

1 International Criminal Court

2 Pre-Trial Chamber II

3 Situation: Darfur, Sudan

4 In the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir - ICC-02/05-01/09

5 Presiding Judge Cuno Tarfusser, Judge Marc Perrin de Brichambaut and

6 Judge Chang-Ho Chung

7 Decision - Courtroom 1

8 Thursday, 6 July 2017

9 (The hearing starts in open session at 2.09 p.m.)

10 THE COURT USHER: [14:09:06] All rise.

11 The International Criminal Court is now in session.

12 Please be seated.

13 PRESIDING JUDGE TARFUSSER: [14:09:37] Good afternoon. Good afternoon to

14 the delegation of the Republic of South Africa, the Office of the Prosecutor, to the

15 public.

16 I would ask first of all the court officer to call the case, please.

17 THE COURT OFFICER: [14:09:58] Thank you, Mr President.

18 The situation in Darfur, Sudan, in the case of The Prosecutor versus Omar Hassan

19 Ahmad Al Bashir case, ICC reference ICC-02/05-01/09.

20 For the record we are in open session.

21 PRESIDING JUDGE TARFUSSER: [14:10:14] Thank you very much.

22 I would now ask the representative of the Office of the Prosecutor to present their

23 team.

24 MR NICHOLLS: [14:10:26] Good afternoon, your Honours. I'm Julian Nicholls

25 and I'm here today with Rod Rastan, Manoj Sachdeva, Melissa Simms,

1 Stanilas Talontsi and our case manager, Dusan Ilic. Thank you.

2 PRESIDING JUDGE TARFUSSER: [14:10:40] Thank you. And I revert to the
3 representatives of the Republic of South Africa to present their team. Thank you
4 very much.

5 MS DE WET: [14:10:52] And good afternoon, your Honours. I'm Susanna de Wet,
6 Chief State Law Advisor of the Republic of South Africa. I'm joined today, a part of
7 the legal team, Professor Tladi. Dire Tladi, he's the advisor to the Minister of
8 International Relations and Cooperation. And Andre Stemmet, who is the legal
9 counsellor in The Hague. We are also fortunately to be accompanied by our
10 ambassador, His Excellency Ambassador Koloane who is the ambassador in The
11 Hague to the Kingdom of The Netherlands. Thank you.

12 PRESIDING JUDGE TARFUSSER: [14:11:28] Thank you very much.

13 Now I present the team of the Chamber. The team is composed by Bruno Zehnder,
14 legal officer, Mr Silvestro Stazzone, associate legal officer, by Mr Simon Grabovec,
15 associate legal officer, by Drazan Djukic, associate legal officer, Teodora Jugrin,
16 associate legal officer, and by Marie Dang Van Sung, intern.

17 The Chamber is composed by Judge Chang-Ho Chung on my left, and on my right
18 by Judge Marc Perrin de Brichambaut. I, myself, am Cuno Tarfusser, Presiding
19 Judge.

20 I think we can now start.

21 The purpose of the present hearing is the delivery of the Chamber's decision under
22 Article 87(7) of the Rome Statute following the hearing we had in this courtroom
23 on 7 April 2017.

24 I speak slowly for the translation into French to permit a sound translation into
25 French.

1 I shall now summarise the decision. This summary is not part of the written
2 decision, which is the only authoritative account of the Chamber's decision and
3 reasoning. The written decision will be made available to the participants, to the
4 parties, participants and to the public at the conclusion of this hearing. And it is
5 already filed.

6 I start with a brief account of the procedural background and the relevant events.

7 On March 31, 2005, the Security Council of the United Nations, acting under
8 Chapter VII of the Charter of the United Nations, adopted Resolution 1593, whereby
9 it referred the situation in Darfur, Sudan, since 1 July 2002 to the Prosecutor of the
10 Court. The Security Council also decided that, "that the Government of Sudan and
11 all other parties to the conflict in Darfur, shall cooperate fully with and provide any
12 necessary assistance to the Court and the Prosecutor."

13 Following investigations on the part of the Prosecutor into the situation as referred
14 by the Security Council, and upon application by the Prosecutor, Pre-Trial
15 Chamber I issued, on 4 March 2009 and 12 July 2010, two warrants of arrest against
16 Omar Al Bashir for war crimes, crimes against humanity and genocide allegedly
17 committed in Darfur from March 2003 to, at least, 14 July 2008.

18 The Court, pursuant to Part 9 of the Statute, transmitted to the States Parties to the
19 Statute requests for the arrest of Omar Al Bashir and his surrender to the Court.
20 South Africa was notified of the requests on 5 March 2009 and 16 August 2010
21 respectively.

22 To date, the warrants of arrest against Omar Al Bashir are yet to be executed and,
23 pending his appearance before the Court, proceedings against Omar Al Bashir
24 remain halted.

