

ANNEX 1

CONFIDENTIAL



Ref: 039/2015

The Embassy of the Republic of South Africa to the Kingdom of the Netherlands presents its compliments to the Registry of the International Criminal Court and has the honour to refer to the latter's Note Verbale Reference 2015/ER/38/aab/CB of 28 May 2015, forwarding a request for cooperation in the case of *The Prosecutor v. Omar Hassan Al Bashir* for transmission to the relevant South African authorities.

The request was sent in the context of the African Union Summit to be held in South Africa from 7 to 15 June 2015, the Assembly of Heads of State and Government meeting being held on 14 and 15 June 2015, and which may be attended by President Al-Bashir of Sudan. The Note requests the relevant South African authorities to cooperate with the Court in the arrest and surrender to the Court of President Al-Bashir in accordance with Article 86 and 89 of the Rome Statute, should he enter the territory of the Republic of South Africa to attend the Summit. It also invites the authorities, if they can identify any problem which may impede or prevent the execution of the request for cooperation, to consult with the Court pursuant to Article 97 of the Rome Statute, in order to resolve the matter.

In this regard, the Government of the Republic of South Africa wishes to consult with the Court in terms of Article 97 and bring the following matters to the attention of the Court:

Invitations to the African Union Summit, to be chaired by Zimbabwe and hosted by South Africa in Johannesburg, South Africa have been issued to Heads of State and Government in line with decisions by the African Union. Furthermore, the Court's attention is drawn to the fact that in terms of the Agreement between the Government of the Republic of South Africa and the African Union on the hosting of the Summit, representatives of Member States of the African Union are accorded immunity from personal arrest or detention. It is submitted that Article 98(2) of the Rome Statute is applicable in this respect, as it provides that the Court may not proceed with a request for surrender or assistance which would require a State Party to the Rome Statute to act inconsistently with its obligations under international agreements where the consent of the affected State is required to surrender a person of that State to the Court. It is submitted that the purpose of Article 98(2) is precisely to address the dilemma of possible conflicting obligations as is presently faced by South Africa.

South Africa is first and foremost a Member State of the African Union. The African Union has always been committed to fight impunity, promote human rights and democracy and stressed the importance of safeguarding the sovereignty, stability and integrity of its Member States. In this regard, the African Union expressed its strong conviction that the search for justice should be

pursued in a way that does not impede or jeopardise efforts to promote lasting peace. To this end, the African Union is in the process of expanding the mandate of the African Court of Justice and Human Rights to try international crimes as such as genocide, crimes against humanity and war crimes. Furthermore, in order to harmonize the objectives of justice and peace, the African Union has on two occasions approached the United Nations Security Council with requests to employ the deferral mechanism contained in Article 16 of the Rome Statute with respect to the situation in Darfur. A positive response to any of these approaches would have solved the present impasse between conflicting international obligations, but was unfortunately not forthcoming.

The African Union has over the years raised concerns on how the Court has responded to African situations and has taken a number of decisions in this regard. These decisions are binding on Member States that are also States Parties to the Rome Statute, and consequently, such States Parties, including South Africa, are placed in a position of facing conflicting obligations. It is submitted that international law does not prescribe a clear hierarchy between conflicting obligations emanating from the applicable treaties.

It is further submitted, with respect to the Court's aforementioned Note and its reference to South Africa's obligations under the Rome Statute, that a flexible interpretation should be given to these obligations in view of their conflict with South Africa's obligations in terms of the Constitutive Act of the African Union. Such an interpretation will allow for balancing these competing obligations in a way that will serve to stabilise the relationship between the Court and the African Union. In this respect, it should further be noted that a narrow interpretation of the cooperation obligations of the African Union Member States that are also States Parties to the Rome Statute, will have the result of placing them at risk of a finding of non-cooperation when hosting African Union Summits, a situation that would severely undermine the work of the African Union, also in its primary goal of ensuring peace and security in Africa, which coincides with South Africa's own foreign policy objectives.

South Africa has the further honour to request that its concerns as outlined in this Note will enjoy the urgent and serious consideration of the Court, with a view to find an amicable solution.

The Embassy of the Republic of South Africa avails itself of this opportunity to renew to the Registry of the International Criminal Court the assurances of its highest consideration.

The Hague, 12 June 2015

