

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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**No.: ICC-02/05-01/09**

**Date: 17 March 2017**

**PRE-TRIAL CHAMBER II**

**Before: Judge Cuno Tarfusser, Presiding Judge  
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**

**Public Document**

**Submission from the Government of the Republic of South Africa for the  
purposes of proceedings under Article 87(7) of the Rome Statute**

**Source: The Government of the Republic of South Africa  
Pretoria**

*VBK.*

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

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**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

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**States' Representatives**  
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**Amicus Curiae**

## **REGISTRY**

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**Registrar**  
Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

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## 1. PROCEDURAL HISTORY

1. On 31 March 2005, the United Nations Security Council (“UNSC”), acting under Chapter VII of the Charter of the United Nations (“UN Charter”), 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, respectively, Pre-Trial Chamber I (“PTC I”) issued two warrants of arrest against Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”).<sup>2</sup>

3. On 28 May 2015, following the news reports of Omar Al Bashir’s potential travel to South Africa, the Registrar notified the competent authorities of South Africa of the request for its cooperation to: (i) arrest and surrender Omar Al Bashir to the Court in accordance with Articles 86 and 89 of the Statute should he enter into the territory of South Africa; and (ii) in case of any problem impeding or preventing the execution of the request for cooperation, consult with the Court without delay in order to resolve the matter.<sup>3</sup>

4. On 12 June 2015, South Africa requested to consult with the Court in terms of Article 97 of the Rome Statute.<sup>4</sup> On 12 June 2015, the Registry submitted a document titled “Urgent request from the authorities of South Africa”<sup>5</sup> in which they notified the Chamber of the Article 97 request. In response, the Office of the Prosecutor (“OTP”) submitted an urgent confidential request<sup>6</sup> to the Chamber titled “Urgent request from the authorities of South Africa”. In the OTP’s submission, it stated, *inter alia*, that precedent required that South Africa was obliged to arrest Omar Al Bashir and that any Article 97 consultations should take the form of a hearing on 12 June 2015 at 17h00.

<sup>1</sup> S/RES/1593 (2005), 31 March 2005, available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1593%20\(2005\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1593%20(2005)).

<sup>2</sup> *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, 4 March 2009 (ICC-02/05-01/09-1) and *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir*, 12 July 2010 (ICC-02/05-01/09-95).

<sup>3</sup> *Note Verbale* from the Registry of the International Criminal Court, Reference 2015/ER/38/aab/CB, 28 May 2015.

<sup>4</sup> *Note Verbale* from the Embassy of the Republic of South Africa to the Kingdom of the Netherlands, Reference 039/2015, 12 June 2015 (ICC-02/05-01/09-243-Anx1).

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

<sup>6</sup> *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Prosecution’s Urgent Response to the Registry’s submission titled “Urgent request from the Authorities of South Africa” (ICC-02/05-01/09-239-Conf)*, 12 June 2015; ICC-02/05-01/09-240.

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5. On 12 June 2015 at 17h00, Single Judge Tarfusser convened a meeting with a delegation of the Embassy of South Africa to the Kingdom of the Netherlands, representatives of the Registry and of the OTP.<sup>7</sup>

6. During this meeting the Ambassador of the Republic of South Africa read the *Note Verbale* dated 12 June 2015<sup>8</sup>. The meeting ended just before 18h00 with no clarity on the procedures for the way forward.<sup>9</sup>

7. On 13 June 2015, at 20h52 the OTP filed with the Registry an urgent “Request for an order further clarifying whether article 97 consultations with South Africa had concluded and that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir” (“the Urgent Request”).<sup>10</sup>

8. It is common cause that on the evening of 13 June 2015, the Presiding Judge of the Pre-Trial Chamber II (“the 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 Omar Al Bashir* (“the June Decision”) in response to the Urgent Request by the OTP clarifying that the South Africa is under the obligation immediately to arrest and surrender Omar Al Bashir to the Court.<sup>11</sup>

9. On 4 September 2015, the 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 Omar Al Bashir, inter alia* directing the

<sup>7</sup> *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015*, 17 June 2015 (ICC-02/05-01/09-243), para 1.

<sup>8</sup> ICC-02/05-01/09-243-Anx1

<sup>9</sup> Transcript of the 12 June meeting (ICC-02/05-01/09-243-Anx2), p. 24, line 6.

<sup>10</sup> *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Prosecution’s Urgent Request 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*, 13 June 2015 (ICC-02/05-01/09-241); *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Prosecution’s submissions on Annex 6 of the Registry’s submission entitled “Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015 (ICC-02/05-01/09-243-Conf-Anx6)”*, 24 June 2015 (ICC-02/05-01/09-244), para 10.

<sup>11</sup> *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: 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*, 13 June 2015 (ICC-02/05-01/09-242); ICC-02/05-01/09-244, para 15.

VBK

competent authorities of South Africa “to submit, no later than Monday, 5 October 2015, their views on the events surrounding Omar Al Bashir’s attendance of the African Union (“AU”) Summit, 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 Rome Statute (“the Order”).<sup>12</sup> An extension of this time limit was granted on 15 October 2015, until the relevant judicial proceedings before the courts of South Africa were finalised while South Africa had to report promptly to the Court on any developments in the relevant domestic judicial proceedings as they occur.<sup>13</sup>

10. On 26 October 2015, the OTP requested the Chamber for it to be heard should the domestic legal proceedings in South Africa not be finalised by 31 December 2015 and for the confirmation of South Africa’s continuing obligations to arrest and surrender Omar Al Bashir and for reclassification of filings.<sup>14</sup> The OTP sought such relief “out of concern for the potentially open-ended time frame that may result from the need for resolution of the domestic proceedings; indications that Al Bashir may travel to South Africa again; and the manner in which the proceedings have been represented in South Africa’s submissions in support of its request for an extension of time.”<sup>15</sup>

11. On 21 December 2015, South Africa filed a submission with the Chamber<sup>16</sup> in which it submitted a report that detailed the progress of the domestic judicial proceedings that were ongoing in South Africa. In addition, South Africa responded to the OTP’s filing dated 26 October 2015. South Africa argued that the OTP’s arguments as to the urgency of the matter were flawed, since the assertion by the OTP that court processes in South Africa are unpredictable could not go unchallenged and that the OTP failed to demonstrate the urgency of their request for South Africa to submit its views.

<sup>12</sup> *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-02/05-01/09-247).

<sup>13</sup> *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87(7) of the Rome Statute*, 15 October 2015 (ICC-02/05-01/09-249), para 11.

<sup>14</sup> *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Prosecution request for it to be heard should the domestic legal proceedings in the Republic of South Africa not be finalised by 31 December 2015, and for confirmation of South Africa’s continuing obligations to arrest and surrender Omar Al Bashir and for reclassification of filings*, 26 October 2015 (ICC-02/05-01/09-253).

<sup>15</sup> ICC-02/05-01/09-253, para 4.

<sup>16</sup> *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision on the request of the Republic of South Africa - for an extension of the time limit for submitting their views for the purposes of proceedings under article 87(7) of the Rome Statute* of 15 October 2015 (ICC-02/05-01/09-256), 21 December 2015.

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12. On 24 December 2015, South Africa made a further supplementary submission<sup>17</sup> in which it informed the Chamber that the Supreme Court of Appeal had set a date for the hearing in the *Matter between the Southern Africa Litigation Centre and the Minister of Justice and Correctional Services and Others* relating to the visit to South Africa by President Al-Bashir.

13. On 4 May 2016, South Africa again notified the Chamber<sup>18</sup> of the ongoing judicial proceedings before the courts of South Africa. South Africa noted that the Supreme Court of Appeal had, on 12 February 2016, heard oral arguments on a number of legal and procedural issues. A copy of the judgment of the Supreme Court of Appeal, dated 15 March 2016, was also appended to South Africa's submission to the Chamber.

14. On 21 November 2016, South Africa delivered a *Note Verbale* to the Registry of the Court, informing it that South Africa's domestic proceedings had concluded and that South Africa would submit its views and observations for the purposes of the Article 87(7) proceedings.<sup>19</sup>

15. On 8 December 2016, the Chamber issued a decision to convene a public hearing on 7 April 2017 under Article 87(7) of the Rome Statute to discuss any issues that are relevant to the Chamber's determination of whether to make a finding of non-compliance by South Africa.<sup>20</sup>

16. The Chamber has invited South Africa to make written and oral submissions at the Article 87(7) hearing on:

<sup>17</sup> *The Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87(7) of the Rome Statute* of 15 October 2015, 24 December 2015 (ICC-02/05-01/09-257).