25 In May 2015, the Court learned from media reports that Omar Al Bashir was

1 intending to travel to South Africa for the purpose of attending a summit of the
2 African Union due to take place in Johannesburg from Monday, 7 June, to
3 Tuesday, 15 June.

4 On 28 May 2015, the Registrar of the Court, acting on the basis of these media
5 reports, notified to the competent authorities of South Africa of a request for
6 cooperation requesting South Africa:

7 (i) to arrest Omar Al Bashir and surrender him to the Court should he enter South
8 African territory, in accordance with Articles 86 and 89 of the Statute; and, in the
9 event of any problem impeding or preventing the execution of the request for
10 cooperation

11 (ii) to consult with the Court without delay in order to resolve the matter.

12 On Thursday, 11 June 2015, the Embassy of South Africa in The Netherlands
13 contacted the Registry to request an urgent meeting between the Registrar and the
14 Chief Law Advisor to the Government of the Republic of South Africa and a
15 delegation from the Embassy, with a view to entering into consultations pursuant to
16 Article 97 of the Statute.

17 The following morning, on Friday, 12 June 2015, the Chamber, the Pre-Trial
18 Chamber was informed of the request by South Africa to have a consultation
19 meeting. It was then decided to schedule a meeting at the time proposed by South
20 Africa, to be presided by the Presiding Judge of the Chamber and to be attended by
21 representatives of South Africa, the Registry and the Office of the Prosecutor. This
22 meeting took place at 1700 hours on Friday, 12 June 2015.

23 During this meeting, the Presiding Judge pointed out, inter alia, that:

24 (i) all of the issues tabled by South Africa had already been decided by the Court;
25 and

1 (ii) the consultations had no suspensive effect on South Africa's outstanding
2 obligations under the Statute to cooperate with the Court and proceed with the
3 arrest and surrender of Omar Al Bashir.

4 The following day, Saturday, 13 June 2015, Omar Al Bashir entered the territory of
5 the Republic of South Africa.

6 In the course of the day, the Chief State Law Advisor of the Republic of South Africa
7 met, separately, with the representatives of the Registry of the Court and with
8 representatives of the Office of the Prosecutor.

9 In the evening of the same day, the Chamber received an urgent request from the
10 Prosecutor seeking that the Presiding Judge issue an order clarifying that:

11 (i) there was no ambiguity regarding South Africa's obligation immediately to arrest
12 Omar Al Bashir and surrender him to the Court;

13 (ii) issues relating to domestic law did not nullify or change South Africa's
14 obligations under the Statute and;

15 (iii) South Africa's immediate obligation to arrest and surrender Omar Al Bashir was
16 not subject to any delay, stay or suspensive effect.

17 Later in the evening on the same Saturday, 13 June 2015, the Presiding Judge rejected
18 the Prosecutor's request, observing that the position of the Court, maintaining that
19 South Africa had an obligation to arrest and surrender Omar Al Bashir to the Court,
20 had already been made sufficiently clear and that no further reminder or clarification
21 was necessary.

22 Omar Al Bashir left the territory of the Republic of South Africa in the morning of
23 Monday, 15 June 2015.

24 Despite the Court's request for the arrest of Omar Al Bashir and his surrender to the
25 Court, South Africa did not arrest and surrender him while he was on its territory

1 between 13 and 15 June 2015.

2 On 4 September 2015, the Chamber held that these events warranted the opening of
3 proceedings pursuant to Article 87(7) of the Statute and, in line with Regulation 109
4 of the Regulations of the Court, requested the competent authorities of South Africa
5 to submit their views. A full chronology of the subsequent proceedings can be
6 found in the written decision of the Chamber.

7 Here, I only wish to recall that on 8 December 2016, the Chamber decided to convene
8 a hearing for the purpose of receiving submissions, in law or fact, concerning in
9 particular the following issues:

- 10 (i) whether South Africa failed to comply with its obligations under the Statute by
11 not arresting and surrendering Omar Al Bashir to the Court while he was on South
12 African territory despite having received a request from the Court under Articles 87
13 and 89 of the Statute for the arrest and surrender of Omar Al Bashir; and if so
14 (ii) whether circumstances are such that a formal finding of non-compliance by
15 South Africa in this respect and referral of the matter to the Assembly of States
16 Parties to the Rome Statute and/or to the Security Council of the United Nations
17 within the meaning of Article 87(7) of the Statute are warranted.

18 The Chamber invited to the hearing, in addition to the representatives of South
19 Africa, also the Prosecutor of the Court and representatives of the United Nations.
20 The United Nations subsequently responded, stating that it would not be sending a
21 representative to attend the hearing and would not be making written submissions
22 for the Chamber's consideration.

