of the SCA and to have the judgments of the SCA and the High Court set aside.<sup>75</sup>

48. On 25 October 2016, South Africa withdrew its application for leave to appeal from the Constitutional Court.<sup>76</sup>

<sup>73</sup> ICC-02/05-01/09-258-Anx, p.4, para.4.

<sup>74</sup> ICC-02/05-01/09-258-Anx, para.7.

<sup>75</sup> ICC-02/05-01/09-258, para.1.5

<sup>76</sup> Annex H.

49. On 30 November 2016, the Registrar filed a *Note Verbale* addressed by South Africa to the Secretariat of the ASP, which was dated 21 November 2016.<sup>77</sup> This *Note Verbale* stated that the domestic court processes had now been concluded and that South Africa would be submitting its views and observations for the purposes of the article 87(7) proceedings.

## Submissions

### I. The 'issue' in these proceedings

50. The Chamber has indicated that the purpose of the hearing on this matter is to obtain all relevant submissions, in fact and in law, with respect to:

- a. whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on South Africa's territory despite having received a request by the Court under articles 87 and 89 of the Statute for the arrest and surrender of Omar Al Bashir; and, if so,
- b. whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute are warranted.<sup>78</sup>

51. Despite the lengthy nature of these proceedings, at its core, the matter before the Court is a simple one in fact and law: whether South Africa failed to comply with its obligations under the Statute, and whether that failure warrants a judicial finding and referral to the ASP and/or the UNSC.

52. The litigation is thus primarily procedural. It should not focus on the substantive law relating to the alleged immunity of Mr Al Bashir in the light of purportedly

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<sup>77</sup> ICC-02/05-01/09-273-Anx1.

<sup>78</sup> ICC-02/05-01/09-274, para.15.

conflicting treaty obligations, since these matters have already been adjudicated by Chambers of this Court.<sup>79</sup>

53. Furthermore, the relevant issue in these proceedings is not whether the Single Judge correctly applied the law, a matter which could only have been determined in the context of reconsideration or an appeal against those rulings. The relevant issue is instead whether South Africa acted inconsistently with its cooperation duties under the Statute, and if it did, whether a referral is warranted.

54. South Africa chose not to seek leave to appeal the Single Judge's Urgent Decision or ask for its reconsideration at the time<sup>80</sup> and the parties should not re-litigate the issue now some 17 months later. Instead, the present proceedings should primarily focus on the procedural consequences flowing from South Africa's failure to comply with its obligations under the Statute by not arresting Mr Al Bashir.

55. Nevertheless, in the interests of addressing all relevant issues, in Part V below, the Prosecution briefly discusses the valid legal basis of the Single Judge's determination that South Africa was obligated to arrest and surrender Mr Al Bashir to the Court.

## **II. South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Mr Al Bashir**

56. As a State Party, South Africa is obliged to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court", under article 86 of the Statute. This cooperation includes executing requests for

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<sup>79</sup> In particular in the DRC Decision, as the Single Judge confirmed during the 12 June 2015 article 97 consultations, and in the Urgent Decision.

<sup>80</sup> Indeed the Chamber has ruled that South Africa is out of time to seek leave to appeal, *see* ICC-02/05-01/09-274, para.18.

arrest and surrender to the Court issued against persons under article 58 of the Statute.<sup>81</sup>

57. South Africa appears to accept the existence of this obligation, which is why it triggered article 97 consultations and argued that it had a legal impediment to carrying out that duty. Indeed, in 2009 when Mr Al Bashir was due to attend the inauguration of President Zuma, South African officials had confirmed that if Mr Al Bashir arrived in the country, they would arrest him because of obligations arising from the Court's 2009 warrant of arrest and surrender.<sup>82</sup>

58. However, invoking article 98(2), South Africa argued that its obligations to arrest and surrender Mr Al Bashir were overridden by the Host Agreement dated on or about 4 June 2015.<sup>83</sup>

59. It should be recalled that only the Court is competent to settle any dispute concerning its judicial functions.<sup>84</sup> Once a Chamber rules on the interpretation and application of a particular provision, the parties affected by the decision, in this case a State Party, are required to accept the Court's determination in the matter. If they disagree with the decision they may seek re-consideration or to appeal.

60. In terms of the application of article 98, rule 195 of the Rules confirms that when a requested State raises a problem in respect of article 98, while it must provide

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<sup>81</sup> See, e.g. ICC-02/05-01/09-266, para.8.

<sup>82</sup> ICC-02/05-01/09-275-AnxKRK8, para. 12 (In this instance, Mr Al Bashir declined the invitation to attend. South Africa also appeared to accept in June 2015 that Mr Al Bashir's status as a sitting head of state provided no immunity and bar to his arrest and surrender to the Court, relying instead on his status as a purported AU delegate to the AU summit). See also, Annex A, paras.3.15 and 3.19 (the Director-General: Justice and Constitutional Development and the Central Authority swore that in 2009 South Africa was obliged to arrest Mr Al Bashir should he travel to South Africa based on the 2009 ICC arrest warrant. Further, regarding Mr Al Bashir's visit in June 2015, the Director-General made clear that she was advised that the AU Host Agreement prevented South Africa from arresting Mr Al Bashir "during the duration of the AU Summit and an additional two days after the conclusion of the AU summit").

<sup>83</sup> ICC-02/05-01/09-243-Anx.1.

<sup>84</sup> Article 119(1) of the Statute.

relevant information to the Court, this is “to assist the Court in the application of article 98.” As such, it emphasises that it is for the Court to determine whether the conditions in article 98(1) or (2) are met. Should the Court determine they are not, it may proceed with the cooperation request and the requested State Party must comply.

61. Having heard the submissions of South Africa during the consultations, the Single Judge advised that the conditions set out by South Africa pursuant to article 98 did not apply, and that South Africa was obliged to arrest and surrender Mr Al Bashir. Specifically, the Single Judge recalled the DRC Decision, which concerned similar legal arguments about the effects for the Democratic Republic of Congo (the “DRC”) of a conflicting international obligation arising from its membership of the AU.

