

ANNEX 6

CONFIDENTIAL

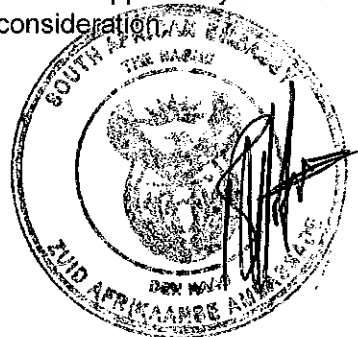


Ref: 040/2015

The Embassy of the Republic of South Africa to the Kingdom of the Netherlands presents its compliments to the International Criminal Court and has the honour to refer to the case, *The Prosecutor v Omar Hassan Ahmad Al Bashir*. In this regard, the Embassy wishes to make specific reference to two ICC documents, namely ICC-02/05-01/09-242 filed by the Office of the Prosecutor on 13 June 2015 and ICC-02/05-01/09-242 issued by Pre-Trial Chamber II also on 13 June 2015.

In light of the aforementioned two documents referred to, please find attached hereto the South African Government's observations, for the record, expressing our Government's interpretation of the procedural issues.

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



The Hague, 15 June 2015

INTRODUCTION

1. On 28 May 2015, the Registrar of the International Criminal Court directed an urgent, confidential request in accordance with Rule 176(2) of the Rules of Procedure and Evidence in the Case of *The Prosecutor vs Omar Hassan Al Bashir* for onward transmission to the relevant authorities in South Africa to the Embassy of the Republic of South Africa in the Kingdom of the Netherlands.
2. The request is based on Resolution 1593 (2005) of the United Nations Security Council (UNSC) referring the situation in Darfur to the Court dated 31 March 2005, article 89(1) of the Rome Statute, the decision issued by the Pre-Trial Chamber 1 on 4 March 2009 entitled Decision on the Prosecutor's Application for a warrant of Arrest against Omar Hassan Al Bashir (ICC-02/05-01/09-3), the decision issued by Pre-Trial Chamber I on 12 July 2010, entitled Second Decision on the Prosecutor's application for a warrant of arrest (ICC-02/05-01/09-94) and the decision of the Pre-trial Chamber II dated 15 April 2015 entitled Corrigendum of "Orders of the Registrar concerning action to be taken in case of information relating to travel of suspects (ICC-02/05-01/09-235-Corr).
3. The Registry refers to its Notes Verbale sent to the Embassy of the Republic of South Africa to the Kingdom of the Netherlands dated 5 March 2010 (reference NV/DCS/2009/82/ab) and 16 August 2010 (reference NV/DCS/2010/202/MD/ab) respectively transmitting the Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Al Bashir (ICC-02/05-01/09-7) and the supplementary request to all States Parties for arrest and surrender for Omar Hassan Al Bashir (ICC-02/05-01/09 -96).
4. The present note verbale is sent in the context of the African Union Summit taking place in South Africa from 7 – 15 June 2015 in South Africa.
5. President Omar Hassan Al Bashir, President of Sudan is in South Africa at present.
6. In the instant Note Verbale, the relevant authorities of the Republic of South Africa are requested to cooperate with the Court on his arrest and surrender in accordance with articles 86 and 89 of the Rome Statute.
7. The authorities in South Africa were invited to identify any problem which may impede or prevent the execution of the request for arrest and surrender of President Omar Al Bashir and to consult with the Court without delay, pursuant to Article 97 of the Rome Statute, in order to resolve the matter.
8. The relevant authorities of the Republic of South Africa decided to accept the Court's invitation to consult with it pursuant to Article 97 without delay in order to resolve the matter, as the Republic of South Africa has identified a number of problems with the implementation of the request.
9. Apart from the communications between the Department of International Relations and the Court, the Minister of Justice and Constitutional Development addressed a

letter to the Cooperation Adviser who is the person identified as the channel of communication in the Note Verbale dated 28 May 2015. That letter was dated 11 June 2015.

10. The Chief State Law Adviser was directed to attend a meeting, which meeting was held on 12 June 2015 at the Court and which was attended by the Ambassador of the Republic of South Africa to the Kingdom of The Netherlands and the legal counsel. During this meeting, the Republic South Africa made it clear that this is a request for consultation with the Court in terms of Article 97. It was also conveyed to the Court that the Republic of South Africa did not regard the meeting as the Article 97 consultation but intended to send its legal experts to address the Court, should the Court agree to the request for consultation in terms of Article 97.
11. Despite the clear communication by the Republic of South Africa that its request for consultation be responded to by the Court, the Republic of South Africa received two documents very late on Saturday night, 13 June 2015 from the Court:
 - (a) An Urgent, Confidential Request to the Court for an Order clarifying whether Article 97 Consultations with South Africa have Concluded and that South Africa is Under an Obligation to Immediately Arrest and Surrender Omar Al Bashir, dated 13 June 2015; and
 - (b) Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, dated 13 June 2015.
12. As is evident from the documents referred to in paragraph 11, the Urgent, Confidential Request was submitted to the Court and the Decision was made by the Court without any notice whatsoever to the Republic of South Africa.
13. Both documents were submitted to the relevant authorities in the Republic of South Africa for instructions and directions regarding the documents in the early hours of Sunday, 14 June 2015.
14. Late on 14 June 2015, instructions and directions were received from the relevant authorities in the Republic of South Africa to seek a reversal of the decision referred to in paragraph 11(b) above.
15. The meeting was held with the Court on Friday, 12 June 2015 in order to arrange consultations with the Court pursuant to Article 97. Although consultations pursuant to Article 97 were scheduled to take place on Monday, 15 June, 2015, no notice whatsoever of the Urgent, Confidential Request by the Prosecutor referred to in paragraph 11(a) above was given to the Republic of South Africa at all.
16. The unfortunate result was that the Court made the decision referred to in paragraph 11(b) above without the benefit of any submissions by the Republic of South Africa.
17. As far as the Republic of South Africa has been able to establish, no consultations in terms of Article 97 have ever taken place before. This would, therefore, be the very

first time that the Court has to consider the full implications of Article 97, especially as Article 97 suggests that the Court has a corresponding obligation to assist the State Party concerned to resolve the problem.

18. The Republic of South Africa respectfully is of the view that a proper consideration of Article 97 by the court is important as it will set a precedent and assist State Parties who may encounter similar problems in the future.
19. Procedurally, it would appear that the rights of the Republic of South Africa, especially as it has identified and encountered serious problems with the execution of the request for the arrest and the surrender of President Omar Al Bashir and had, in good faith, availed itself of the Court's request to consult with it pursuant to Article 97 had been breached and has caused it prejudice and embarrassment.
20. The South African Government continues to remain seized of this matter and hopes to keep the lines of communication open between itself and the Court, to which the Republic of South Africa remains committed.