23 As authorised by the Chamber, written submissions in advance of the hearing were
24 filed on 17 March 2017 by the Office of the Prosecutor and by South Africa. These
25 are, respectively, filings number 289 and 290 in the record of the case.

1 In addition, the Chamber received written observations from the Kingdom of
2 Belgium, filing 277, and from the Southern Africa Litigation Centre, filing 288.

3 On 7 April 2017, a public hearing took place before this Chamber. Representatives
4 of South Africa and of the Office of the Prosecutor made submissions on the issues
5 under consideration. The transcript of the hearing bears the number T-2 in the
6 record of the case.

7 Article 87(7) of the Statute provides, as follows:

8 Where a State Party fails to comply with a request to cooperate by the Court contrary
9 to the provisions of this Statute, thereby preventing the Court from exercising its
10 functions and powers under this Statute, the Court may make a finding to that effect
11 and refer the matter to the Assembly of States Parties or, where the Security Council
12 referred the matter to the Court, to the Security Council.

13 In exercising its competence under said provision, the Chamber has to answer two
14 separate questions:

15 (i) whether South Africa failed to comply with the request for arrest and surrender
16 for Omar Al Bashir contrary to the provisions of the Statute; and

17 (ii) whether a referral of the matter to the Assembly of States Parties or to the
18 Security Council is warranted.

19 I pass now to summarise the first of the two questions.

20 With respect to the first question, the Chamber is called upon to analyse whether
21 South Africa was entitled not to comply with the Court's request for arrest and
22 surrender on two independent grounds, namely:

23 (i) on account of Omar Al Bashir's immunity; and/or

24 (ii) as a result of South Africa's interactions with the Court in June 2015.

25 Again, I shall address these two questions in turn, starting by the immunity.

1 South Africa argued two distinct legal bases for Omar Al Bashir's immunity at the
2 time of his visit to South Africa in June 2015, namely customary international law, on
3 account of his position as the sitting Head of State of Sudan, on the one hand, and
4 the Host Agreement concluded between South Africa and the African Union for the
5 purposes of the African Union Summit on the other.

6 The Chamber is not persuaded by South Africa's latter argument and considers that
7 Article VII(1) of the Host Agreement, on its terms, does not apply to Omar Al Bashir
8 and thus could not have conferred upon him any immunity.

9 Conversely, the Chamber notes that customary international law prevents the
10 exercise of criminal jurisdiction by States against Heads of State of other States.

11 This immunity extends to any act of authority which would hinder the Head of State
12 in the performance of his or her duties. The Chamber is unable to identify a rule in
13 customary international law that would exclude immunity for Heads of State when
14 their arrest is sought for international crimes by another State, even when the arrest
15 is sought on behalf of an international court, including, specifically, this Court.

16 The Chamber must therefore determine whether there exists any derogation to the
17 general regime of immunities under international law when the Court seeks the
18 arrest and surrender of a person enjoying immunity as Head of State. This
19 determination concerns primarily the interpretation of Article 27(2) of the Statute
20 and of its relationship with Article 98(1).

21 Article 27(2) of the Rome Statute states:

22 Immunities or special procedural rules which may attach to the official capacity of a
23 person, whether under national or international law, shall not bar the Court from
24 exercising its jurisdiction over such a person.

25 South Africa made the argument that this provision does not have any effect on the

1 rights and obligations of States vis-à-vis the Court, but concerns only the Court's
2 jurisdiction, ensuring that such jurisdiction is not excluded in cases of immunity or
3 special procedural rules attaching to the official capacity of a person.

4 The Chamber does not subscribe to this view and finds that Article 27(2) of the
5 Statute also excludes the immunity of Heads of State from arrest. First, the
6 Chamber considers that since immunity from arrest would bar the Court from the
7 exercise of its jurisdiction, the general exclusionary clause of Article 27(2) of the
8 Statute, in its plain meaning, also encompasses that immunity. Had the drafters of
9 the Statute intended exclusion only of a narrow category of immunities, they would
10 have expressed it in plain language. The language used in that provision, however,
11 conveys comprehensiveness and is not compatible with the proposition that the
12 immunity from arrest of Heads of State is excluded from it.

13 Furthermore, reliance by States Parties to the Rome Statute on immunities or special
14 procedural rules to deny cooperation with the Court would create, at least concerns
15 requests for the arrest and surrender of individuals subject to a warrant of arrest, an
16 insurmountable obstacle to the Court's ability to exercise its jurisdiction. Such a
17 situation would clearly be incompatible with the object and purpose of Article 27(2)
18 of the Statute. Indeed, the Court's jurisdiction with respect to persons enjoying
19 official capacity would be reduced to a purely theoretical concept if States Parties
20 could refuse cooperation with the Court by invoking immunities based on official
21 capacity.