62. Once the Chamber had settled the issue raised, it was clear that South Africa remained bound to comply with the Arrest Warrants. Similarly, in the DRC Decision, the Chamber recalled that “the Court is the sole authority to decide whether or not the immunities generally attached to Omar Al Bashir as a sitting Head of State were applicable in this particular case”, referring to article 119(1) of the Statute in support.<sup>85</sup>

63. Even if South Africa wished to engage in further consultations with the Court, the Single Judge had already removed the alleged ambiguity in the law that was raised by South Africa. In doing so, the purpose of the article 97 consultations – to resolve problems identified by the requesting State – had been fulfilled. The Single Judge also made clear that any further discussion or consultation that

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<sup>85</sup> ICC-02/05-01/09-195, para.16.

South Africa might seek did not suspend South Africa's standing obligation to arrest and surrender Mr Al Bashir.<sup>86</sup>

64. South Africa may dispute whether consultations occurred and may argue that it merely made a request for consultations. It may also now argue that its interpretation of the application of article 98(2) should have prevailed. However, these arguments do not alter its obligations, as a State Party, to comply with the Arrest Warrants. By failing to execute the cooperation request and by failing to arrest and surrender Mr Al Bashir, South Africa failed to comply with its obligations under the Statute.

65. The Prosecution notes that during a press conference on 21 October 2016, South Africa appeared to accept the ruling of the SCA that "in enacting the Implementation of the Rome Statute of the International Criminal Court Act, 2002, South Africa had expressly waived the immunity of such heads of state and that South Africa was obliged to arrest persons wanted for crimes committed against humanity."<sup>87</sup> South Africa thus appears to have acknowledged that it was required to arrest and surrender Mr Al Bashir and that its failure to do so violated its domestic obligations, and by implication, its obligations to the ICC.

### **III. A formal finding of South Africa's non-compliance and referral of the matter to the ASP and the UNSC is warranted**

66. As discussed in more detail below, the Chamber should make a formal finding of non-compliance in respect of South Africa, and refer the matter to the ASP and the UNSC.

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<sup>86</sup> ICC-02/05-01/09-242, para.8.

<sup>87</sup> Annex D: Minister Michael Masutha: Media briefing on International Criminal Court and Sudanese President Omar Al Bashir, 21 October 2016. On the relevance of the domestic litigation to the issue at hand, *see* South Africa's submissions at ICC-02/05-01/09-248-Anx1, para.1.10 and 1.11.

67. The Appeals Chamber held in the *Kenyatta* case that a finding under article 87(7) requires a two stage assessment involving the exercise of a Chamber's discretion on (i) whether to make a finding of a failure to comply with a request for cooperation by a State, which prevents the Court from exercising its powers and functions under the Statute; and (ii) a determination of whether it is appropriate to refer the matter to the ASP or UNSC in order to seek external assistance to obtain cooperation with the request at issue or to otherwise address the lack of cooperation by the Requested State.<sup>88</sup>

68. The Appeals Chamber also found that it is "within a Chamber's discretion to consider whether a particular factor is relevant for its determination on either a failure to cooperate or whether it is appropriate to refer the matter of non-cooperation, or both."<sup>89</sup> The relevant factors are discussed below.

### *III.A. The Chamber should make a formal finding of non-compliance*

#### *III.A.1. South Africa's failure to arrest and surrender Mr Al Bashir prevented the Court from exercising its functions and powers under the Statute*

69. The Appeals Chamber has also held that article 87(7) contains in its first clause a "factual prerequisite that needs to be met for a finding of non-compliance to be made, namely that there is a failure to comply with the cooperation request of a certain gravity."<sup>90</sup>

70. A State Party's failure to comply with the Court's arrest and surrender request is perhaps the clearest circumstance where the Court is prevented from exercising its powers and functions under the Statute, since the entire judicial process and

<sup>88</sup> ICC-01/09-02/11-1032, para.55.

<sup>89</sup> ICC-01/09-02/11-1032, para.2.

<sup>90</sup> ICC-01/09-02/11-1032, para.39. *See also* ICC-01/09-02/11-982, para.40 (the Chamber observed that a finding of non-compliance requires a threshold assessment, holding that where non-compliance is "technical or trivial in nature, such non-compliance which in most cases would not materially prevent the Court from exercising its functions and powers under the Statute, will not reach the threshold of non-compliance required by Article 87(7) of the Statute.")

purpose of the Court is thereby frustrated. As the Court has consistently held “unlike domestic courts, the Court has no direct enforcement mechanism and must rely on cooperation by the States in order to fulfil its mandate.”<sup>91</sup> Moreover, the failure to comply with Court arrest warrants by States Parties has resulted in findings of non-compliance.<sup>92</sup>

71. Mr Al Bashir did not covertly enter South Africa, evade arrest and escape from the country unbeknownst to the authorities and despite efforts to apprehend and detain him. He openly entered South Africa, remained at liberty in the country for the duration of his planned visit under VIP protection<sup>93</sup> and was permitted to leave South Africa through an official military airbase.<sup>94</sup>

72. As South Africa argued in its application for more time to make article 87(7) submissions,<sup>95</sup> the facts established in the domestic judicial litigation assist the Court in determining the issue at hand. In this regard, the Prosecution welcomes the *amicus curiae* observations submitted to the Chamber by SALC,<sup>96</sup> which will no doubt assist the Chamber’s understanding of the domestic litigation in South Africa in this matter.

73. It was established in the domestic litigation concerning these events that Mr Al Bashir left the country in full knowledge of the South African government.<sup>97</sup> As the SCA held, “senior officials representing the Government must have been aware of President Al Bashir’s movements and his departure.”<sup>98</sup> The SCA also found that in respect of the assurances given to the High Court that Mr Al Bashir

<sup>91</sup> See, e.g. ICC-02/05-01/09-267, para.16; ICC-02/05-01/09-266, para.17; ICC-02/05-01/09-151, para.22; ICC-02/05-01/09-195, para.33; ICC-02/05-01/09-227, para.17.