<sup>18</sup> *The Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87(7) of the Rome Statute* of 15 October 2015, 4 May 2016 (ICC-02/05-01/09-258).

<sup>19</sup> *Note Verbale* addressed to the Secretariat of the Assembly of States Parties (NV 66/2016), 21 November 2016 (ICC-02/05-01/09-273-Anx1).

<sup>20</sup> *The Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: 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*, 8 December 2016 (ICC-02/05-01/09-274).

VSK

(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.”<sup>21</sup>

## 2. CONTEXT

17. This matter should be considered in the context of South Africa’s commitment to international peace and security, the protection of human rights and the fight against impunity. This commitment was forged in the struggle for liberation against the inhumanity of colonialism and apartheid. It is based on the values of our nation, namely human rights, freedom and dignity as aspired to in the Freedom Charter, which was adopted by the people of South Africa in 1955 and is enshrined in our Constitution.

18. It is, therefore, not surprising that South Africa played a significant role in the international negotiations on the establishment of the Court and was one of the first signatories to the Rome Statute in 1998.

19. South Africa, from its own experience and involvement in international peacekeeping missions in Africa, and particularly in Sudan, and inter-related peace processes on a bilateral basis, including under AU mandates, has always expressed the view that to keep peace, one must first make peace.<sup>22</sup> This awareness is based on South Africa’s direct involvement, on the ground, in peace efforts, including the enforcement of peace on the African continent, where mandated.

<sup>21</sup> ICC-02/05-01/09-274, para 15.

<sup>22</sup> Opening Statement by Ms Maite Nkoana-Mashabane, Minister of International Relations and Cooperation, delivered at the General Debate of the Fourteenth Meeting of the Assembly of States Parties of the International Criminal Court, The Hague, 18 – 26 November 2015, available at: <http://www.dirco.gov.za/docs/speeches/2015/mash1118.htm>.

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20. The difficult peace-justice relationship and the dilemma that South Africa was faced with, were indeed foreseen by the drafters of the Rome Statute when they authorised the UNSC not only to refer a situation to the Court, but also, in terms of Article 16 and, acting under its Chapter VII peace and security mandate, to defer it for a specific period in order to give peace a chance to be attained. Despite several efforts by the AU to obtain a deferral, such deferral was not forthcoming from the UNSC.<sup>23</sup>

21. This is the context in which the hosting of the AU Summit by South Africa should be seen. The AU decided in January 2015 that South Africa would host the next AU Summit in June 2015, following Chad's decision not to host the Summit. The AU Summit, by design, comprises various high level and technical meetings that require the attendance and participation of representatives of States, including Ministers and Heads of State and Government. The AU Summit hosted in South Africa included the 30th Ordinary Session of the Permanent Representatives Committee, the 27th Ordinary Session of the Executive Council and the 25th Ordinary Session of the Assembly of the AU from 7 to 15 June 2015.<sup>24</sup> According to AU practice, Member States do not require an invitation from host Governments to attend Summits, and all Member States are allowed to attend. South Africa often hosts international meetings and negotiations, and serves as the host for many international organisations, including Agencies of the AU. As indicated by Belgium in its submission to the Court, the hosting off international meetings by states and international organisations are a complex matter.<sup>25</sup>

22. Clearly these complexities are not restricted to South Africa as is shown in the experiences of Chad, Malawi, Democratic Republic of Congo, Djibouti, Nigeria and Uganda. All of these States have come before the Court raising similar challenges in implementing the Court's requests for cooperation.<sup>26</sup>

<sup>23</sup> A.S. Knottnerus "The Security Council and the International Criminal Court: The Unsolved Puzzle of Article 16" *Netherlands International Law Review*, Vol LXI No. 2 (2014) p.195 – 224.

<sup>24</sup> Decision of the AU Assembly on the Date and Venue of the 25th Ordinary Session of the Assembly of the African Union in June 2015, January 2015 (Assembly/AU/Dec.562 (XXIV), available at: <https://www.au.int/en/decisions/assembly>).

<sup>25</sup> *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir: Annex to the Transmission of written observations from the Kingdom of Belgium, dated 20 February 2017, submitted pursuant to Pre-Trial Chamber II's Decision ICC-02/05-01/09-274, 23 February 2017 (ICC-02/05-01/09-277).*

<sup>26</sup> *Prosecutor v Omar Al Bashir: Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011 (ICC-02/05-01/09-140); Prosecutor v Omar Al Bashir: Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 26 March 2013 (ICC-02/05-*

VBK

23. As part of hosting the AU Summit, South Africa was required to make all necessary arrangements for the Summit, which included the signing of the *Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organization of the Meetings of the 30th Ordinary Session of the Permanent Representatives Committee from 7 to 9 June 2015; the 27<sup>th</sup> Ordinary Session of the Executive Council from 10 to 12 June 2015 and the 25th Ordinary Session of the Assembly on 14 to 15 June 2015 in Pretoria (7 and 8 June 2015) and Johannesburg (10 to 15 June 2015), Republic of South Africa* (“the Host Agreement”). The Host Agreement incorporated the immunities contained in the General Convention on the Privileges and Immunities of the Organization of African Unity (“General Convention”), which provides immunities and privileges to Heads of State from African States.

24. It is the submission of South Africa that international criminal courts and tribunals are created for a specific purpose and have to operate within the cultural, political and diplomatic realities that confront them when dealing with particular issues. Therefore, the Court risks undermining its effectiveness if it fails to recognise these contextual realities of each case.

### 3. APPLICABLE LAW

25. In its Decision of 8 December 2016, this Chamber noted that 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 (“the Rules”), Regulation 109(2), (3) and (4) of the Regulations of the Court (“the Regulations”) and Article 17(3) of the Negotiated Relationship Agreement

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01/09-151); *Prosecutor v Omar Al Bashir: Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute*, 11 July 2016 (ICC-02/05-01/09-266); *Prosecutor v Omar Al Bashir: Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute*, 11 July 2016 (ICC-02/05-01/09-267); *Prosecutor v Omar Al Bashir: Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court*, 5 September 2013 (ICC-02/05-01/09-159); *The Prosecutor v. Omar Hassan Ahmad Al Bashir: Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 13 December 2011; *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, 9 April 2014 (ICC-02/05-01/09-195).

VBR

between the International Criminal Court (“the Court”) and the United Nations as the applicable law.

26. South Africa submits that in addition to these provisions, the whole of Part 9 of the Statute, customary international law and treaty law that includes the Host Agreement are applicable.<sup>27</sup>

#### 4. ELEMENTS OF THE SUBMISSION

27. For the Chamber’s convenience, the arguments contained in this submission are structured as follows:

- 27.1. Article 97 Consultations;
  - 27.1.1. The Request for Consultations;
  - 27.1.2. Purpose and Nature of the Consultations;
  - 27.1.3. Violation of the Right to Due Process;
- 27.2. Article 87(7) of the Rome Statute;
- 27.3. Obligation to Arrest and Surrender under Article 87(7) of the Rome Statute;
  - 27.3.1. Customary International Law Obligation to Respect Immunities in National Courts;
  - 27.3.2. Treaty Obligations to Respect Immunity;
  - 27.3.3. Implied Waiver of Immunity *Ratione Personae* by UNSC Resolution 1593;
  - 27.3.4. Obligations Placed on States in terms of UNSC Resolution 1593;
- 27.4. Summary; and
- 27.5. Relief Sought.

#### 5. ARTICLE 97 CONSULTATIONS

28. South Africa objects in the strongest terms to the manner in which its request for consultation in terms of Article 97 of the Statute was dealt with by the Court. It also registers its concern that a similar situation should never again occur in the event that another sovereign

<sup>27</sup> Host Agreement signed on 5 June 2015.

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State would request to consult with the Court.

29. It is South Africa's submission that in dealing with the request for consultations, the Court erred in three fundamental aspects. Firstly, by regarding the request for consultations by the Ambassador of the Republic of South Africa ("the South African Ambassador") as the consultation itself; secondly, by treating the request for consultations directed at the Registry and intended to be a diplomatic and political process, as a quasi-judicial process without any applicable procedures to guide the process; and thirdly, that in doing so the basic principles of natural justice and due process was not adhered to.

30. In order to understand the objection and concerns of South Africa it is necessary to reflect on the process that evolved in respect to the request for consultation by South Africa.