22 That said, the Chamber considers that the effect of Article 27(2) of the Statute as just
23 described concerns both, vertically, the relationship between a State Party and the
24 Court and, horizontally, the inter-State relationship between States Parties to the
25 Statute.

1 On the one hand, a State Party would have the duty to arrest and surrender to the
2 Court its own Head of State if the Court made a request for cooperation to that
3 effect. On the other hand, a State Party cannot refuse to arrest and surrender an
4 individual on the grounds that the individual benefits from immunities based on
5 official capacity belonging to another State Party to the Statute. Indeed, just as
6 States Parties cannot invoke their own immunities based on official capacity to
7 refuse to cooperate with the Court, they cannot invoke those same immunities when
8 cooperation in the arrest and surrender of a person is provided by another
9 State Party. This is the effect *inter partes* of the Statute, an international treaty.
10 As there exists no immunity from arrest and surrender based on official capacity
11 with respect to proceedings before the Court where any such immunity would
12 otherwise belong to a State Party to the Rome Statute, Article 98(1) of the Statute is
13 without object in the scope of application of Article 27(2) of the Statute. No waiver
14 is required as there is no immunity to be waived.

15 It is evident that this applies only to States that have consented to such a regime,
16 which are in the first instance States Parties to the Statute and States which accept
17 the jurisdiction of the Court under Article 12(3) of the Statute.

18 Nevertheless, the Statute provides for a particular situation where obligations
19 defined in the Statute may become incumbent upon a State not as a result of its
20 acceptance of the Statute, but as a result of, and under, the Charter of the United
21 Nations. It is to this *sui generis* regime that the Chamber now turns.

22 The Court's jurisdiction in the instant case was triggered by the Security Council
23 Resolution 1593, whereby the Security Council, acting under Chapter VII of the
24 Charter of the United Nations, referred the situation in Darfur to the Prosecutor of
25 the International Criminal Court.

1 For the reasons explained in detail in the decision, the Chamber finds, in line with
2 previous decisions of other Chambers of this Court, that the effect of a Security
3 Council resolution triggering the Court's jurisdiction under Article 13(b) of the
4 Statute is that the legal framework of the Statute applies, in its entirety, with respect
5 to the situation referred.

6 For the purposes of the present summary of the Chamber's reasoning it suffices to
7 observe that the ordinary meaning of the term "refer", the context of a referral, which
8 is the entirety of the Court's legal regime, and its object and purpose all confirm that
9 the effect of a referral is to enable the Court to act in the referred situation, and to do
10 so under the rules according to which it has been designed to act.

11 Moreover, by deciding that Sudan shall cooperate fully with the Court, the Security
12 Council has also imposed on Sudan, acting under Chapter VII of the Charter of the
13 United Nations, an obligation vis-à-vis the Court which Sudan would not otherwise
14 have as it has not ratified the Statute.

15 The terms of such cooperation are set by the Rome Statute. The Court is an
16 institution whose competences are established by its Statute and, indeed, which
17 cannot receive cooperation but in accordance with its Statute. The Chamber finds,
18 by majority, that the necessary effect of the Security Council Resolution triggering
19 the Court's jurisdiction in the situation in Darfur and imposing on Sudan the
20 obligation to cooperate fully with the Court, is that, for the limited purpose of the
21 situation in Darfur, Sudan has rights and duties analogous to those of States Parties
22 to the Statute.

23 It is acknowledged that this is an expansion of the applicability of an international
24 treaty to a State which has not voluntarily accepted it as such. Nonetheless, the
25 finding of the majority of the Chamber in this respect is in line with the Charter of

1 the United Nations, which permits the Security Council to impose obligations on
2 States.

3 It may be emphasised that Sudan's rights and obligations are only those related to
4 the situation in Darfur as referred by the Security Council and strictly within the
5 parameters of this situation.

6 Accordingly, as a result of Security Council Resolution 1593, the interactions
7 between Sudan and the Court with respect to the Court's exercise of jurisdiction in
8 the situation in Darfur are regulated by the Statute. One consequence of this is that
9 Article 27(2) of the Statute applies equally with respect to Sudan, rendering
10 inapplicable any immunity on the ground of official capacity belonging to Sudan
11 that would otherwise exist under international law.

12 This means, in the first instance, that Sudan cannot claim, vis-à-vis the Court,
13 Omar Al Bashir's immunity as Head of State: Sudan has the obligation to arrest him
14 and surrender him to the Court.

15 Second, in the view of the majority of the Chamber, the immunities of
16 Omar Al Bashir as Head of State do not apply vis-à-vis States Parties to the Statute
17 when they seek to execute a request for arrest and surrender issued by the Court in
18 the exercise of its jurisdiction in the situation in Darfur. Accordingly, Article 98(1)
19 of the Statute is not applicable to the arrest of Omar Al Bashir and his surrender to
20 the Court: No immunity needs to be waived and States Parties can execute the
21 Court's request for arrest and surrender of Omar Al Bashir without violating Sudan's
22 rights under international law.