<sup>92</sup> See e.g. ICC-02/05-01/09-195; ICC-02/05-01/09-267; ICC-02/05-01/09-151, and ICC-02/05-01/09-139-Corr.

<sup>93</sup> ICC-02/05-01/09-275-AnxKrk9, para.9, which indicates that visiting delegations are afforded “transportation, VIP protection and protocol officers.”

<sup>94</sup> ICC-02/05-01/09-258-Anx, para.7.

<sup>95</sup> ICC-02/05-01/09-248-Anx1, paras 1.10 to 1.12.

<sup>96</sup> ICC-02/05-01/09-288.

<sup>97</sup> ICC-02/05-01/09-275-AnxKrk8, paras. 36 to 39; ICC-02/05-01/09-258-Anx, para.7.

<sup>98</sup> ICC-02/05-01/09-258-Anx, para.7.

was still in the country at the time of the hearing, either the representatives of the South African government set out to mislead the High Court and misled counsel in giving instructions, or the representatives and counsel misled the High Court.<sup>99</sup>

74. Furthermore, before the SCA, South Africa did not take the position that it could not physically arrest Mr Al Bashir or that it was unaware that Mr Al Bashir had left the country.<sup>100</sup> To the contrary, it argued that Mr Al Bashir enjoyed immunity from arrest.<sup>101</sup> Finally, South Africa has not argued that technical or logistical issues impeded its ability to arrest and surrender Mr Al Bashir.

75. There is no indication in the record that at any point in June 2015 South Africa considered arresting and surrendering Mr Al Bashir to the Court. To the contrary, the information available shows that South Africa had been planning Mr Al Bashir's attendance at the AU summit for several weeks prior to his arrival, and had put in place the logistical and legal machinery necessary to facilitate his visit.<sup>102</sup>

76. In light of the findings by the High Court and the SCA<sup>103</sup> any argument that South Africa was technically unable to arrest Mr Al Bashir and/or was unaware of his departure, would seem implausible.

III.A.2. The conduct of the parties justifies a finding of non-compliance and a referral to the ASP and the UNSC

77. Despite the rapid unfolding of events in The Hague during 12-15 June 2015, the conduct of the Single Judge, the Prosecution and the Registry in engaging with South Africa did not negatively impact South Africa's ability to cooperate with

<sup>99</sup> ICC-02/05-01/09-258-Anx, para. 7.

<sup>100</sup> ICC-02/05-01/09-258-Anx, para. 14.

<sup>101</sup> ICC-02/05-01/09-258-Anx, para. 14.

<sup>102</sup> Annex B. paras. 3.1-3.2, and paras. 3.6-3.7. *See also* Annex A, paras. 3.12-3.19.

<sup>103</sup> ICC-02/05-01/09-275-AnxKRK8, para. 7; ICC-02/05-01/09-258-Anx, paras. 7 and 14.

the Court. South Africa's conduct, discussed below, should be assessed by the Chamber against the standard of good faith cooperation required from States Parties.

78. The Appeals Chamber found in the *Kenyatta* case that the "primary obligation to cooperate lies with the requested State and not with the party requesting cooperation."<sup>104</sup> However, the Appeals Chamber also observed in that case that the conduct of the requesting party may also be a relevant factor if that conduct "negatively impacted the requested State's ability to cooperate."<sup>105</sup>

79. Similarly, Trial Chamber V in the *Kenyatta* case determined that the "approach of the relevant State during the cooperation process, as well as of the party seeking a finding under Article 87(7) of the Statute, may be of particular importance in finding whether there has been a standard of good faith cooperation required from State Parties."<sup>106</sup>

80. In this instance, the requesting organ was the Chamber, since the request for arrest and surrender transmitted by the Registrar was made by the Chamber,<sup>107</sup> as also reflected in the fact that it was the Chamber that opened article 87(7) proceedings.<sup>108</sup> Nonetheless, the conduct of the Prosecution and the Registry also did not negatively impact South Africa's ability to cooperate with the Court.

*Timing of the article 97 consultations*

81. The Registry notified South Africa about the requests for the arrest and surrender of Mr Al Bashir three times: twice when arrest warrants were issued in 2009 and

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<sup>104</sup> ICC-01/09-02/11-1032, para.87.

<sup>105</sup> ICC-01/09-02/11-1032, para.87.

<sup>106</sup> ICC-01/09-02/11-982, para.42.

<sup>107</sup> Rule 176(2) of the Rules.

<sup>108</sup> ICC-02/05-01/09-247, para.16.

2010, and, after reports of Mr Al Bashir's planned attendance at the AU summit in Johannesburg from 13-15 June 2015, a third time in a request for cooperation submitted as a *Note Verbale* dated 28 May 2015. In its *Note Verbale*, the Registry reminded South Africa of its obligation and requested that in the event South Africa should foresee any difficulties in implementing the request for cooperation, then it should consult with the Court "without any delay".<sup>109</sup> Furthermore, SALC had also earlier reminded South Africa of its obligation to arrest and surrender Mr Al Bashir.<sup>110</sup>

82. South Africa did not respond without delay; rather it appeared to put in place potential impediments to the execution of the Court's request.

83. At the article 97 consultations, South Africa explained the delay on the basis that the matter had to go through the council of ministers to the legal division and cabinet before arriving at a position.<sup>111</sup> Yet simultaneously other arrangements were implemented by South Africa that were then said to impede the execution of the Court's request.

