

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 29 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

**Urgent
Confidential**

Prosecution's Observations on the 'Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan' and Request for Decision instructing the Hashemite Kingdom of Jordan of its obligation to arrest Mr Omar 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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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

The competent authorities of the
Hashemite Kingdom of Jordan

Amicus Curiae

REGISTRY

Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

**Other
Section**

Observations and Request

1. The Prosecution requests Pre-Trial Chamber II (the "Chamber") to urgently issue a decision instructing the Hashemite Kingdom of Jordan ("Jordan") of its obligation as a State Party to immediately arrest and surrender Omar Hassan Ahmad Al Bashir ("Mr Al Bashir"). Media reports indicate that Mr Al Bashir has arrived in Jordan.¹ In addition, Jordan has informed the Registry that it received confirmation that Mr Al Bashir will attend the Arab League Summit in Jordan to be held today, 29 March 2017.²
2. The Prosecution files this submission confidentially pursuant to Regulation 23bis(2) of the Regulations of the Court as it refers to the contents of confidential annexes. However, the Prosecution submits that this filing and the two *Note Verbales* submitted by Jordan (confidential annexes to filings ICC-02/05-01/09-291 and ICC-02/05-01/09-293), and the 'Prosecution's Observations on the Note Verbale submitted by the Embassy of the Hashemite Kingdom of Jordan to the Netherlands to the Registrar concerning the possible visit to the Hashemite Kingdom of Jordan of Omar AL BASHIR'³ should be reclassified as public as there is no justification for them to remain confidential.
3. In response to Jordan's previous transmission of a *Note Verbale* dated 24 March 2017 concerning Mr Al Bashir possible visit to its territory,⁴ the Prosecution requested the Chamber to order the Registrar to seek immediate clarification from Jordan regarding whether it has identified a problem that would impede or prevent the execution of the Court's requests for arrest and surrender, and if so,

¹ See Sudan News Agency, <http://suna-sd.net/suna/showNews/331547/en> (last accessed on 28 March 2017 at 2152hrs); see also tweet from The Royal Hashemite Court, <https://twitter.com/RHCJO/status/846774420119191553/photo/1> (last accessed on 28 March 2017 at 2154hrs).

² Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan, ICC-02/05-01/09-293, and ICC-02/05-01/09-293-Conf-Anx1-Corr.

³ ICC-02/05-01/09-292-Conf.

⁴ ICC-02/05-01/09-291-Conf-Anx1 and Conf-Anx2.

to remind Jordan of its obligation under article 97 to consult with the Court without delay in order to resolve the matter. These observations were notified also to the competent authorities of Jordan.⁵

4. Jordan has now clarified its position through the submission of its second *Note Verbale* dated 28 March 2017. The second *Note Verbale* formally identifies an alleged legal problem, which it communicates to the Court by way of article 97 consultations. Accordingly, the Prosecution withdraws its previous request to the Chamber for clarification. Instead, it requests that the Chamber proceed to urgently resolve any misunderstanding that Jordan may perceive with respect to its obligations under the Statute to immediately comply with the request for arrest and surrender of Mr Al Bashir.
5. In its decision concerning the cooperation of the Democratic Republic of Congo ("DRC") with respect to the arrest and surrender of Mr Al Bashir ("DRC Decision"), the Chamber made clear 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.⁶
6. Moreover, rule 195 of the Rules of Procedure and Evidence confirms that when a requested State raises a problem in respect of article 98, while it must provide relevant information to the Court, this is "to assist the Court in the application of article 98." As such, rule 195 emphasises that it is for the Court to determine whether the conditions in article 98(1) or (2) are met.
7. Accordingly, given that Mr Al Bashir has reportedly arrived in Jordan for the summit to be held on 29 March 2017, the Prosecution requests the Chamber to

⁵ ICC-02/05-01/09-292-Conf.

⁶ ICC-02/05-01/09-195, para.16.

urgently rule upon the purported legal impediment claimed by Jordan in its second *Note Verbale* and instruct Jordan that it is obliged to arrest and surrender Mr Al Bashir.

8. In so doing, the Chamber should make clear to Jordan the applicability of the law as set out in the Chamber's previous decisions dealing with the assertion of conflicting international obligations, as set out in its decision concerning the cooperation of the DRC,⁷ and the Republics of Uganda⁸ and Djibouti.⁹ These decisions demonstrate that the alleged legal impediments raised by Jordan in the second *Note Verbale* do not exist and that there is no basis under article 98(1) (or 98(2)) to nullify Jordan's obligation to arrest and surrender Mr Al Bashir to the Court.
9. The Chamber should also inform Jordan that the triggering of consultations has no suspensive effect on Jordan's obligation as a State Party to arrest and surrender Mr Al Bashir.¹⁰



Fatou Bensouda, Prosecutor

Dated this 29th March 2017

At The Hague, The Netherlands

⁷ ICC-02/05-01/09-195.

⁸ ICC-02/05-01/09-267.

⁹ ICC-02/05-01/09-266.

¹⁰ ICC-02/05-01/09-242, para.8.