



Original: English

No.: ICC-02/05-01/09  
Date: 8 December 2016

**PRE-TRIAL CHAMBER II**

**Before:** Judge Cuno Tarfusser, Presiding Judge  
Judge Marc Perrin de Brichambaut  
Judge Chang-ho Chung

**SITUATION IN DARFUR, SUDAN**

***THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR***

**Public**

**Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to 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**

Fatou Bensouda

James Stewart

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

Competent authorities of  
the Republic of South Africa

**Others**

United Nations

Secretariat of the Assembly of States  
Parties

**REGISTRY**

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**Registrar**

Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Pre-Trial Chamber II** (the “Chamber”) of the International Criminal Court (the “Court”) issues this decision scheduling a public hearing for the purposes of a determination under article 87(7) of the Rome Statute (“Statute”) with respect to the Republic of South Africa (“South Africa”).

## **I. PROCEDURAL HISTORY AND BACKGROUND**

1. On 31 March 2005, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593(2005), referring the situation in Darfur, Sudan to the Prosecutor of the Court.<sup>1</sup>
2. On 4 March 2009 and 12 July 2010, Pre-Trial Chamber I issued two warrants of arrest against Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”).<sup>2</sup> These warrants of arrest remain to be executed. As a State Party to the Statute, South Africa was notified of the requests for arrest and surrender of Omar Al Bashir to the Court pursuant to the two warrants on 5 March 2009 and 16 August 2010 respectively.<sup>3</sup>
3. On 28 May 2015, acting in compliance with the Chamber’s orders and on the basis of media reports of Omar Al Bashir’s potential travel to South Africa for the purposes of attending the African Union summit scheduled from 7 to 15 June 2015, the Registrar notified to the competent authorities of South Africa a request for cooperation requesting South Africa: (i) to arrest and surrender Omar Al Bashir to the Court should he enter into the territory of South Africa in accordance with articles 86 and 89 of the Statute; and, in case of any problem impeding or preventing the execution of the request for cooperation (ii) to consult with the Court without delay in order to resolve the matter.<sup>4</sup>

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<sup>1</sup> S/RES/1593 (2005).

<sup>2</sup> ICC-02/05-01/09-1 and ICC-02/05-01/09-95.

<sup>3</sup> See reference in ICC-02/05-01/09-239-Conf-Anx1.

<sup>4</sup> ICC-02/05-01/09-239-Conf-Anx1.

4. On 12 June 2015, the Registrar informed the Chamber that the Embassy of South Africa had requested a meeting between the Registrar and the Chief State Law Adviser from the Ministry of Justice, with a view to engaging into consultations pursuant to article 97 of the Statute.<sup>5</sup> A meeting before Judge Cuno Tarfusser with the representatives of South Africa was held on the same day, with representatives of both the Office of the Prosecutor and of the Registry also attending.<sup>6</sup>

5. During this meeting, Judge Cuno Tarfusser pointed out, *inter alia*, that: (i) all of the issues tabled by South Africa had already been decided upon by the Court; and (ii) the consultations had no suspensive effect on South Africa's outstanding obligations under the Statute to cooperate with the Court. On 13 June 2015, Judge Cuno Tarfusser issued a decision stating that there was no need for any additional reminder to South Africa or further clarification as regards the existence of its obligation to immediately arrest and surrender Omar Al Bashir to the Court.<sup>7</sup>

6. Despite the Court's request for arrest and surrender of Omar Al Bashir to the Court, South Africa did not arrest and surrender him while he was on South Africa's territory between 13 and 15 June 2015.

7. On 4 September 2015, the Chamber held that these events warranted the opening of proceedings pursuant to article 87(7) of the Statute and, requested, in line with regulation 109 of the Regulations of the Court ("Regulations"), the competent authorities of South Africa to submit their "views on the events surrounding Omar Al Bashir's attendance of the African Union summit in Johannesburg on 13, 14 and 15 June 2015, with particular reference to their failure to arrest and surrender Omar Al Bashir, for the purposes of the Chamber's determination pursuant to article 87(7) of the Statute".<sup>8</sup> The time limit was set by the Chamber at 5 October 2015.

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<sup>5</sup> ICC-02/05-01/09-239-Conf.

<sup>6</sup> See transcripts of this meeting at ICC-02/05-01/09-243-Anx2.

<sup>7</sup> ICC-02/05-01/09-242.

<sup>8</sup> ICC-02/05-01/09-247.

8. Upon a request by South Africa for an extension of this time limit,<sup>9</sup> the Chamber, on 15 October 2015, granted South Africa “until such time as the currently ongoing relevant judicial proceedings before the courts of South Africa are finalised”.<sup>10</sup> In addition, the Chamber ordered “the competent authorities of the Republic of South Africa to promptly report to the Chamber on any developments in the relevant domestic judicial proceedings as they occur”.<sup>11</sup>

9. Following the Chamber’s decision, South Africa submitted three reports concerning the progress of the ongoing domestic judicial proceedings before its national courts on 21<sup>12</sup> and 24<sup>13</sup> December 2015, and on 4 May 2016.<sup>14</sup>

10. On 30 November 2016, the Registrar filed in the record of the case a note verbale addressed by South Africa to the Secretariat of the Assembly of States Parties and dated 21 November 2016.<sup>15</sup> This note verbale states that “the domestic court processes have now been concluded” and that “South Africa will be submitting its views and observations for the purposes of the Article 87(7) proceedings”. In this regard, South Africa requests the Court to provide “guidance on the rules and procedures which would govern the submission of its views and observations in terms of Article 87(7)”. .