84. In early June 2015, in a departure from the position that South Africa had taken in the past in respect of its obligations to arrest and surrender Mr Al Bashir to the Court,<sup>112</sup> the Cabinet decided to grant Mr Al Bashir immunity so that he could attend the AU summit and not be arrested.<sup>113</sup> South Africa was thereafter made aware of Mr Al Bashir's acceptance of the AU invitation. Thus, on or about 4 June 2015 South Africa entered into the Host Agreement<sup>114</sup> and on 5 June 2015 South

<sup>109</sup> ICC-02/05-01/09-240, para.9.

<sup>110</sup> ICC-02/05-01/09-275-AnxKRK3 and ICC-02/05-01/09-275-AnxKRK4. *See also* para.9 above.

<sup>111</sup> ICC-02/05-01/09-243-Anx2, p.11 l.21 to p.12 l.4.

<sup>112</sup> Annex E -Founding Affidavit of Applicant - SALC, para.24.

<sup>113</sup> Annex B, paras.3.6-3.7. *See also* Annex A, paras.3.12-3.19 and Annex C.

<sup>114</sup> Annex A, paras.3.2.

Africa published it along with the guarantees of diplomatic immunity and privileges.<sup>115</sup>

85. At any of these points in time, South Africa had sufficient notice that a potential problem with regard to South Africa's statutory obligations existed, thus necessitating prompt consultations with the Court. South Africa informed the Court that it had decided to consult without delay upon receipt of the Registry's notification<sup>116</sup> – yet it made no request until almost two weeks later, on 11 June 2015.

86. The fact that South Africa took measures to create a legal impediment to the execution of the pending Arrest Warrants against Mr Al Bashir, and only sought consultations with the Court on the eve of his visit, despite having been in a position to do so earlier, are relevant factors for the Chamber to consider when determining the good faith of the parties involved in the cooperation process.

*The article 97 consultations*

87. Although the Prosecution commends any request for consultations, the lateness of South Africa's request meant that the Court had to conduct consultations on the eve of Mr Al Bashir's anticipated travel to South Africa. This inevitably meant that the Single Judge had to proceed quickly. Nevertheless, the Single Judge acted appropriately to ensure that any problems identified by South Africa could be promptly resolved. The inherent urgency of the situation could have been avoided had consultations taken place earlier. In the circumstances, the Single Judge's actions were entirely correct and reasonable.

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<sup>115</sup> Annex F: Supplementary Affidavit of Applicant – SALC, para. 7. *See also* Annex A, para.3.7 and Annex G: General Convention on the Privileges and Immunities of the Organization of African Unity.

<sup>116</sup> ICC-02/05-01/09-243-Anx6, para.8.

88. Notwithstanding the time pressure, the Single Judge, the Prosecution and the Registry made every effort to consult with South Africa. The meeting requested by South Africa went ahead at the requested time, at 17:00 on the evening of Friday 12 June 2015.<sup>117</sup>
89. Given the circumstances, it was appropriate for the Single Judge to treat the request for consultations as actual consultations. The Single Judge made it clear during the consultations that due to this urgency, the meeting was in fact a consultation under article 97 of the Statute.<sup>118</sup>
90. At the article 97 consultations the formal position of South Africa<sup>119</sup> was submitted to the Single Judge as contained in South Africa's *Note Verbale*.<sup>120</sup> Although at the time South Africa requested the Registry to arrange for consultations it stated that these would be undertaken by the Chief State Law Adviser,<sup>121</sup> at the consultations, the South African Ambassador informed the Single Judge that the Minister of Justice had been delayed and could not attend due to a visa problem.<sup>122</sup> This problem was not caused by the Court and was beyond its control.
91. In addition, any argument by South Africa that the consultations should have been undertaken with the Registry<sup>123</sup> and not by the Chamber – in this case the Single Judge – is misplaced. Article 97 states that consultations shall take place between the Court and the State, leaving it intentionally open which specific

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<sup>117</sup> Article 97 consultations establish a consultative mechanism to be invoked in order to resolve problems that arise in relation to a request for cooperation under Part 9 of the Statute. Any problems must be broached with the Court without delay. Examples of such problems are promulgated in article 97 (a-c), but the article is not limited in application to those situations. The consultations presume good faith efforts on behalf of the Court and the State - *See* C. Kress and K. Prost, 'Article 97', in O. Triffterer/K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2016, 3<sup>rd</sup> ed) at p. 2115, mns.1-2.

<sup>118</sup> ICC-02/05-01/09-243-Anx2, p.12, l.25 to p.13, l.1.

<sup>119</sup> ICC-02/05-01/09-243-Anx2, p.12, l.6 to 7.

<sup>120</sup> ICC-02/05-01/09-243-Anx1.

<sup>121</sup> ICC-02/05-01/09-243-Anx6, para.10.

<sup>122</sup> ICC-02/05-01/09-243-Anx2, p.16, l.4 to 10.

<sup>123</sup> ICC-02/05-01/09-243-Anx2, p.3, l.3 to 14.

organ(s) should be involved, depending on the nature of the issue and the substantive competence required. South Africa's request for consultations had identified an alleged legal - as opposed to a technical or logistical - impediment within the meaning of article 97(c), which properly required the Single Judge to be involved in the consultations. Indeed the Registry had sought guidance on the matter from the Chamber.<sup>124</sup>

92. Further, the determination by "the Court" as to which organ is most competent to consult on a particular matter is not subject to the discretion of the requesting State, but is a prerogative of the Court. In this instance, the Single Judge, the Prosecution and the Registry attending the consultations represented all the organs of the Court. The Single Judge explained this procedure at the commencement of the consultation.<sup>125</sup>

*The Single Judge clearly set out the governing ICC case law*

93. The Single Judge appropriately articulated his view and recalled the governing ICC case law at the earliest opportunity, to resolve any ambiguity which South Africa may have believed to exist as to the applicable law. The Single Judge informed South Africa that the interpretation to be given to conflicting obligations had been decided in a previous decision by the Court along the same lines,<sup>126</sup> and that South Africa remained under an obligation to immediately arrest Mr Al Bashir if he entered South African territory.<sup>127</sup>

94. Following the Prosecution's Urgent Request on 13 June 2015, the Single Judge issued its Urgent Decision that same day, which reiterated in unambiguous terms, South Africa's obligation to arrest and surrender Mr Al Bashir. In the

<sup>124</sup> ICC-02/05-01/09-240, para.10.