23 Accordingly, South Africa was under the duty to arrest Omar Al Bashir and
24 surrender him to the Court while he was on South African territory in June 2015.

25 In any case, the Chamber finds it necessary to emphasise that Article 98 of the

1 Statute provides no rights to State Parties to refuse compliance with the Court's
2 requests for cooperation.

3 Indeed, Article 98 of the Statute addresses the Court, and is not a source of
4 substantive rights, or additional duties, to States Parties. While it does indicate that
5 a tension may exist between the duty of a State Party to cooperate with the Court
6 and the State's obligation to respect immunities under international law, it leaves to
7 the Court, and not to the State Party, the responsibility to address the matter.

8 The Chamber considers that, in the case at hand, South Africa was not entitled to
9 rely on its own understanding of Article 98 of the Statute to decide unilaterally not to
10 comply with the Court's request for arrest of Omar Al Bashir and his surrender to
11 the Court. Irrespective of all considerations made earlier as to the inapplicability
12 under the Statute of immunities on the ground of official capacity, the Chamber
13 notes that the fact that an individual whose arrest and surrender is sought by the
14 Court enjoys diplomatic or State immunities is not as such an exception to the State
15 Parties' duty to cooperate with the Court.

16 Even assuming, for the sake of argument, the existence of a conflict of obligations,
17 this would not have relieved South Africa of its duties vis-à-vis the Court, or given it
18 discretion to dispense with such duties. Article 98 of the Statute simply does not
19 have this effect. Accordingly, even in this scenario of the applicability of
20 Article 98(1) to the situation at hand, South Africa, as a result of having chosen not to
21 give effect to the Court's request for cooperation, would still be found in
22 non-compliance with its obligation to arrest and surrender Omar Al Bashir to the
23 Court.

24 I turn now to the second limb of the Court's analysis of the question whether South
25 Africa failed to comply with the request for arrest and surrender of Omar Al Bashir

1 contrary to the provisions of the Statute.

2 At the hearing of 7 April 2017, South Africa argued that fundamental errors occurred
3 in the conduct of consultations under Article 97 of the Statute, which were, it is
4 recalled, aimed at discussing the application of Article 98(1) of the Statute.

5 Article 97 of the Rome Statute requires States Parties to consult with the Court
6 without delay in order to resolve problems which may impede or prevent the
7 execution of a request for cooperation by the Court. This provision refers to
8 examples of situations where consultations may be appropriate but does not make
9 explicit reference to situations falling under Article 98(1). This appears consistent
10 with the fact that Article 98(1) of the Statute already provides the solution for a
11 possible conflict between the duty to comply with a request for arrest and surrender
12 and the duty to respect certain immunities under international law.

13 That said, the Chamber does not consider that Articles 97 and 98 of the Statute must
14 be interpreted as strictly as to say that the instrument of consultations cannot also be
15 used for the problems under Article 98 of the Statute. Indeed, communication
16 between the requested State and the Court in relation to Article 98, including
17 provisions of information by the State under Rule 195 of the Rules of Procedure and
18 Evidence, may in practice take the same form as consultations.

19 As a matter of fact, South Africa was given the opportunity to raise with the Court
20 the problems that it had identified under Article 98 of the Statute with the execution
21 of the Court's request for arrest and surrender of Omar Al Bashir. However, again
22 as a matter of fact, it became clear during the consultations that the resolution of the
23 matter brought by South Africa under Article 98(1) of the Statute concerned the
24 binary questions of whether or not South Africa had the duty vis-à-vis the Court to
25 arrest Omar Al Bashir and surrender him to the Court. No room was available for

1 possible remedial measures to be addressed through consultations between the
2 Court and the requested State.

3 In any case, the Chamber underscores that consultations, whether requested or
4 ongoing, between a State and the Court do not, as such, suspend or otherwise affect
5 the validity of the Court's request for cooperation. Even more, the availability of a
6 channel for dialogue between the Court and a State Party, irrespective of the form
7 that such dialogue may take, cannot be understood as resulting in a unilateral
8 suspension of the execution of a request for cooperation. This is particularly
9 important in cases such as the one at hand, where execution of the request for
10 cooperation could succeed only in a very narrow window of time.

11 Indeed, it is not the nature of legal obligations that they can simply be put aside on
12 the ground of a disagreement with a determination of a competent court of law, or
13 perceived unfairness of the process and/or the result. In these circumstances, the
14 possible remedies can be of a judicial nature only and the matter must ultimately be
15 settled judicially by the Court.