31. As indicated above, South Africa responded to the request from the Registry in its *Note Verbale* dated 28 May 2015 that "in case the authorities of South Africa can already identify any problem which may impede or prevent the execution of the request for arrest and surrender of Omar Hassan Al Bashir", they should, pursuant to Article 97 of the Rome Statute, "consult with the Court without any delay in order to resolve the matter."<sup>28</sup>

32. It is noted that requests to States Parties to the Rome Statute to consult with the Court is a common and standard practice when requests for cooperation are made by the Court, for example Malawi.<sup>29</sup> The Court in the *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, 9 April 2014 ("DRC case") lamented the fact that the DRC did not consult with the Court as requested and that Article 87 proceedings may have been avoided through Article 97 consultations.<sup>30</sup>

### 5.1 The Request for Consultations

<sup>28</sup> Ref 2015/ER/38/aab/CB.

<sup>29</sup> *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir: Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir*, 6 March 2009 (ICC-02/05-01/09-7); *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir: Supplementary Request to the Republic of the Sudan for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 22 July 2010 (ICC-02/05-01/09-101); *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir: Decision requesting observations about Omar Al-Bashir's recent visit to Malawi*, 19 October 2011 (ICC-02/05-01/09-137).

<sup>30</sup> ICC-02/05-01/09-195, para 22.

VBK

33. As such requests to States Parties to consult are common practice by the Court, it is reasonable and fair that South Africa expected that there would have been procedures in place applicable to such consultations. From the events that unfolded, it soon became evident that there was in fact no procedures to deal with requests from for the Court.

34. The request for consultations was made with the intention to cooperate with the Court in accordance with South Africa's history of support for, and cooperation with, the Court. South Africa intended to share with the Court that it had identified problems which could have hampered and impeded the implementation of the request for cooperation.

35. Furthermore, various Chambers have recognised that States Parties have the obligation to consult with the Court when faced with an issue of competing international law obligations as provided for in Article 98.<sup>31</sup> In this regard, in the *DRC* case, the Chamber indicated that the claim by the DRC that it was "in a delicate and unmanageable situation proves that the Congolese authorities should have consulted or notified the Court in accordance with Article 97 of the Statute and Rule 195 of the Rules of the existence of a problem related to article 98(1) of the Statute which prevented it from discharging its obligations as a State Party to the Statute prior to and during the visit of Omar Al Bashir and before his departure."<sup>32</sup>

36. In light of and in line with this guidance by the Court, South Africa was the first sovereign State to respond positively to the request by instructing the South African Ambassador to urgently approach the Court with a request for consultations.<sup>33</sup> The request to the Registry was made when it became a real possibility that the President of Sudan would indeed attend the AU Summit. It is worth noting that at that stage there was no official confirmation of his attendance of the Summit. Such confirmation was only received after the fact by way of a *Note Verbale* from the Embassy of Sudan dated 14 June 2015.<sup>34</sup>

37. In response to the request for consultation by South Africa on 12 June 2015, and

<sup>31</sup> Claus Kress and Kimberly Prost "Article 98", in Otto Triffterer and Kai Ambos (ed) *Rome Statute of the International Criminal Court: A Commentary* p. 2116.

<sup>32</sup> ICC-02/05-01/09-95, para 15

<sup>33</sup> ICC-02/05-01/09-243-Anx2, p. 1, line 12-14; ICC-02/05-01/09-243-Anx1.

<sup>34</sup> *Note Verbale* from the Embassy of the Republic of Sudan (SEP/RSA/DFA/141/2015), 14 June 2015.

V.B.K.

despite the request from the Prosecutor in its *Urgent Response to the Registry's Submission titled "Urgent request from the Authorities of South Africa" (ICC-02/05-01/09-239-Conf)*, in which it sought relief from the Chamber that, if it found that consultations were necessary, it should schedule "a hearing featuring the legal representatives of South Africa, the Prosecution and the Registry" and "that the Chamber issue a decision immediately upon the conclusion of the above hearing"<sup>35</sup>, a meeting in a roundtable table format was convened.<sup>36</sup> The meeting was attended by a delegation of the Embassy of South Africa to the Kingdom of The Netherlands, the representatives of the Registry and the OTP and chaired by a Single Judge.

38. It is apparent from the transcript of this meeting that the Court itself was unclear on how to deal with the request for consultations and what the purpose and nature of the consultations were. After having noted that it was the first time that a request for consultations was made, the Single Judge alluded to the fact that the Court also grappled with what consultations with the Court (meant) because the Court consists of the Judiciary, the OTP and the Registry. He continued that they did not know what the merit of the consultations requested by South Africa were, and whether if it was "merely executive, or if it was political or if it was judicial..."<sup>37</sup> and, in this regard, he stated that the meeting was "between a very strict status of conference and just, say an informal meeting, so we found this middle way".<sup>38</sup>

39. At the said meeting the South African Ambassador read the *Note Verbale* requesting the consultations. The *Note Verbale* alluded to the difficulties that South Africa foresaw with the implementation of the request by the Court, and was not intended nor could it have been regarded as presenting the comprehensive views of South Africa in this matter. The South African Ambassador repeatedly underscored the fact that he was conveying a request for consultations only. He emphasised that the meeting could not be regarded as the consultations itself, as he had no mandate to represent South Africa at the consultations.

40. South Africa submits that it is inappropriate and not acceptable that when the South African Ambassador with a specific mandate to make a request for consultations, and that in

<sup>35</sup> ICC-02/05-01/09-240, para 17

<sup>36</sup> ICC-02/05-01/09-243-Anx2, p. 2, line 3-5.

<sup>37</sup> ICC-02/05-01/09-243-Anx2, p. 1.

<sup>38</sup> ICC-02/05-01/09-243-Anx2, p. 2, line 3-5

VSK

addition he indicated clearly that he was not mandated to represent the Government in the consultations or in proceedings before the Court, that the Court can simply disregard this fact. It would present an untenable situation of expecting the Ambassador to do what he has not been mandated to do.

41. Despite the several requests from the South African Ambassador for clarity on the process going forward, there was no clear outcome to the consultations. When the Single Judge indicated that “they” (South Africa and the Court) will “obviously continue these consultations in driving or in decisions”, South Africa understood that the Article 97 consultation process would continue. This was also duly reported by the Ambassador to the Government in Pretoria.

42. After the conclusion of the meeting, South Africa expected to be issued with a formal communication/notification by the Registry on the arrangements for the consultation, but none was forthcoming.

43. The confusion about the status and outcome of the meeting on 12 June 2015 was apparently also shared by the OTP. This is evident from the fact that the OTP brought an Urgent Request on 13 June 2015, for an order to clarify whether the Article 97 consultations had been concluded and that South Africa was under the obligation to arrest and surrender Omar Al Bashir.<sup>39</sup>

44. The fact that the OTP deemed it necessary to seek clarification on the status of the consultations is confirmation of the fact that the consultations were yet to be scheduled or, at best, still ongoing at that time. Despite these facts and in response to the OTP’s Urgent Request, the June Decision was issued.

## **5.2 Purpose and Nature of the Consultations**

45. In addition, South Africa maintains that consultations provided for in Article 97 are of a political and diplomatic nature and that any other interpretation would be at variance with the Rome Statute, in particular, the letter and spirit of Article 97. Article 97 creates a

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<sup>39</sup> ICC-02/05-01/09-241.

VBK

consultative mechanism aimed at resolving problems that may prevent States Parties from executing requests of the Court.<sup>40</sup> In line with this purpose and to have any value, such consultations can only be of a political and diplomatic nature. In addition, it is noted that the *Note Verbale* from South Africa was not filed as a legal document, but was a diplomatic communication requesting consultations with the Court to resolve matters.

### 5.3 Violation of the Right to Due Process

46. South Africa submits that the management of, and the process of conducting the Article 97 consultations were flawed, unjust and not in accordance with the purpose of Article 97. The process followed can at best be described as a *quasi-judicial* process that was conducted in the absence of applicable rules and clarity.

47. It is undeniable that South Africa was not afforded the opportunity to be appropriately represented at the consultations. In not affording South Africa an opportunity to be represented in a proper forum and to be properly heard, South Africa's fundamental right to justice was violated. South Africa submits that its treatment in the process was blatantly unfair.

48. South Africa further submits that in the absence of rules and proceedings to conduct Article 97 consultations, and realizing that it is the first time that it had to deal with a request for consultations, it is reasonable and appropriate to expect that the Court should have erred on the side of caution in its approach to the request. As South Africa was the first State Party to the Rome Statute that invoked Article 97 and to request consultations with the Court, the Court should clearly have been aware that it was setting a precedent for similar cases in future. In light of this, it should have applied due diligence in ensuring that the process would be above reproach. Sadly this was not the case.