<sup>125</sup> ICC-02/05-01/09-243-Anx2, p.1, l.12 to 18.

<sup>126</sup> ICC-02/05-01/09-243-Anx2,p.8, l.20 to 25.

<sup>127</sup> ICC-02/05-01/09-243-Anx2,p.23, l.15-19.

Urgent Decision, the Single Judge also stated that the article 97 consultations held the previous day had concluded.<sup>128</sup> The Single Judge, in denying the Prosecution's request, created no additional burden on South Africa, nor changed the status of the legal obligation explained to South Africa the previous day.

95. Furthermore, South Africa received a courtesy copy of the Urgent Request within minutes of it being filed, was notified by telephone of the filing of the Urgent Request, and received the Urgent Decision within an hour of it being issued.<sup>129</sup>

96. Despite the Single Judge's clear statement of the law about South Africa's obligations during the article 97 consultations, which was reiterated by the Single Judge in his Urgent Decision, Mr Al Bashir remained in South Africa for approximately two days before being permitted, in violation of the domestic court order and the Arrest Warrants,<sup>130</sup> to depart under VIP protection from a military airport under the control of the authorities of the government of South Africa.

#### **IV. The Chamber should refer the matter to the ASP and the UNSC**

97. Given the circumstances, it is appropriate for the Chamber to refer South Africa to the ASP and the UNSC.<sup>131</sup> Such a referral is the only judicial remedy available to the Court regarding a State Party that has failed to comply with the Court's arrest warrants. A referral will also foster and promote future cooperation by States Parties should persons subject to Court arrest warrants travel to their territories. Lastly, a referral will ensure South Africa is treated in the same way as

<sup>128</sup> ICC-02/05-01/09-242, para.8 (In particular, the Single Judge stated that "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").

<sup>129</sup> See above, paras.25-28.

<sup>130</sup> ICC-02/05-01/09-275-AnxKRRK6 and AnxKRRK7.

<sup>131</sup> See e.g. the most recent non-compliance decisions issued by the Chamber which referred the matter of non-compliance by each of the Republic of Djibouti ("Djibouti") and the Republic of Uganda ("Uganda") for the non-arrest of Mr Al Bashir to both the ASP and UNSC, see ICC-02/05-01/09-266 and ICC-02/05-01/09-267 respectively.

other States Parties that have been found in non-compliance for not executing Court arrest warrants and referred to the ASP and the UNSC.

98. The Appeals Chamber held in the *Kenyatta* case that where the first clause of article 87(7) is satisfied, then “the second clause of article 87(7) of the Statute provides that: ‘the Court may make a finding to the 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>132</sup>
99. The Appeals Chamber noted that a referral is not an automatic consequence of a finding of a failure to comply with a request for cooperation, but rather that this determination falls within the discretion of the Chamber.<sup>133</sup> In particular, it held that a Chamber should consider whether a referral of a State’s failure to comply with a request for cooperation is an appropriate measure to either seek assistance from external actors to obtain the requested cooperation or otherwise to address the lack of cooperation from the requested State, noting that a referral may be value-neutral and not necessarily intended to cast a negative light on the conduct of a State.<sup>134</sup>
100. The Appeals Chamber further observed that since the ultimate goal is to obtain cooperation, a Chamber has discretion to consider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance to obtain the cooperation; whether referral would provide an incentive for cooperation by the requested State; whether it would instead be beneficial to engage in further consultations with the requested State; and whether more effective external actions may be taken by actors other

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<sup>132</sup> ICC-01/09-02/11-1032, para.39.

<sup>133</sup> ICC-01/09-02/11-1032, para.53.

<sup>134</sup> ICC-01/09-02/11-1032, para.53.

than the ASP or the UNSC, such as third States or international or regional organisations.<sup>135</sup>

*IV.A. Referral is necessary because the Court has been prevented from exercising critical functions and powers under the Statute*

101. South Africa's failure to comply with the Arrest Warrants impeded the Court's functions and undermined the very purpose of the Court. Although it is too late to yield cooperation from South Africa in this particular circumstance, referral is sought because it is the only judicial mechanism left to the Chamber to fulfil the mandate entrusted to it by the UNSC.<sup>136</sup>

102. The Prosecution commends the fact that South Africa came to the Court seeking consultations pursuant to article 97 - a step other States Parties have not taken in similar circumstances in the past - and recognises that South Africa was faced with what it perceived to be competing obligations towards the Court and towards the AU.<sup>137</sup> However, having sought consultations and having been advised that the legal impediments raised did not alter South Africa's obligations, South Africa did not comply with the Arrest Warrants.

103. Accordingly, the non-compliance by South Africa in failing to meet its statutory obligations to arrest and surrender Mr Al Bashir to the Court should be treated in the same way that the Court has treated other instances of non-compliance by States Parties that have failed to arrest and surrender persons subject to Court arrest warrants, namely Djibouti, Uganda, the DRC and the

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<sup>135</sup> ICC-01/09-02/11-1032, para.53.

<sup>136</sup> ICC-02/05-01/09-267, para.16.

<sup>137</sup> ICC-02/05-01/09-243-Anx2, p.16, l.16 to 24.

Republics of Chad and Malawi.<sup>138</sup> A judicial finding of non-cooperation should be made and the matter should be referred to the ASP and the UNSC.

#### *IV.B. Referral would promote future cooperation*

104. Under article 89(1) the Court must rely on the cooperation of States Parties to effect the arrest and surrender of persons wanted by the Court. If such non-cooperation were to be left unsanctioned, it would serve as a disincentive for cooperation by South Africa and other States Parties in the event that persons subject to the Court's arrest warrants travel to their territories. Indeed, the consequence of not referring South Africa to the ASP and the UNSC may well embolden other State Parties to not comply with the Court's arrest warrants.