## II. APPLICABLE LAW

11. The Chamber notes articles 21(1)(a) and (b), 82(1)(d), 86, 87, 89, 97 and 98 of the Statute, rules 103, 176(2) and 195(1) of the Rules of Procedure and Evidence (“Rules”), regulation 109(2), (3) and (4) of the Regulations of the Court

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<sup>9</sup> ICC-02/05-01/09-248 and ICC-02/05-01/09-Anx I.

<sup>10</sup> ICC-02/05-01/09-249.

<sup>11</sup> *Id.*

<sup>12</sup> ICC-02/05-01/09-256 and ICC-02/05-01/09-256-Anx.

<sup>13</sup> ICC-02/05-02/09-257.

<sup>14</sup> ICC-02/05-01/09-258 and ICC-02/05-01/09-258-Anx.

<sup>15</sup> ICC-02/05-01/09-273-Anx-1.

("Regulations") and article 17(3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

### III. DETERMINATION BY THE CHAMBER

12. Given that the domestic proceedings in South Africa are now concluded, South Africa shall be heard, in accordance with regulation 109 of the Regulations, about a possible finding of non-compliance for its failure to arrest and surrender Omar Al Bashir to the Court.

13. While the facts of Omar Al Bashir's visit to South Africa, and the circumstances of his non-arrest by the latter, are relatively clear, there remain a number of issues which may impact on the determination whether or not a finding of non-compliance is warranted. Because these issues have a direct impact on the question whether there has been a failure to comply with a request to cooperate by the Court, the Chamber is the competent entity to resolve these matters, in line with article 87(7) of the Statute.

14. In order to resolve all the relevant questions, the Chamber considers it appropriate to accord South Africa, as well as the Prosecutor, whose request to the Chamber under article 58 of the Statute is at the origin of the warrants of arrest against Omar Al Bashir, an opportunity to fully present their views in a public hearing before the Chamber. Considering that the Prosecutor initiated an investigation into the situation in Darfur, Sudan, following a referral by the Security Council of the United Nations, representatives of United Nations, as appropriate, shall also be given an opportunity to attend the hearing hereby scheduled and be heard.

15. The purpose of this hearing is to obtain all relevant submissions, in fact and in law, with respect to:

- (i) whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on South Africa's territory despite having received a request by the Court

under articles 87 and 89 of the Statute for the arrest and surrender of Omar Al Bashir; and, if so,

(ii) whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute are warranted.

16. In the interest of a focused and streamlined discussion at the hearing, the abovementioned participants shall be accorded an opportunity to make written submissions prior to the hearing.

17. Moreover, considering that the issue is of general importance, the Chamber considers it appropriate to permit, under rule 103 of the Rules, all interested States Parties to the Statute to provide, if they so wish, any relevant submission, in writing and prior to the hearing, which they would wish to bring to the attention of the Chamber for the purposes of its final determination on the matter. The present decision is therefore notified to the Secretariat of the Assembly of States Parties for transmission to the States Parties as appropriate.

18. Finally, the Chamber notes that South Africa states in the note verbale received by the Chamber on 30 November 2016 that “it is considering a appeal against the decision of the Pre-Trial Chamber made on 13 June 2015 and requires guidance on how an appeal should be filed”.<sup>16</sup> The Chamber clarifies that said decision could have only been appealed with the leave of the Chamber under article 82(1)(d) of the Statute, but that, irrespective of any other consideration in this regard, the time limit to request such leave has expired, in line with rule 155(1) of the Rules.<sup>17</sup>

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<sup>16</sup> ICC-02/05-01/09-239-Conf-Anx1, p. 3.

<sup>17</sup> The present proceedings for the purpose of a determination under article 87(7) of the Statute will, however, result in a decision to which an appeal with the leave of the Chamber may equally be possible under the conditions set by article 82(1)(d) of the Statute.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**DECIDES** to convene a public hearing before the Chamber on 7 April 2017, in order to discuss any issues relevant to the Chamber's determination of whether to make a finding of non-compliance by South Africa with the Court's request for arrest and surrender of Omar Al Bashir and refer the matter to the Assembly of States Parties and/or the Security Council of the United Nations under article 87(7) of the Statute;

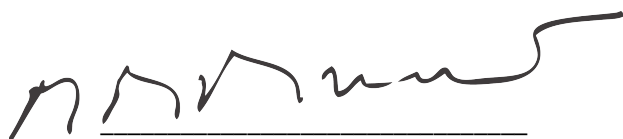
**INVITES** the Prosecutor, representatives of South Africa and representatives of the United Nations to attend the hearing, and to make, if they so wish, written submissions prior to the hearing, by 17 March 2017; and

**INVITES** any interested State Party to the Rome Statute, if they so wish, to make written submissions on the matter, by 24 February 2017.

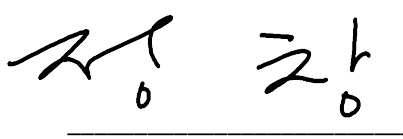
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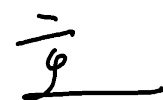
**Judge Cuno Tarfusser**  
Presiding Judge



**Judge Marc Perrin de Brichambaut**



**Judge Chang-ho Chung**



Dated 8 December 2016

At The Hague, The Netherlands