49. In November 2015, the Assembly of States Parties also acknowledged that a problem exists in respect of Article 97 consultations and that there is a *lacuna* in the procedures of the Court. In order to address this problem, the Assembly of States Parties decided to establish a

<sup>40</sup> Claus Kress and Kimberly Prost "Article 98", in Otto Triffterer and Kai Ambos (ed) *Rome Statute of the International Criminal Court: A Commentary* p. 2115

VBR

Working Group to develop guidelines on Article 97.<sup>41</sup> These rules will ensure that no State Party in future is left feeling that it was treated unfairly by the Court when it approached the Court in a *bona fide* manner to engage in consultations on the problems it may experience in giving effect to a request of the Court. More importantly, it will ensure that States Parties would have clear guidance on how to approach the Court in order to ensure that one of the fundamental building blocks on which the Court was established, namely the cooperation between States Parties and the Court, can be safeguarded in future.

## 6. ARTICLE 87(7) OF THE ROME STATUTE

50. As indicated in paragraph 16 above, the Chamber has invited South Africa to make submissions at the Article 87(7) hearing to be held on 7 April 2017 with respect to:

50.1. Whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir; and, if so,

50.2. Whether a formal finding of non-compliance can be made and the matter referred to the Assembly of States Parties to the Rome Statute or the UNSC.<sup>42</sup>

51. Despite the claim by the Chamber that the issues tabled by South Africa had already been decided upon and that there was no need for further clarification regarding the obligation to arrest and surrender Omar Al Bashir, the circumstances within which South Africa found itself and the applicable law were not as clear cut as the Chamber is inclined to believe.<sup>43</sup> The two decisions upon which the Court has consistently relied when finding States to be in non-compliance with its obligations to arrest Omar Al Bashir are vastly different from one another and both are flawed in significant respects.<sup>44</sup>

52. South Africa submits that it did not fail to comply with its obligations under the Rome

<sup>41</sup> Establishment of a working group on the application and implementation of Articles 97 and 98 of the Rome Statute, Bureau of the Assembly of States Parties, Third meeting, The Hague, 3 June 2016, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Bureau/ICC-ASP-2016-Bureau-03-03Jun2016.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2016-Bureau-03-03Jun2016.pdf).

<sup>42</sup> ICC-02/05-01/09-274, para 15.

<sup>43</sup> ICC-02/05-01/09-242, paras 5 and 8; ICC-02/05-01/09-274, para 5.

<sup>44</sup> *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, 12 December 2011 (ICC-02/05-01/09-139); and ICC-02/05-01/09-195.

VBK

Statute by not arresting and surrendering Omar Al Bashir. It will show that:

52.1. Article 98(1) is formulated in a manner that limits the Court's power in relation to requests for arrest and surrender rather than allowing States to decide whether to comply with a request or not.

52.2. Under customary international law, Heads of State have absolute immunity and inviolability from the criminal jurisdiction of national courts in foreign states. Article 27(2) of the Rome Statute which provides "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person", does not create an exception to this immunity as, by its own terms, it applies to proceedings *before the Court itself*. The customary international law immunity operates between States, whilst Article 27(2) operates between the Court and an accused person.

52.3. There is nothing in the text of UNSC Resolution 1593, or circumstances leading up to or following the passing of that Resolution, to warrant the interpretation that immunities have been impliedly waived by the said Resolution.

52.4. There is no express waiver of immunities by Sudan.

52.5. In the absence of such waiver, the Court is precluded from requesting cooperation.

52.6. South Africa remains under the obligation to respect the immunities of Heads of State, including Omar Al Bashir, in terms of customary international law and its treaty obligations. The Rome Statute, in Article 98, recognises and respects this legal position.

53. As the request for cooperation was precluded by Article 98(1), South Africa was in fact under no obligation to cooperate and, consequently, there can be no formal finding of non-compliance or referral to the Assembly of States Parties or the UNSC.

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## 7. OBLIGATION TO ARREST AND SURRENDER UNDER ARTICLE 87(7) OF THE ROME STATUTE

### 7.1 Customary International Law Obligation to Respect Immunities in National Courts

54. Article 86 of the Rome Statute contains a general obligation to cooperate, providing that “States Parties shall...cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”.<sup>45</sup> More specifically, Article 89(1) of the Rome Statute, dealing with surrendered persons to the Court, states, *inter alia*, that “States Parties shall...comply with requests for arrest and surrender”.<sup>46</sup>

55. There is, however, an exception to this duty to arrest and surrender. This exception to the general rule is found in Article 98 of the Statute. Article 98 (1) of the Statute provides that “[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of immunity.”<sup>47</sup>

56. It is well-established in international law that sitting Heads of State are accorded immunity from the jurisdiction of, and consequently inviolability before, national courts of foreign states.<sup>48</sup> The rule of State immunity derives from the principle of sovereign equality of States, a fundamental principle of the international legal order as stated in Article 2(1) of the UN Charter, and it forms the basis of the immunity of a sitting Head of State.<sup>49</sup>

57. The International Court of Justice (“ICJ”) has confirmed that certain individuals, and

<sup>45</sup> Article 86 of the Rome Statute.

<sup>46</sup> Article 89(1) of the Rome Statute.

<sup>47</sup> Article 98(1) of the Rome Statute.

<sup>48</sup> *Case Concerning the Arrest Warrant 11 April 2000 (DRC v Belgium)*, Judgment of 14 February 2000, (“*Arrest Warrant case*”), para 51, available at: <http://www.icj-cij.org/docket/files/121/8126.pdf>; and was confirmed by the ICJ in the subsequent cases of *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment of 4 June 2008, para 170, available at: <http://www.icj-cij.org/docket/files/136/14550.pdf>.

<sup>49</sup> See *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, para 57, (“*Jurisdictional Immunities case*”) available at: <http://www.icj-cij.org/docket/files/143/16883.pdf>; Article 2(1) of the United Nations Charter.

VBK

specifically Heads of State, are accorded immunities from criminal jurisdiction in the *Case Concerning the Arrest Warrant 11 April 2000 (DRC v Belgium)*, (“*Arrest Warrant case*”).<sup>50</sup> This position of international law on State immunity has also been affirmed by the International Law Commission.<sup>51</sup> The ICJ in the *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, (“*Jurisdictional Immunities of the State case*”), declared that the “rule of international law relating to immunities... is one of the fundamental principles of the international legal order” and “occupies an important place in international law and international relations”.<sup>52</sup>

58. At present there is no customary international law exception to this rule.<sup>53</sup>

59. In the *Arrest Warrant* case, having considered State practice and international instruments, including the Rome Statute, the ICJ concluded that it “has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability...” and that such a finding extends to immunities before national courts.<sup>54</sup>

60. The decisions of the ICJ on this matter were adopted subsequent to the adoption and entry into force of the Rome Statute. There is thus nothing in these decisions to suggest that the Rome Statute has affected the state of the law in regard to immunity of sitting Heads of State before *national courts*.

61. In *The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* (“*Malawi case*”), the PTC I came to a conclusion different from

<sup>50</sup> See generally *Arrest Warrant case*.

<sup>51</sup> Draft Articles 3 and 4 of the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted, in the Report of the International Law Commission on the Work of its Sixty-Fifth Session, 6 May – 7 June and 8 July – 9 August 2013, Official Records of the General Assembly, Sixty-Eighth Session, Supplement No. 10 (A/68/10), available at: <http://legal.un.org/docs/?path=../ilc/reports/2013/english/chp5.pdf&lang=EFSSRAC>; Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur (A/CN.4/701), International Law Commission Sixty-eighth session, 2 May-10 June and 4 July-12 August 2016, available at: <http://legal.un.org/docs/?symbol=A/CN.4/701>.

<sup>52</sup> See *Jurisdictional Immunities case*, paras 56 and 57.

<sup>53</sup> *Arrest Warrant case*, para 58.

<sup>54</sup> *Arrest warrant case*, para 58.

VBK

that in the *Arrest Warrant* case.<sup>55</sup> The PTC I argued that the *Arrest Warrant* case was concerned solely with immunity before national jurisdictions and the International Criminal Court was an international court that sought the arrest for Omar Al Bashir in relation to international crimes.<sup>56</sup> South Africa submits that whilst the Head of State may be required to appear before the international court, it is for the national authorities of the requested State to carry out the arrest; and it is this act of arrest in the domestic jurisdiction of that State that is prohibited by Head of State immunity. Therefore, a distinction should be made between the jurisdiction of an international court and the powers of national jurisdictions to cooperate in bringing a Head of State before an international court.

