

# **ANNEX I PUBLIC**

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



*Original: English*

No.: ICC-02/05-01/09  
Date: 02 October 2015

**PRE-TRIAL CHAMBER II**

**Before:** Judge Cuno Tarfusser, President  
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  
Public**

**Submission from the Republic of South Africa in response to the Order requesting  
a submission dated 4 September 2015 for the purposes of proceedings under article  
87(7) of the Rome Statute**

**Source:** Embassy of the Republic of South Africa

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives  
Republic of South Africa**

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Referring to the Order of 4 September 2015 by the Pre-Trial Chamber II in the *The Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir*, (hereinafter referred to as “the Order”), *inter alia* directing the competent authorities of the Government of the Republic of South Africa “to submit, no later than Monday 5 October 2015, their views on the events surrounding Al Bashir’s attendance of the African Union, ....” the Government of the Republic of South Africa (hereinafter “the Government”) makes the following submission:

- 1.1 The Government remains committed to cooperate with the International Criminal Court (hereinafter “the Court”) in the pursuit of Justice as was envisaged in the Rome Statute of the International Criminal Court (hereinafter “the Statute”). The importance of cooperating with the Court was indeed the motivating factor for the decision of the Government on 12 June 2015 to engage with the Court in consultations provided for in Article 97 of the Statute on how best to resolve the problems that the Government has identified which may impede or prevent the execution of the request to cooperate in light of the attendance of Al Bashir of the African Union Summit from 14 – 15 June 2015 on invitation of the African Union in South Africa.
- 1.2 It is important to recall the events that led to this submission as follows: Prior to the Summit, acting on the possibility that Al Bashir may attend the Summit, the Registrar submitted a *Note Verbale* dated 28 May 2015 to the Government, reminding it of its obligation to cooperate with the Court in the arrest of Al Bashir and also of its obligations to consult the Court should it face any difficulties in implementing the request for cooperation. The Government responded to the said *Note Verbale* in *Note Verbale* No 039/2015 of 12 June 2015 by requesting to consult the Court in terms of Article 97 of the Statute.
- 1.3 A preliminary meeting between the Government and the Court took place on 12 June 2015 and it was the understanding of the Government that the official Article 97 consultations were to take place on Monday, 15 June 2015.
- 1.4 Despite this understanding, on 13 June 2015 at 22h49, the Prosecutor made an urgent request to the Court for clarity regarding the Article 97 consultations, without any prior warning or notice to the Government. In response to this request by the Prosecutor, the Pre-Trial Chamber issued the *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 Al Bashir* on 13 June 2015 (hereinafter the “13 June 2015 Decision.”)
- 1.5 The Government responded to the 13 June 2015 Decision in a *Note Verbale* No 040/2015 dated 15 June 2015 stating its view that the consultations requested under Article 97 of the Statute had not been concluded, that it and the South African domestic court system are seized with the matter and that it viewed the 13 June 2015 Decision to be in violation of South Africa’s basic right to fair procedure.
- 1.6 At the very same time the South African domestic courts were already seized with this matter with an interim order being granted on 15 June 2015. On 23 June 2015, the South African North Gauteng High Court issued an order (hereinafter “the High Court Order”) directing that there was a duty to arrest Al Bashir. In the High Court Order,



the High Court directed that an investigation into the non-arrest of Al Bashir be initiated.<sup>1</sup> The Government immediately lodged an application for leave to appeal. This application was refused on 16 September 2015. The Government has filed an application petitioning the Supreme Court of Appeal for leave to appeal on 2 October 2015.

- 1.7 In the meantime, the Order was issued on 4 September 2015, by Pre-Trial Chamber II in *The Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir*, (hereinafter referred to as “the Order”), *inter alia* directing the competent authorities of the Government “to submit, no later than Monday 5 October 2015, their views on the events surrounding Al Bashir’s attendance of the African Union, with particular reference to their failure to arrest and surrender Al Bashir.”<sup>2</sup>
- 1.8 The Government wants to again place on record that it is of the view that the circumstances surrounding the issuance of the 13 June 2015 Decision were at variance with the Statute, in particular the letter and spirit of Article 97 thereof, and the basic principles of justice.
- 1.9 It is against this background that the Government applies for an extension of the time limit set for 5 October 2015 in terms of Regulation 35 of the Regulations of the Court. An extension until the finalisation of the judicial process in South Africa would allow the Pre-Trial Chamber to have the opportunity to consider this matter on the basis of all the information available.
- 1.10 As the facts of this matter are inextricably linked with the judicial process concerning the legal obligations of the Government under both international and domestic law, the full facts and circumstances surrounding Al Bashir’s departure will be revealed only at the end of this judicial process. At this stage the circumstances under which Al Bashir left South Africa is a matter before the South African courts and have not been established. Currently there is not sufficient information on how Al Bashir left South Africa and the Government, together with the domestic courts are in the process of establishing these circumstances.
- 1.11 It is the Government’s submission that in the interest of justice, the prudent course of action for the Pre-Trial Chamber would be to grant the application for an extension in order for the judicial process in South Africa to be finalised. On the basis of the information emanating from that process, the Chamber will be in a better position to come to a conclusion about the ‘events surrounding the circumstances of Al Bashir’s departure’.
- 1.12 If this application for an extension to respond is granted, the Government undertakes to periodically inform the Registrar of the progress made in the domestic court process in South Africa.

---

<sup>1</sup> *Southern African Litigation Centre v Minister of Justice and Constitutional Development and Others*, case Number 27740/2015.

<sup>2</sup> *The Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Order Requesting Submission from the Republic of South Africa for the Purposes of Proceedings under Article 87(7) of the Rome Statute*, 4 September 2015 (ICC-02/05-01/09).