16 The Chamber concludes that, by not arresting Omar Al Bashir while he was on its
17 territory between 13 and 15 June 2015, South Africa failed to comply with the Court's
18 request for the arrest and surrender of Omar Al Bashir contrary to the provisions of
19 the Statute, thereby preventing the Court from exercising its functions and powers
20 under the Statute in connection with the criminal proceedings instituted against
21 Omar Al Bashir. The Chamber makes this finding unanimously. However, part of
22 the reasoning that I have just summarised is adopted by majority.

23 Judge Perrin de Brichambaut appends an individual opinion, which he will
24 summarise shortly.

25 I turn now to the second question before the Chamber, which is whether it is

1 appropriate to refer this matter to the Assembly of States Parties and/or the Security
2 Council. This is a separate question and an automatic referral is not required as a
3 matter of law in all cases of non-compliance. Rather, the Chamber has discretion to
4 consider all factors that may be relevant in the circumstances of the case.

5 In the present circumstances, the Chamber considers, at first, that the manner in
6 which South Africa has approached its obligations to cooperate with the Court is a
7 significant consideration in the determination of whether a referral under
8 Article 87(7) of the Statute is warranted.

9 In particular, the Chamber notes that South Africa is the first State Party specifically
10 to invoke Article 97 of the Statute following receipt of a request for arrest and
11 surrender. It triggered Article 97 of the Statute in an attempt to resolve what is
12 perceived to be conflicting obligations under international law. South Africa's
13 subsequent conduct is also of relevance in this regard. South Africa presented
14 extensive written and oral legal arguments on the matter at hand and indicated its
15 intention to avail itself of the possible remedy of lodging an appeal in the event that
16 the Chamber found that it had violated its obligation under the Statute.

17 Second, the Chamber considers that, in the circumstances of the case, a referral of
18 South Africa's non-compliance to the Assembly of States Parties and/or the Security
19 Council would not be an effective way to obtain cooperation.

20 The Chamber notes that South Africa's domestic courts have found that the
21 Government of South Africa acted in breach of its obligations under its domestic
22 legal framework by not arresting Omar Al Bashir and surrendering him to the Court.
23 In particular, the Supreme Court of Appeal of South Africa has concluded that the
24 conduct of the Government of South Africa was, "inconsistent with South Africa's
25 obligations in terms of the Rome Statute and section 10 of the Implementation of the

1 Rome Statute of the International Court Act 27 of 2002, and unlawful." Importantly,
2 this ruling has become final as the Government of South Africa has withdrawn its
3 previously lodged appeal against it. It therefore appears that the Government of
4 South Africa has accepted its obligations to cooperate with the Court under its
5 domestic legal framework. In addition, the present decision comprehensively and
6 conclusively disposes of the matter as concerns South Africa's obligations under the
7 Statute.

8 Therefore, should there have existed any doubt in this regard, it has now been
9 unequivocally established, both domestically and by this Court, that South Africa
10 must arrest Omar Al Bashir and surrender him to the Court. Any possible
11 ambiguity as to the law concerning South Africa's obligations has been removed. In
12 these circumstances, a referral of South Africa's non-compliance with the Court's
13 request for arrest and surrender of Omar Al Bashir would be of no consequence as a
14 mechanism for the Court to obtain cooperation.

15 In addition, the Chamber observes that States Parties have been referred to both the
16 Assembly of States Parties and the United Nations Security Council in six instances
17 in relation to failures to arrest and surrender Omar Al Bashir. However, the past 24
18 meetings of the Security Council of the United Nations following the adoption of
19 Resolution 1593, including meetings held on the occasion of the biannual reports
20 made by the Prosecutor of the International Criminal Court to the Security Council
21 of the United Nations, have not resulted in measures against States Parties that have
22 failed to comply with their obligations to cooperate with the Court, despite
23 proposals from different States to develop a follow-up mechanism concerning the
24 referral of States to the Security Council by the Court. As previously expressed by
25 another Chamber of this Court, the absence of any such follow-up is regrettable in

1 that it results in the inability of the Court to exercise its functions and powers under
2 the Statute and renders any referral by the Security Council effectively futile.

3 In view of the specific circumstances of this case, and bearing in mind its discretion
4 under Article 87(7) of the Statute, the Chamber considers that a referral to the
5 Assembly of States Parties or the Security Council of the United Nations of South
6 Africa's non-compliance with the Court's request for arrest and surrender of
7 Omar Al Bashir is not warranted.

8 This concludes the summary of the Chamber's decision. And I will now pass the
9 floor to Judge Marc Perrin de Brichambaut on my right for the summary of his
10 individual opinion.

11 You have the floor.

12 JUDGE PERRIN DE BRICHAMBAUT: [15:00:24] (Interpretation) Thank you,
13 your Honour. I will now speak in French.

14 I wish to say that I subscribe to the Chamber's ruling that South Africa has failed to
15 comply with the obligation to honour the request for cooperation made by the Court
16 by refusing to arrest Omar Al Bashir and surrender him to the Court.