62. In the *Malawi* case, the PTC I ultimately decided that Malawi was in non-compliance with the request to cooperate as there was a customary international law exception to immunity. Thus Article 98 of the Rome Statute did not apply.<sup>57</sup> The PTC I erred in two respects:

62.1. Firstly, by concluding that a customary international law exception to Heads of State immunity has been created before international Courts and tribunals and thus there was no duty on *national authorities* to respect the immunities of Omar Al Bashir.<sup>58</sup> Whilst it may be true that there is no immunity before the Court, it does not follow that there is no immunity (and no inviolability) before national authorities.

62.2. Secondly, in finding that Article 98(1), which requires a waiver of immunities before the Court may request a State Party to arrest and surrender a Head of State, was not applicable as Heads of State immunities are removed before the Court in terms of Article 27. The PTC I reiterated its decision of 4 March 2009 concerning the first warrant of arrest of Omar Al Bashir, wherein it decided that in terms of Article 27 of the Rome Statute “the current position of Al Bashir as Head of a State which is not a party to the Statute, has *no effect on the Court’s jurisdiction over the present case*” (emphasis added).<sup>59</sup> Whilst the PTC I then proceeded to observe that “there is an inherent tension between Articles 27(2) and 98(1) of the Statute and the role

<sup>55</sup> ICC-02/05-01/09-139.

<sup>56</sup> ICC-02/05-01/09-139, para 34.

<sup>57</sup> ICC-02/05-01/09-139, paras 43 and 47.

<sup>58</sup> ICC-02/05-01/09-139.

<sup>59</sup> ICC-02/05-01/09-139, para 14.

VBK

immunity plays when the Court seeks cooperation regarding the arrest of a Head of State”,<sup>60</sup> it nevertheless stated that Malawi was “not entitled to rely on Article 98(1) of the Statute to justify” its non-cooperation.<sup>61</sup>

63. The PTC I based its decision on three related propositions:

63.1. The immunity for Heads of State before international courts has been rejected time and time again;

63.2. There has been an increase in prosecution of Heads of State in international tribunals;

63.3. By virtue of Article 27, States Parties to the Rome Statute have renounced claims to immunity of their Heads of State.<sup>62</sup>

64. All three propositions above may be correct, but do not justify the conclusion that Malawi cannot rely on Article 98 for the non-arrest of Omar Al Bashir, as it does not deal with the legal authority of domestic authorities to act in disregard of the immunity and inviolability of a sitting Head of State within the domestic sphere.

65. The principal problem with decision of the PTC I is that it treats the argument concerning Article 98 as if it concerns the *jurisdiction of the Court over an accused Head of State*. It is, however, Article 27, the so-called “removal of immunity provision”, that concerns the exercise of jurisdiction *by the Court* (an international court) over a Head of State. Article 98, on the other hand, governs cooperation and, in particular, whether there is a duty on States Parties to cooperate in the arrest and surrender of Heads of State of non-State Parties. Therefore, addressing the position of Heads of State before international tribunals does not resolve the problem of immunity before national courts, and Article 98 acknowledges the dichotomy found in assessing jurisdiction of national courts and jurisdiction of the Court.

66. Article 98 forms an integral part of the Statute. The Court, including the Chamber, is

<sup>60</sup> ICC-02/05-01/09-139, para 37.

<sup>61</sup> ICC-02/05-01/09-139, para 37.

<sup>62</sup> ICC-02/05-01/09-139

VSK

not at liberty to ignore the clear terms of Article 98 or to interpret the Statute in such a way as to render Article 98 meaningless, obsolete or with a view to arriving at a predetermined outcome. To do so would be contrary to the well-established rule of treaty interpretation whereby provisions should be interpreted to be effective and meaningful.<sup>63</sup>

67. The decision in the *Malawi* case has been severely criticised in scholarly articles for its lack of reasoning and logic.<sup>64</sup>

68. Indeed, in April 2014, in the *DRC* case, the Chamber deviated from the *Malawi* case and supported a finding that Heads of State have immunities before national courts. The Chamber stated that it “wishes to make clear that it is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign states even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court.”<sup>65</sup>

69. Furthermore, the Chamber held that whilst Article 27(2) of the Rome Statute may remove such immunity, it is confined to those States that have ratified the Statute.<sup>66</sup> The Chamber states that “the Statute cannot impose obligations on third States without their consent”.<sup>67</sup> Such a finding is in accordance with the fundamental principle of *pacta tertiis*

<sup>63</sup> *Eureko v Poland*, Partial Award, 19 August 2005, para 248

<sup>64</sup> Dire Tladi “The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Article 98” *Journal of International Criminal Justice*, Vol 11 No. 1 (2013), 199; Alexander K. A. Greenwalt “Introductory Note to the International Criminal Court: Decisions Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi and the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir and African Union Response”, *International Legal Materials*, 2012 Vol 51 No. 2, 393; Asad G. Kiyani “Al Bashir and the ICC: The Problem of Head of State Immunity”, *Chinese Journal of International Law*, 2013 Vol 12 No. 3, 467-508, available at: <https://academic.oup.com/chinesejil/article-lookup/doi/10.1093/chinesejil/jmt035>; Wambui Mwangi and Tiyana Mphepo, “Developments in international criminal justice in Africa during 2011”, *African Human Rights Law Journal* Volume 12 No 1 (2012), pp. 275-277, available at: [http://www.ahrli.up.ac.za/images/ahrli/2012/ahrli\\_vol12\\_no1\\_2012\\_mwangi\\_mphepo.pdf](http://www.ahrli.up.ac.za/images/ahrli/2012/ahrli_vol12_no1_2012_mwangi_mphepo.pdf); Dov Jacobs “The Frog that Wanted to be an Ox: The ICC’s Approach to Immunities and Cooperation”, in Carsten Stahn (ed) (2015) *The Law and Practice of the International Criminal Court*, p 296; See further Dapo Akande “ICC Issues Detailed Decision on Bashir’s Immunity (. . . At long Last . . . ) But Gets the Law Wrong”, *EJIL Talk*, 15 December 2011 available at <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>; William Schabas, “The ICC Prosecutor ‘shelves’ the Darfur situation: What is the Security Council supposed to do?”, 14 December 2014, available at: <http://humanrightsdoctorate.blogspot.co.za/search?q=malawi>; Dov Jacobs, “A Sad homage to Antonio Cassese: The ICC’s confused pronouncements on State Compliance and Head of State Immunity”, available at: <https://dovjacobs.com/2011/12/15/a-sad-hommage-to-antonio-cassese-the-iccs-confused-pronouncements-on-state-compliance-and-head-of-state-immunity/>.

<sup>65</sup> ICC-02/05-01/09-195, para 25

<sup>66</sup> ICC-02/05-01/09-195, para 26

<sup>67</sup> ICC-02/05-01/09-195, para 26

VBR

(*nec nocent nec prosunt*) as expressed in Article 34 of the 1969 Vienna Convention on the Law of Treaties (“VCLT”) that “a treaty does not create either obligations or rights for a third state without its consent”. A State Party can therefore not arrest the Head of State of a non-State Party on the basis of a removal of immunities under Article 27(2) of the Rome Statute.

70. The inconsistency in the decisions in the *Malawi* and *DRC* cases indicates that the law is not as clear as the Chamber expressed in the June Decision.<sup>68</sup>

71. It is South Africa’s submission that, as per the *Arrest Warrant* case, immunities *ratione personae* for Heads of State before national courts exist under customary international law. No customary international law exception has been created in this regard. South Africa, therefore, remains under a customary international law obligation to respect the immunities of Omar Al Bashir.

72. Article 27(2) of the Rome Statute does not remove the immunity of Omar Al Bashir. As Sudan is not a State Party to the Rome Statute, Article 27(2) cannot be applied to Sudan.

73. Article 98(1) of the Rome Statute prohibits the Court from requesting South Africa to arrest or surrender Omar Al Bashir without waiver of immunity or consent to surrender.

74. South Africa therefore did not act in violation of its obligations under the Rome Statute.

## 7.2 Treaty Obligations to Respect Immunities

75. The above reasoning relating to customary international law immunities as well as Articles 27(2) and 98(1) of the Rome Statute, is similarly applicable to South Africa’s treaty obligations.

76. For the purpose of hosting the AU Summit, as indicated in paragraph 21 above, the AU and the Republic of South Africa entered into the Host Agreement. The Host Agreement, like the Rome Statute, is a treaty under international law and its provisions on

<sup>68</sup> ICC-02/05-01/09-242, paras 5 and 8;

VBK

Heads of State immunity are consistent with customary international law.

77. The Host Agreement provides that the South African Government shall accord the Members of the AU Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings, the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention.<sup>69</sup>

78. Article V of the General Convention provides that Representatives of Member States shall be accorded, *inter alia*, “immunity from personal arrest or detention” and “[s]uch other privileges, immunities and facilities...as diplomatic envoys enjoy...”.<sup>70</sup>

79. South Africa was thus under an obligation, in terms of the Host Agreement, to respect the immunities of Omar Al Bashir.