105. In a previous case before the Court, a State Party successfully argued that it should not be referred to the ASP or UNSC for non-compliance in circumstances where Mr Al Bashir had suddenly left the country while that State Party was considering the necessary steps to take in respect of its international obligations.<sup>139</sup>

106. The present scenario is distinguishable. Here, South Africa put in place a set of legal impediments to ensure that Mr Al Bashir could enter and leave its territory without being arrested. Thereafter, it presented the agreement as a *fait accompli* and sought to be relieved of its duties pursuant to article 98(2). Article 98(2) was clearly not intended to apply to situations where a State Party decides to put in place an agreement not to execute specific requests for arrest and surrender. Such an interpretation would undermine the object and purpose of the Statute.

<sup>138</sup> ICC-02/05-01/09-266; ICC-02/05-01/09-267; ICC-02/05-01/09-195; ICC-02/05-01-151; ICC-02/05-01/09-140; and ICC-02/05-01/09-139-Corr.

<sup>139</sup> ICC-02/05-01/09-159.

**V. The Single Judge correctly determined that South Africa was obliged to arrest and surrender Mr Al Bashir to the Court**

107. As set out above, the issues in this case are primarily procedural. This litigation should not be an opportunity to rehearse the substantive question of whether Mr Al Bashir has immunity from legal process before the Court, contrary to article 27, or whether a State Party who is asked to execute an ICC warrant is entitled to raise article 98(2) as a bar to executing such a warrant, based on the alleged existence of conflicting obligations. Nonetheless, as the Chamber has stated that it would welcome “[a]ny submission which the Prosecutor and South Africa consider relevant to these issues and wish to bring to the Chamber’s attention” for its consideration, as appropriate, for the Chamber’s eventual determination following the hearing,<sup>140</sup> the Prosecution briefly discusses the fundamental soundness of the rationale underlying the Single Judge’s determination that South Africa was required to arrest and surrender Mr Al Bashir.

*V.A. The Single Judge was correct to apply the DRC Decision to the issue raised by South Africa*

108. In the 12 June 2015 consultations and again in the Urgent Decision, the Single Judge emphasised the applicability of the Court’s earlier DRC Decision. In the Urgent Decision the Single Judge confirmed the finding in the DRC Decision that 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

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<sup>140</sup> ICC-02/05-01/09-284, para.5.

contrary.” The Single Judge noted that “[t]he same applies squarely to the Republic of South Africa as well.”<sup>141</sup> Citing the DRC decision further, the Single Judge recalled:

[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. [...] <sup>142</sup>

109. The Single Judge was correct to find that South Africa was not entitled to raise article 98 as a bar to arresting Mr Al Bashir and surrendering him to the Court. This is because the requirements in article 98, sub-paragraphs 1 and 2 were not met. Both with respect to the requirement that the Court seek “cooperation of that third State [Sudan] for the waiver of the immunity”, contained in article 98(1), and with respect to the requirement for the Court to “first obtain the cooperation of the sending State [Sudan] for the giving of consent for the surrender”, as contained in article 98(2), the effect of UNSCR 1593 is the same. By virtue of paragraph 2 of this resolution, the UNSC implicitly waived the immunities afforded to Mr Al Bashir under international law and attached to his position as a Head of State.<sup>143</sup> The same paragraph waived any immunities granted by an international agreement pursuant to which the consent of a sending State is required to surrender a person of that State to the Court.<sup>144</sup>

<sup>141</sup> ICC-02/05-01/09-242, paras.7-8.

<sup>142</sup> ICC-02/05-01/09-242, para.6, citing to the DRC Decision, ICC-02/05-01/09-195, para.29.

<sup>143</sup> UNSCR 1593, para. 2, “[d]ecides 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 [...]”

<sup>144</sup> The waiver of the immunity of a State representative under the Host Agreement is reserved for the Sending State; *see* section C, article V (4) of the General Convention on the Privileges and Immunities of the Organization of African Unity, CAB/LEG/24.2/13 (1965), as cross-referenced in article VIII of the Host Agreement: “Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in

Consequently, no impediment at the horizontal level arises between the surrendering State Party and Sudan as regards the execution of the Court's pending requests.<sup>145</sup>

*V.B. The rationale underlying the Single Judge's decision flows from the interaction between the UN Charter and the Statute*

110. The rationale underlying the Single Judge's decision emanates from the legal consequences that flow from a referral of a situation by the UNSC. These legal consequences come from two separate instruments: the UN Charter and the Statute.

111. Under the UN Charter, because the UNSC acts under Chapter VII of the UN Charter when making a referral to the ICC, any such referral is binding for the UN Member State(s) concerned. Pursuant to articles 25 and 103 of the UN Charter, Member States have agreed to accept and carry out the decisions of the UNSC, and their obligations under the UN Charter prevail over any conflicting obligations under any other international agreement.<sup>146</sup>

112. As a result, the UNSC may refer situations that would otherwise be outside of the Court's treaty-based jurisdictional parameters, in particular by conferring

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connection with the Organization of African Unity. Consequently, a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded." In this regard, the Prosecution notes the findings of the High Court and SCA that the Host Agreement did "not confer any immunities or privileges on President Bashir" ICC-02/05-01/09-275-AnxKRR8, paras. 28.10 to 28.11 and ICC-02/05-01/09-258-Anx, para.47. The High Court held, and the SCA affirmed, the Host Agreement "on its terms" did not confer immunity on Member States or their representatives or delegates", ICC-02/05-01/09-275-AnxKRR8, paras. 28.10, and ICC-02/05-01/09-258-Anx, para.41. Further, both judgments hold that the Host Agreement could not, in fact, confer immunity on Mr Al Bashir since it had been promulgated under Section 5(3) of the Diplomatic Immunities and Privileges Act [South Africa], which relates exclusively to the "Immunities and privileges of United Nations, specialised agencies and other international organisation"; ICC-02/05-01/09-275-AnxKRR8, para. 28.13 to para.32; ICC-02/05-01/09-275-AnxKRR10, paras 40 to 44.