17 I also concur in the Chamber's decision that it is, all the same, not justified to refer
18 the matter to the Assembly of States Parties or to the United Nations Security
19 Council.

20 I shall begin by setting out the reasons why I agree with the conclusions of the
21 majority, namely that Omar Al Bashir does not enjoy immunity in relation to arrest
22 and surrender. However, given that I do not share the analysis made by the
23 majority and the legal foundation thereof, I think it is necessary to make a number of
24 points.

25 I will now deal with the underlying legal issues of the case, particularly issues

1 dealing with immunity under international law of Omar Al Bashir in relation to
2 arrest and surrender.

3 My position is based on an interpretation of the 1948 Convention on the Prevention
4 and Punishment of the Crime of Genocide, also on the obligation that this
5 Convention creates for States Parties.

6 South Africa and Sudan are both parties to the genocide convention, Sudan ever
7 since 11 January 2004 and South Africa ever since 10 March 1999.

8 On 12 July 2010, Pre-Trial Chamber I issued a warrant of arrest for Omar Al Bashir
9 on the basis of alleged individual criminal responsibility under Article 25(3)(a) of the
10 Statute for genocide, in the meaning of paragraphs (a), (b) and (c) of Article 6 of the
11 Statute. Pre-Trial Chamber I found that there were reasonable grounds to believe
12 that acts of genocide had been committed between April 2003 and 14 July 2008
13 throughout the entire Darfur region.

14 This is the backdrop against which the immunity of Omar Al Bashir must be
15 reviewed in light of obligations upon Sudan and South Africa as Parties to the
16 Genocide Convention. It is important to realise what these obligations are and what
17 the consequences are in relation to contrary obligations that South Africa may have
18 to Sudan and to the Court, as provided in Article 98 of the Statute, not only under
19 customary law but under treaty law.

20 In my view, the combined effect of a literal interpretation and a contextual
21 interpretation of Article 4 of the Genocide Convention, along with an analysis of the
22 purpose and aim of the treaty, leads to this conclusion. When State officials must
23 respond to allegations of genocide, they do not enjoy personal immunity. Pursuant
24 to Article 6 of the Convention, these immunities are lifted at the time of proceedings,
25 particularly before an international criminal court. The International Criminal

1 Court clearly is such a court, an international criminal court.

2 Given that personal immunities are incompatible with the obligations of parties to
3 the Genocide Convention, Sudan must be deemed to have renounced the immunity
4 of its state officials at the time that the country acceded to the Convention. Thus, I
5 believe that owing to Sudan and South Africa's full fledged participation in the
6 Genocide Convention is such that Omar Al Bashir's immunity is lifted, thus creating
7 an obligation upon parties to the said Convention to arrest Mr Al Bashir when he is
8 upon their territory.

9 South Africa was duty bound to review whether and how the convention could
10 apply to Omar Al Bashir when he was upon South African territory given that he
11 had been subject to a warrant for his arrest for genocide. South Africa itself
12 invoked Article 98(1) of the Statute. In so doing, South Africa should have tried to
13 determine whether the Court's request to arrest and surrender Mr Al Bashir
14 was -- obliged it to act accordingly under its obligations. However, South Africa
15 did not do so. The conditions provided for in Article 98(1) have been met because
16 of Sudan's prior accession to the Genocide Convention. Consequently, South Africa
17 would not have acted in an inconsistent manner with its obligations under
18 international law. When it comes to the immunity of a person from a third state, as
19 set out under Article 98 of -- this would not have been incompatible if South Africa
20 had arrested Omar Al Bashir and surrendered him to the Court. Mr Al Bashir's
21 immunity was lifted because of Sudan's accession to the genocide convention.

22 In light of the horizontal dealings with between Sudan and South Africa there was
23 no hindrance to the Court's request to arrest and surrender Omar Al Bashir. By not
24 proceeding with the arrest of Omar Al Bashir, South Africa failed to comply with its
25 obligation under the Statute.

1 However, I do believe that it is necessary to make a number of additional points by
2 way of an attentive reading of the various legal positions that were taken before the
3 Chamber.

4 The legal foundations of the Chamber's conclusions are extremely important. I do
5 not entirely -- do not entirely agree with certain point taken by the majority and I
6 believe a more detailed analysis is needed.

7 My individual minority decision -- or opinion, rather, will deal with a number of
8 issues.

9 Did the referral by the Security Council place Sudan in a position identical to that of
10 a States Party, thus leading to the lifting of Al Bashir's immunity under Article 27 of
11 the Statute?