80. In the absence of an express waiver from Sudan of the immunities of Omar Al Bashir obtained by the Court, in accordance with Article 98(1) of the Rome Statute, South Africa could not arrest or surrender him. This was one of the reasons why South Africa deemed it necessary to ask for consultations in terms of Article 97 of the Rome Statute.

### 7.3 Implied Waiver of Immunity *Ratione Personae* by UNSC Resolution 1593

81. The Court acquired jurisdiction over matters arising from the Situation in Darfur by virtue of the UNSC referring the matter to it in Resolution 1593. Since Sudan is not a State Party to the Rome Statute, Article 98 requires the Court to obtain a waiver from Sudan before it can request cooperation from a State Party. Without such a waiver, it will place States Parties in a predicament as they would be required to assist the Court, but may not invoke their treaty obligations *vis-à-vis* the Court and other States Parties against a third State.

82. However, the Chamber, in the *DRC* case, decided that this predicament was resolved by Resolution 1593.<sup>71</sup>

<sup>69</sup> Article VIII(1) of the Host Agreement.

<sup>70</sup> Articles V(1)(a) and (g), respectively of the General Convention, available at: [https://www.au.int/web/sites/default/files/treaties/7760-file-general\\_convention\\_privileges\\_immunities\\_organization\\_african\\_unity\\_0.pdf](https://www.au.int/web/sites/default/files/treaties/7760-file-general_convention_privileges_immunities_organization_african_unity_0.pdf).

<sup>71</sup> ICC-02/05-01/09-195, para 29.

VBK

83. At paragraph 29 of the *DRC* case, the Chamber recalls that under UNSC Resolution 1593, Sudan is obliged to cooperate fully with the Court. The Chamber then states that the obligation was meant to “eliminate any impediment to the proceedings before the Court, including immunities.” The Chamber concluded that there had been an implied waiver of immunities and there was thus no need for the Court to request cooperation from Sudan in terms of Article 98(1) of the Rome Statute. Consequently, by virtue of UNSC Resolution 1593 placing an obligation on Sudan to cooperate, States Parties are obliged now also to arrest Omar Al Bashir.

84. South Africa submits, with respect, that the interpretation of paragraph 2 of UNSC Resolution 1593 by the Chamber is incorrect.

85. As a starting point, it is questionable whether the UNSC has the authority to waive immunities of Heads of State.<sup>72</sup> The authority to grant a waiver of immunity rests with a State, not another actor, such as the UNSC. This point is also reflected in Article 98 which contemplates the State, not another actor, waiving immunity. The authority of the UNSC with respect to the Court derives not from the UN Charter, but from the Rome Statute itself, which gives it very specific (and limited) powers of referral under Article 13(b) and of deferral in terms of Article 16. According to Article 13(b) of the Rome Statute, the UNSC’s referral merely triggers jurisdiction of the Court; nowhere does the Rome Statute authorise the UNSC to waive the immunity of a Head of State of a non-State Party.

86. It is worth recalling that while UNSC resolutions are not treaties, it is generally accepted that the rules of interpretation in the VCLT apply *mutatis mutandis* thereto.<sup>73</sup>

86.1. According to Article 31(1) of the VCLT the ordinary grammatical meaning of words must be given to terms in the treaty. There is nothing in the ordinary meaning of the words of paragraph 2 in UNSC Resolution 1593 that suggests a removal of

<sup>72</sup> Dov Jacobs “The Frog that Wanted to be an Ox”, p 294; Asad G Kiyani “Al Bashir and the ICC: The Problem of Head of State Immunity”, pp 474-475.

<sup>73</sup> In *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para 94, the Court stated that the Vienna Convention on the Law of Treaties “may provide guidance” in the interpretation of Security Council resolutions. In the course of the interpretation of UN Security Council Resolution 1244 (1999), the Court in the *Kosovo Opinion* relies on the means of interpretation in the Vienna Convention on the Law of Treaties, such as “text” and “object and purpose”, available at: <http://www.icj-cij.org/docket/files/141/15987.pdf>.

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immunity before national courts.

86.2. Article 31(3)(c) of the VCLT requires that relevant principles of international law be taken into account in the process of interpretation. The application of this principle in this context would imply that a resolution should be interpreted in a way that is consistent with existing international law, including the law on immunities, unless there is an express conflict. This would serve to confirm that, unless there is an express deviation from international law rules, including the rules on immunities, resolutions of the UNSC should be interpreted as consistent with, and not deviating from, international law. There was no such express deviation from the law with regards to immunities of Heads of State in UNSC Resolution 1593.

87. It is widely accepted that a waiver of immunity should be express as this guards against abuses and is in line with the principle of *par in parem non habet imperium*, which underlies immunity itself.<sup>74</sup> This is also in conformity with the Vienna Convention on Diplomatic Relations which states in Article 32(2) that a “waiver must always be express”.

88. Whilst the UNSC may deviate from customary international law in limited instances, in the *Prosecutor v Dusko Tadic* case, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) found that it is a general principle that interpretations reflecting, rather than conflicting with customary international law, are favoured “unless an intention to depart from customary international law is expressed in the Statute or other authoritative source.”<sup>75</sup> The usual practice of the UNSC demonstrates that when it does deviate from general rules of international law, it does so explicitly and circumscribes the limits of its deviation. An example is paragraph 6 of UNSC Resolution 1593 in which, contrary to the rules of the Rome Statute itself, the jurisdiction of the Court over nationals of certain States is ousted. This ousting by the said Resolution is done expressly, leaving no doubt as to its meaning. No similar express ousting of Head of State immunity is evident in UNSC Resolution 1593, and the Chamber cannot read such an ouster into the Resolution. Furthermore, in paragraph 6, the

<sup>74</sup> Memorandum by the Secretariat, “Immunity of State officials from foreign criminal jurisdiction”, (A/CN.4/596) General Assembly, 31 March 2008, para 256, available at: <http://www.refworld.org/pdfid/48abd597d.pdf>; Report by the Special Rapporteur of the International Law Commission, “Third report on immunity of State officials from foreign criminal jurisdiction”, Sixty-third session (A/CN.4/646) 24 May 2011, paras 32-55, available at: <http://legal.un.org/docs/?symbol=A/CN.4/646>

<sup>75</sup> *Prosecutor v Dusko Tadic*, Decision by Appeals Chamber (1995) IT-94-1-AR72, 15 July 1999, para 296, available at: <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

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ousting of the Court's jurisdiction can only be reversed by an "express waiver" of exclusive jurisdiction. These examples confirm the need for a waiver to be express, and it does not follow, therefore, that the UNSC would waive immunities for a Head of State by mere implication. Similarly, on 26 February 2011, the UNSC passed Resolution 1970 which referred the Situation in Libya to the OTP of the Court.<sup>76</sup> Nowhere in Resolution 1970 does the UNSC state either impliedly or expressly that immunities of any officials will be waived. What the UNSC does do expressly, in paragraphs 4-8, is to set out the terms by which the referral to the Court will operate. Furthermore, the UNSC is very specific in paragraphs 15-16 when it sets out the modalities (and exceptions) for the imposition of a travel ban on specific individuals, the names of whom are listed in its Annex 1. It appears that the UNSC is well aware of the limits of its authority and that it cannot waive immunity.

89. To allow implied waivers of immunities should be avoided as it is a highly controversial matter.<sup>77</sup> In the very exceptional circumstances where it may be done, there must be no doubt that there indeed was an intention to waive immunities by the State concerned. *In casu*, it cannot be said that there is such clarity<sup>78</sup>, as is evidenced by the number of States that continue to observe Omar Al Bashir's immunities.<sup>79</sup>

90. The matter of Omar Al Bashir's immunities is consistently raised during consideration of the bi-annual Report of the OTP at the UNSC. During these debates little clarity has been provided. South Africa submits that if the UNSC intended to remove immunity, it could have clarified the situation by adopting another resolution.

91. The Chamber comes to the conclusion in the *DRC* case that an interpretation that does not remove immunities would render "senseless" the decision to impose an obligation on

<sup>76</sup> S/RES/1970 (2011), available at:

[http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1970%20%282011%29](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970%20%282011%29).

<sup>77</sup> A/CN.4.596, para 256.

<sup>78</sup> Wambui Mwangi and Tiyana Mphepo, "Developments in international criminal justice in Africa during 2011", pp. 277.