<sup>145</sup> ICC-02/05-01/09-195, para.29; and ICC-02/05-01/09-242, para.7.

<sup>146</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, 4 March 2009, paras 245-247 ("Arrest Warrant Decision"); DRC Decision, ICC-02/05-01/09-195, paras.30-31.

jurisdiction over crimes which occur in the territory of a State not a party to the Statute, such as here, with respect to crimes which allegedly occurred in the Darfur region of Sudan. This does not violate the principle that a State cannot be bound by a treaty without its consent,<sup>147</sup> since the relevant treaty in this regard is the UN Charter, not the Statute. This is emphasised in article 13(b) of the Statute which makes clear that a referral is made by the UNSC “acting under Chapter VII of the Charter of the United Nations.” Thus, the legal consequences that result for the State concerned arise from its acceptance of the UN Charter and its consent to be bound by mandatory decisions adopted by the UNSC acting under Chapter VII.

113. In turn, article 13(b) of the Statute, and not the UNSC or UN Charter, regulates the scope and competence of the Court. This is reflected in the *chapeau* text of article 13 which provides that “[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if [...]” Thus, while the UNSC can refer a situation, the functions and powers of the Court to act in relation to that situation are not regulated by the UNSC or the UN Charter, but by the Statute. Accordingly, the other legal consequence that flows from a UNSC referral to the Court is that the Statute applies to that situation.<sup>148</sup> As Pre-Trial Chambers of the Court have consistently held, the referral of a situation by the UNSC triggers the application of the entire legal framework of the ICC *vis-à-vis* the State concerned, including by implication any obligations attendant on States Parties.<sup>149</sup>

<sup>147</sup> Article 34, Vienna Convention on the Law of Treaties (1969). *See similarly*, DRC Decision, ICC-02/05-01/09-195, paras.26-29.

<sup>148</sup> *See* D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', *Journal of International Criminal Justice* (2009) 7 (2): 333-352.

<sup>149</sup> *See* Arrest Warrant Decision, para. 248 (foreshadowing a finding of non-compliance against Sudan pursuant to article 87(7)); Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, ICC-01/11-01/11-577, 10 December 2014, paras. 20-22 (finding Libya in non-compliance under article 87(7)); Decision on ‘Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan’, ICC Trial Chamber IV, ICC-02/05-03/09-169, 1 July 2011, para. 15; Decision on the postponement of the execution of the request for surrender of Saif Al-Islam

114. The application of the Statute to a situation referred to the Court by the UNSC is not simply implicit in the Statute; it is explicitly set out in article 13(b). The *chapeau* of article 13 provides that “[t]he Court may exercise its jurisdiction [...] in accordance with the provisions of this Statute”, but only if certain conditions are met. For a UNSC referral, the UNSC must have acted under Chapter VII of the UN Charter. The inclusion of this legal basis is not merely descriptive of UNSC powers: it serves to demarcate the basis of the Court’s jurisdictional competence. Only under Chapter VII conditions can the Court exercise its jurisdiction beyond the preconditions in article 12. Chapter VII of the UN Charter is relevant here not because of its effects on the Court – since the ICC, as an independent organisation with international legal personality, cannot be directly bound by UNSC decisions– but because of its consequence for the UN Member State(s) concerned.

115. Chapter VII of the UN Charter obliges Member State(s) to accept the UNSC’s conferral of jurisdictional competence on the ICC and to comply with any obligations the UNSC resolution establishes. As such, a UNSC Chapter VII resolution serves to provide a legal basis for the exercise of the Court’s jurisdiction that is founded upon the powers entrusted to the UNSC under the UN Charter.

116. Accordingly, when the Statute provides that the “[t]he Court may exercise its jurisdiction [...] in accordance with the provisions of this Statute”, this includes article 27(2) which provides that “[i]mmunities 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.” The requirement of UN Charter Chapter VII authority in article

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Gaddafi pursuant to article 95 of the Rome Statute, ICC-01/11-01/11-163, 1 June 2012, paras. 28-30, stating: “the Court has consistently held that the legal framework of the Statute applies in the situations referred by the Security Council in Libya and Darfur, Sudan, including its complementarity and cooperation regimes.”

13(b), set out as a precondition for the application of the Statute in the *chapeau*, emphasises the binding applicability and effects of those provisions within the UN Charter regime in the event of a UNSC referral.<sup>150</sup>

117. As such, it is incorrect to assert that the Court's exercise of jurisdiction with respect to a national of a State not party to the Statute, or the duty of a States Party to execute an ICC arrest warrant in these circumstances, applies only to the extent that it reflects customary international law.<sup>151</sup> Doing so would create two entirely separate regimes of law, one for States Parties and article 12(3) declarant States, and another for UNSC referrals. The Statute nowhere suggests that the applicable law is different depending on the source of the referral. To the contrary, article 13 states the opposite.

*V.B.1. South Africa cannot rely on article 98(2) to avoid its obligation to arrest and surrender Mr Al Bashir*

118. In determining whether South Africa was entitled to rely on the existence of a competing international obligation under an international agreement pursuant to which the consent of the government of Sudan was required for the surrender of Mr Al Bashir to the Court, pursuant to article 98(2), the Court should consider the following in sequence:

- (i) Does the Court have jurisdiction with respect to the situation in Darfur? UNSC resolution 1593 (2005) plainly provides that it does;
- (ii) Since the Court has jurisdiction, the applicable law for the exercise of that jurisdiction are the provisions of the Statute, one of which is article 27;

<sup>150</sup> This is also reflected in section 10(9) of South Africa's Implementation of the Rome Statute of the International Criminal Court Act (2002).