12 In this regard, if one reviews the various submissions made by the Prosecution and
13 the submissions of South Africa, one sees that the various submissions are supported
14 by certain elements of the Statute by doctrine and that in both cases some elements
15 are valid. In light of the divergences between these various submissions, it is not
16 possible to draw clear-cut conclusions regarding the issue of whether or not the
17 referral by the Security Council of Darfur situation to the Court placed Sudan in a
18 situation equivalent to that of a State Party to the Statute.

19 That is why, given the current status of law one cannot determine exclusively on the
20 basis of the legal effects of United Nations Security Council Resolution 1593 whether
21 or not Article 27(2) of the Statute, namely -- or, Article 98(1) of the Statute apply
22 between the Court, South Africa and Sudan.

23 Let me turn now to the second issue. Did UN Security Council Resolution 1593
24 implicitly lift the immunity of Omar Al Bashir?

25 In relation to this second issue, a detailed interpretation of the substance of

1 Resolution 1593, on the basis of laws set out by the International Court of Justice,
2 leads one to a number of results that are both contradictory and unclear. The
3 wording of the resolution itself, the various interventions made by States before the
4 Security Council and the States' passive attitude to Omar Al Bashir are such that one
5 cannot draw clear-cut conclusions.

6 Thus, as was the case for the issue of Sudan's status subsequent to adoption of
7 Resolution 1593 by the Security Council, the current state of law does not allow one
8 to provide a clear answer to the question of whether or not this resolution implicitly
9 lifted the immunities of Omar Al Bashir.

10 Now allow me to turn to the third question.

11 Does the involvement of an international court affect the application of the rule of
12 customary international law that governs the personal immunity of Heads of State as
13 part of dealings amongst States?

14 Regarding this third question, the various positions adopted by States, whether or
15 not they are Parties to the Rome Statute, during discussions within the Security
16 Council, at meetings of regional organisations, at meetings of the Assembly of States
17 Parties, in responses to requests for cooperation from the OTP of the ICC on 25
18 separate occasions before the Security Council show that countries are extremely
19 reluctant to involve themselves clearly in the situation and to take practical
20 measures.

21 As the Presiding Judge has just noted, the Chamber asked the United Nations to
22 provide, and States to provide written submissions on the issue of South Africa's
23 non-cooperation. Only a single response was received. And this silence nearly a
24 complete silence bears witness to the sensitive nature of the immunity of sitting
25 Heads of State and issues that deal with the immunity of those who govern. And

1 we also see that there is a great deal of prudence in this regard.

2 It is difficult to determine whether or not the rule of customary international law
3 concerning the immunity of Heads of State, sitting Heads of State applies or not in
4 the same way.

5 In light of the various possible and legitimate interpretations of statutes, custom and
6 doctrine, I am of the view that the current state of international law does not allow
7 one to draw clear-cut conclusions on any of these three questions.

8 Unlike the majority of the Chamber, I come to the conclusion that the full-fledged
9 participation of Sudan and South Africa in the Genocide Convention has as its effect
10 the lifting of the immunity of Al Bashir, thus placing an obligation on parties to said
11 Convention to arrest this person when he is upon their territory and to surrender
12 him to the Court.

13 South Africa was duty bound to execute this obligation. Al Bashir was subject to a
14 warrant of arrest for genocide. It did not do so. By not arresting Al Bashir, South
15 Africa failed to comply in its obligations under the Statute.

16 And I thank you, your Honour.

17 PRESIDING JUDGE TARFUSSER: [15:14:14] Thank you very much.

18 This concludes today's hearing, which had the purpose, as said at the beginning, to
19 deliver the Chamber's decision under Article 87(7) of the Statute, but before
20 adjourning I would like maybe to give guidance to the representatives of South
21 Africa which are probably not very familiar with the proceedings in this Court, and
22 as the representatives of South Africa also requested, give guidance as far as the
23 possibility to appeal this decision is concerned. In doing so, I would direct the
24 representatives of South Africa to the provisions of Article 82(1)(d) of the Statute and
25 Rule 154 of the Rules of Procedure and Evidence.

1 The decision, in any case, may only be appealed with the Chamber's authorisation
2 and, therefore, if South Africa wishes, or it will be determined after having read the
3 whole decision, of course, to appeal the decision itself, it must file an application for
4 leave to appeal within five days from the rendering of the decision. And in this
5 application, it has to identify one or more issues arising from the decision which
6 would meet the requirements of Article 82(1)(d) of the Statute.

7 I hope this is enough guidance.

8 And, therefore, the hearing is concluded. I thank the representatives of the
9 Republic of South Africa, the Prosecutor, our assistants, colleagues, the public and
10 adjourn the hearing.

11 The hearing is adjourned. Thank you.

12 THE COURT USHER: [15:16:38] All rise.

13 (The hearing ends in open session at 3.16 p.m.)