<sup>79</sup> According to the Statement of the ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 13 December 2016, Al Bashir "has crossed international borders on 131 occasions since March 2009, on 14 occasions to State Parties and on 117 occasions to non-State Parties.", available at: <https://www.icc-cpi.int/Pages/item.aspx?name=161213-otp-stat-uns-c-darfur>; Twenty-Fourth Report of the Prosecutor to the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593(2005), para 9, available at: [https://www.icc-cpi.int/itemsDocuments/161213-otp-rep-24-darfur\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/161213-otp-rep-24-darfur_Eng.pdf).

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Sudan to cooperate.<sup>80</sup> South Africa submits, with respect, that this conclusion simply does not follow. The duty to cooperate does not only, or necessarily, require a waiver of immunity. It also includes the duty to provide information, documents, access to witnesses, sites – actions analogous to forms of cooperation and assistance provided for in the Rome Statute.<sup>81</sup> The UNSC refers situations, not individuals, to the Court and UNSC Resolution 1593 thus remains relevant for the prosecution of individuals who do not have immunities *ratione personae*.

92. It is apposite here to recall that the Chambers have found in the *DRC* and *Malawi* cases that “the Court is the sole authority to decide whether or not the immunities generally attached to Al Bashir as a sitting Head of State were applicable in this particular case”.<sup>82</sup> The Chambers then suggest that the aforementioned statement is established by Article 119(1) of the Statute, which provides that “[A]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”.<sup>83</sup> It is submitted, respectfully, that the Chambers have, regrettably, confused two legal issues in this instance. Whilst the Court does indeed have a special authority to interpret the Rome Statute as provided in Article 119(1) of the Rome Statute, the definition of “judicial functions” does not, in our view, amount to a determination whether or not immunities are applicable in a certain case. It is unclear how the Court can be seen to be the sole arbiter of whether immunities and privileges are applicable in a specific case. Moreover, the Court’s all-or-nothing approach may scupper immunities and privileges that are conferred on a person by virtue of their official capacity in terms of customary international law, over which the Court has no jurisdiction.

93. Furthermore, the authority to interpret the Rome Statute in terms of Article 119(1) thereof does not extend such a special status of authoritative interpretation to other instruments, such as UNSC Resolutions. The Permanent Court of International Justice (“PCIJ”) issued an advisory opinion in terms of which it found that “it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.”<sup>84</sup> In the absence of an

<sup>80</sup> ICC-02/05-01/09-195, para 29.

<sup>81</sup> Article 93 of the Rome Statute.

<sup>82</sup> ICC-02/05-01/09-195, para 16 and ICC-02/05-01/09-139, para 11.

<sup>83</sup> ICC-02/05-01/09-195, para 16 and ICC-02/05-01/09-139, para 11.

<sup>84</sup> *Question of Jaworzina, Advisory Opinion*, 1923 P.C.I.J. (ser. B) No. 8 (Dec. 6), available at: [http://www.icj-cij.org/pcij/serie\\_B/B\\_08/Jaworzina\\_Avis\\_consultatif.pdf](http://www.icj-cij.org/pcij/serie_B/B_08/Jaworzina_Avis_consultatif.pdf); Sir Michael Wood “The Interpretation of Security

VBK

authoritative interpretation from the UNSC or from the UN's principal judicial organ, the ICJ, the interpretation of UNSC Resolutions should come from its members.<sup>85</sup> This approach is consistent with the Article 31(3)(b) of the VCLT. In this regard, South Africa submits that in view of past practises of States Parties, the Head of State immunities remain intact as there has been neither an express waiver nor subsequent State practice to warrant the conclusion that such immunities have been waived.

94. The question that arises is whether the Court is the appropriate institution to provide an authoritative interpretation of UNSC Resolutions. Although, in international law, there exists no hierarchy of international courts, the ICJ, as the principal judicial organ of the UN, is best placed to provide the authoritative interpretation. Such an authoritative interpretation will not only be of interest to the Court and States Parties to the Rome Statute, but also to the wider international community and specifically the UNSC and States negotiating and adopting the resolutions of the UNSC.

#### 7.4 Obligations Placed on States in terms of UNSC Resolution 1593

95. In relation to the concern of conflicting obligations between the duty to arrest and the obligation to respect immunity, the Chamber in the *DRC* case based its decision on the priority to be given to obligations flowing from UNSC Resolution 1593, on account of Articles 25 and 103 of the UN Charter.<sup>86</sup>

96. Article 25 provides that “[t]he Members of the United Nations agree to accept and carry out the decisions of the UNSC in accordance with the present Charter”, while Article 103 provides that “[i]n the event of a conflict between the obligations of Members of the United Nations under the Present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

97. In the current context, the Chamber's proposition in the *DRC* case is that Article 103 of the UN Charter implies that the obligations to respect Omar Al Bashir's immunities are trumped by the obligations under UNSC Resolution 1593.

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Council Resolutions” in *Max Planck Yearbook of United Nations Law* (1998), available at: [http://www.mpil.de/files/pdf2/mpunyb\\_wood\\_2.pdf](http://www.mpil.de/files/pdf2/mpunyb_wood_2.pdf).

<sup>85</sup> Article 92 of the UN Charter.

<sup>86</sup> ICC-02/05-01/09-195, paras 30 and 31.

VBR

98. Paragraph 2 of UNSC Resolution 1593 makes it abundantly clear that *it* does not impose obligations on States other than Sudan; it merely *urges* States to cooperate. When the Chamber thus refers to the “obligation of Member States under the Charter” under Article 103 of the UN Charter, it is therefore misplaced. The deliberate *and express choice* by the UNSC not to impose obligations on States other than Sudan should militate against the interpretation of UNSC Resolution 1593 as suggested by the Chamber.

99. In any event, Article 103 of the UN Charter applies to a conflict between UN Charter obligations, including UNSC Resolution obligations, and obligations from other international agreements and not customary international law. From the *travaux préparatoires* of the UN Charter it is clear that States were not in favour of including customary international law in Article 103.<sup>87</sup> Article 103 is to be distinguished from instances where the Court deviates from customary international law, in which cases it authorizes States to act outside of its obligations contained in customary international law, it does not *oblige* them to do so.

## 8. SUMMARY

100. South Africa has demonstrated that this matter is complex both in terms of the specific facts and the law. South Africa has shown that in the absence of clear rules and procedures to conduct Article 97 consultations which are political and diplomatic in nature, the Court must consider the impact of its conduct and, at the very least, act in accordance with the rules of due process. South Africa’s history necessitated that it play an important, active and constructive role on the African continent. The ideological underpinnings of South Africa’s engagement in peacekeeping in the African continent are underscored by the belief, as addressed in our submission above, that to keep peace, one must first make peace. South Africa has set out the general obligations on States Parties to cooperate with the Court pursuant to Part 9 of the Rome Statute. It highlighted the tension between Articles 27 and 98 of the Rome Statute and the application of Article 98 in light of UNSC Resolution 1593.

101. South Africa therefore concludes that it was obliged to respect the Head of State immunities of Omar Al Bashir. South Africa could not arrest Omar Al Bashir without the

<sup>87</sup> Rain Liivoja, “The Scope of the Supremacy Clause of the UN Charter” *International Comparative Law Quarterly* Vol 57, July 2008; Goodrich, Hambro and Simms *Charter of the United Nations: Commentary and Documents* 3<sup>rd</sup> revised edition, 1969, pp 614-617.

VBR

Court first obtaining an express waiver to do so from the Sudanese authorities. Since such cooperation from Sudan is not forthcoming, it cannot be expected that South Africa be held responsible for Sudan's non-compliance. The dispute exists between the UNSC, the Court and Sudan; it is for these three entities to resolve their dispute amongst one another.

## 9. RELIEF SOUGHT

102. South Africa thus requests the following of the Chamber –

102.1. To ensure that in all future cases due process and the principles of natural justice are following in respect of Article 97 consultations;

102.2. That South Africa did not act contrary to its obligations under Articles 87 and 89 of the Rome Statute; and

102.3. That this matter not to be referred to either the Assembly of States Parties or the UNSC;

103. South Africa further requests the Chamber to obtain an authoritative interpretation of UNSC Resolution 1593 from the UNSC, including calling upon the UNSC to request the ICJ for an advisory opinion in terms of Article 96(1) of the UN Charter.

104. In the alternative, should the Chamber find that South Africa violated Article 87(7) of the Rome Statute, South Africa requests that the Chamber grant it leave to the appeal to the Appeals Chamber for the purposes of a final determination of the legal questions raised in this submission.