<sup>151</sup> ICC-02/05-01/09-258-Anx, para. 14. *See also* discussion in ICC-02/05-01/09-275-AnxKRR10, pp. 32-69, and also P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', *Journal of International Criminal Justice* (2009) 7 (2): 315-332.

- (iii) Since Mr Al Bashir has no immunity before the Court in the exercise of its jurisdiction, by virtue of UNSC 1593, a State Party requested to execute a request for surrender from the Court will not be required “to act inconsistently with its obligations under international agreements pursuant to which the consent of the sending State (government of Sudan) is required to surrender a person of that State (Mr Al Bashir) to the Court” within the terms of article 98(2), since the immunities from legal process conferred by such an agreement are rendered irrelevant by the application of article 27 and cannot bar the Court’s exercise of jurisdiction over Mr Al Bashir.<sup>152</sup>

119. The lack of Mr Al Bashir’s immunity before the Court and its inapplicability to a State Party’s execution of an ICC warrant in these circumstances, applies equally with respect to the Head of State immunity that Mr Al Bashir otherwise enjoys under international law before foreign domestic jurisdictions,<sup>153</sup> pursuant to article 98(1), as it does for any temporary immunity from legal process conferred by an international agreement, pursuant to article 98(2).<sup>154</sup> In both cases, the immunities attached to the official capacity of Mr Al Bashir, whether under national or international law, are rendered irrelevant to the exercise of the Court’s jurisdiction by article 27, whose application and effects, as a consequence of UNSC resolution 1593, are binding on the government of Sudan. So

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<sup>152</sup> Similarly, for the purpose of article 98(1), since Mr Al Bashir has no immunity before the Court, a State Party requested to execute a request for surrender from the Court would not be required to act inconsistently with its obligations under international law with respect to the State immunity of Mr Al Bashir – since no such immunity applies before the ICC.

<sup>153</sup> ICJ, “Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)”, Judgment, 14 February 2002, paras 53-61. *See also* the ongoing study by the International Law Commission on the topic of Immunity of State officials from foreign criminal jurisdiction; *Report of the International Law Commission*, A/71/10 (2016), 341-363.

<sup>154</sup> *See also* C. Kress and K. Prost, ‘Article 98’, in O. Triffterer/K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2016, 3<sup>rd</sup> ed), at p.2142-2146, mn.44-58. The authors also note that an agreement that was purposely entered into by a State Party in order to avoid a pre-existing duty to arrest and surrender a person sought by the Court would subvert the object and purpose of article 98(2) and violate the principle enshrined in article 18 of the Vienna Convention on the Law of Treaties; *ibid.*, at p.2144-2146, mn.51-55.

fundamental is this issue to the effective exercise of the Court's mandate, as entrusted to it by the UNSC, that the Court's *raison d' être* would be in doubt if the Court could not address the criminality of those alleged to be most responsible for the most serious crimes.<sup>155</sup>

120. Consistent with the Court's prior decisions, any immunity which may have been said to attach to Mr Al Bashir by virtue of an obligation arising out of an international agreement was rendered inapplicable before the Court and from national authorities asked to execute a cooperation request, by operation of UNSCR 1593. This resolution conferred jurisdiction over the situation in Darfur, Sudan to the ICC, in conjunction with the Court's exercise of that jurisdiction pursuant to the Statute.<sup>156</sup>

### **Conclusion**

121. Mr Al Bashir is accused of the most serious crimes under the Statute. At the time when Mr Al Bashir was allowed to leave South Africa on 15 June 2015, the victims of his alleged crimes had been waiting for over six years for the first arrest warrant to be executed. To bring truth and justice for these victims, the Court must be able to exercise its powers and try Mr Al Bashir. There was every reasonable expectation that from 13 to 15 June 2015, whilst Mr Al Bashir was on its territory, South Africa should have complied with the Court's request, and arrested and surrendered him to the Court. Instead, South Africa facilitated Mr Al Bashir's departure, in contravention of international and domestic law.

122. The Single Judge did all he could to enable South Africa to comply with the pending requests. Working against the clock, he held consultations with South

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<sup>155</sup> C. Kress and K. Prost, 'Article 98', in O. Triffterer/K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2016, 3<sup>rd</sup> ed), at p.2133-2134, mn.30.

<sup>156</sup> Arrest Warrant Decision, paras 245-247; DRC Decision, ICC-02/05-01/09-195, paras.30-31. This is also reflected in subsequent decisions on non-cooperation by Uganda, ICC-02/05-01/09-267, and Djibouti, ICC-02/05-01/09-266.

Africa, heard South Africa's submissions, and reiterated the applicable law and guiding jurisprudence, thereby removing any ambiguity claimed by South Africa with respect to its obligations under the Statute. By deciding not to arrest and surrender Mr Al Bashir, South Africa prevented the Court from exercising its statutory functions and powers.

123. Referral to the ASP and the UNSC is the appropriate remedy in the circumstances. Whilst it is now too late for such a referral to gain South Africa's compliance in this particular instance,<sup>157</sup> it would assist in the future should a person against whom there are outstanding arrest warrants visit South Africa or another State Party, and might prevent recurrence of such non-compliance.

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<sup>157</sup> ICC-01/09-02/11-1032, para.53.

**Relief requested**

124. For the reasons given above, the Prosecution requests that the Chamber:
- a) find that South Africa failed to comply with its obligations under the Rome Statute by not arresting and surrendering Mr Al Bashir to the Court while he was on South Africa's territory despite having received a request by the Court under articles 87 and 89 of the Rome Statute for the arrest and surrender of Mr Al Bashir; and
  - b) determine that the circumstances are such that a formal finding of non-compliance by South Africa in this respect, and referral of the matter to the Assembly of States Parties to the Rome Statute and the Security Council of the United Nations, pursuant to article 87(7) of the Statute, is warranted.



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**Fatou Bensouda, Prosecutor**

Dated this 17<sup>th</sup> March 2017

At The Hague, The Netherlands