Ambassador VB Koloane

on behalf of

The Government of the Republic of South Africa

Dated this 17<sup>th</sup> of March 2017  
At The Hague, The Netherlands

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**AGREEMENT**

**BETWEEN**

**THE REPUBLIC OF SOUTH AFRICA**

**AND**

**THE COMMISSION OF THE AFRICAN UNION ON**

**THE MATERIAL AND TECHNICAL ORGANIZATION OF THE  
MEETINGS**

**OF**

**THE 30<sup>TH</sup> ORDINARY SESSION OF THE PERMANENT  
REPRESENTATIVES COMMITTEE  
FROM 7 TO 9 JUNE 2015**

**THE 27<sup>th</sup> ORDINARY SESSION OF THE EXECUTIVE COUNCIL  
FROM 10 TO 12 JUNE 2015**

**AND**

**THE 25<sup>TH</sup> ORDINARY SESSION OF THE ASSEMBLY  
ON 14 TO 15 JUNE 2015**

**IN PRETORIA (7 AND 8 JUNE 2015) AND JOHANNESBURG (10 TO  
15 JUNE 2015), REPUBLIC OF SOUTH AFRICA**

**PREAMBLE**

The present Agreement concluded between the Government of the Republic of South Africa, hereinafter referred to as "the Government", and the Commission of the African Union (AU), hereinafter referred to as "the Commission", relates to the material and technical organization of the Meetings of the 30<sup>th</sup> Ordinary Session of the Permanent Representatives' Committee (PRC), the 27<sup>th</sup> Ordinary Session of the Executive Council and the 25<sup>th</sup> Ordinary Session of the Assembly of the Union (Assembly), and any other side Meetings that may be considered necessary by the Commission.

These Meetings which are provided for in the Constitutive Act of the African Union, the Rules of Procedures of the Assembly, the Executive Council and the Permanent Representatives' Committee as well as in decisions of the African Union policy organs will be held in Pretoria, Republic of South Africa, from 7 to 9 June, and from 10 to 13 June and on 14 to 15 June 2015 in Johannesburg, respectively, at the invitation of the Government.

Accordingly, the Commission is charged with the exclusive responsibility of organizing, conducting and managing the Meetings, while the Government will, on its part, provide all the necessary facilities and assistance to ensure the success and smooth running of the Meetings.

Furthermore, in accordance with the relevant provisions of the African Union Financial Rules and Regulations and Rules 6(2) and 5(2) of the Rules of Procedure of the Executive Council and the Assembly, respectively, the Government shall bear the additional expenses incurred by the Commission arising from the holding of the Meetings outside the African Union Headquarters.

For these Meetings to be held under the best possible conditions, the Government and the Commission have agreed as follows:

**ARTICLE I**  
**CONFERENCE FACILITIES**

**A. PREMISES**

1. The Government shall, at its expense, make available to the Commission, rooms and offices with the following facilities needed for the Summit meetings and side events:

- a) One (1) Plenary Hall containing at least one thousand (1000) seats with corresponding desks, equipped with microphones, earphones, six (6) interpretation booths, one (1) tape recording cabin complete with recording machines;
- b) One (1) podium centrally located at the far end of the Hall, facing the delegates' row. The Podium shall be equipped with at least eight (8) armchairs and corresponding microphones and earphones. The podium shall be provided with an African Union desk flag and a gavel;
- c) One (1) Speaker's Rostrum complete with microphone and suitable reading lamp. The Rostrum shall be situated on the forward centre portion of the platform below the Podium;
- d) Desks to seat at least twelve (12) African Union Officers to be situated near the Rostrum, with individual earphones, serving for the purpose of report writing for the Commission;
- e) Seating area equipped with earphones for at least fifty (50) observers in the Plenary Hall;
- f) Seating area equipped with earphones for members of the media (at least one hundred (100)) in the Plenary Hall during the Opening Sessions of the Meetings. An overspill area equipped with audiovisual recording facilities, shall also be made available from where journalists can watch live coverage of the open sessions;
- g) Space on the floor of the Plenary Hall shall be made available to accommodate camera persons and photographers wishing to take photos during the Open Sessions of the Meetings. Alternatively, a system shall be worked out to ensure that all camera persons get turns to take pictures and video footage of the Open Sessions of the Meetings;
- h) Four (4) suitable Rooms for Committee/side/parallel Meetings or events, to accommodate seating for not less than hundred ten (110) delegates each and with corresponding central desk and name plates, as well as microphones, earphones and five (5) interpretation booths each. The Drafting Team shall also use one (1) of these four (4) rooms for its meetings;

- l) One (1) Room to seat twenty to twenty-five (20-25) persons for Consultation Meetings. It shall also be used for the daily meetings of the Commission Conference Coordination Committee;
  - j) Offices for the Chairperson of the Commission, the Deputy Chairperson and the eight (8) Commissioners;
  - k) Suitable offices/ working space for:
    - (i) Staff of the Bureau of the Chairperson of the Commission;
    - (ii) Staff of the Bureau of the Deputy Chairperson of the Commission;
    - (iii) Secretary General of the Commission;
    - (iv) Legal Counsel;
    - (v) Chief of Protocol of the African Union;
    - (vi) Information and Communication Directorate;
    - (vii) The Finance and Personnel Services;
    - (viii) The Conference Coordination Unit, large enough to seat at least eight (8) persons;
    - (ix) Documents Distribution;
    - (x) Documents Reproduction;
    - (xi) Typing Pools for the four (4) working languages;
    - (xii) Revisers and Translators for four (4) language units;
    - (xiii) Proof-readers for four (4) language units;
    - (xiv) The Report-drafting team;
    - (xv) Protocol Reception and Delegates Registration Desk;
    - (xvi) Doctor's Consultation Room and Conference Clinic with installed medical emergency facilities;
    - (xvii) Storage Room for office supplies and materials;
2. In accordance with the established practice, it shall be the exclusive responsibility of the Commission to arrange the seating arrangements of the Meeting Rooms.
3. The Government shall also provide suitable lounges to be used for consultations by the Ministers and the Heads of State and Government.
4. The Government shall, at its expense, furnish and maintain in good condition, all the aforesaid rooms and offices in a manner suitable for the effective conduct of the Meetings.
5. The Government shall provide a Press Centre with multi-media facilities (telephone, fax and e-mail) for use by members of the press and delegations at their expense. The Press Centre shall have at least fifty (50) computers with internet connection out of which five (5) shall be in Portuguese while the rest shall be in Arabic, English and French. Five (5) printers should be networked to the computers in the Press Centre. Wireless network shall also be made available within the Press Centre and its

environs. The Press Centre shall have at least forty (40) free tables and chairs to facilitate the work of those wishing to work from their laptops or to write by hand.

6. Three (3) notice boards shall be placed in the Press Centre to allow the Commission to post notices of press conferences, briefings or special events for the information of the media.

## **B. EQUIPMENT, OFFICE SUPPLIES AND STATIONERY**

- a) The Conference Hall for Plenary Meetings shall be equipped for simultaneous interpretation into Arabic, English, French and Portuguese. Two (2) booths for Kiswahili and Spanish shall also be organised for the Meeting of the Assembly. The Government shall also provide, at its expense, a speech time limit, display of speakers' list, and adequate facilities for Press, Radio and Television Services, as well as space for a Media Centre and required facilities.
- b) The Government shall, at its expense, provide and maintain in good condition the following other equipment:
  - (i) Four (4) High-Volume photocopiers with a recto-verso facility, including sorting attachment, capable of producing ninety (90) to hundred twenty (120) copies per minute.
  - (ii) Four (4) Mid-Volume photocopiers with a recto-verso facility, capable of producing sixty (60) to eighty (80) copies per minute for the following offices:
    - Office of the Chairperson of the Union
    - Office of the Chairperson of the Commission
    - Office of the Deputy Chairperson of the Commission
    - Office of the Commissioners
    - Office of the Secretary General of the Commission
    - Office of the Legal Counsel
    - Office of the Protocol Division
    - Office of the Conference Coordinating Unit
    - Office of the Communication and Information Directorate.
 An additional computer shall be provided for this office to facilitate press release drafting and processing in all African Union languages

- (iii) Six (6) collating tables.
- (iv) Thirty three (33) computers connected to twelve (12) network laser printers as follows:
  - Eight (8) English
  - Eight (8) French
  - Eight (8) Arabic
  - Eight (8) Portuguese
  - One (1) for the Director of Conferences

The Commission shall provide the necessary software for the Arabic and Portuguese language for installation on the computers in South Africa.

- c) The Government shall provide, at its expense, adequate audio recording equipment, together with the required technical personnel, for documentation purposes. The Commission shall provide the recording tapes, which shall remain its property.
- d) The Government shall provide, at its expense an electronic notice board, a PA system and a film projector to show African Union films or documentary.
- e) The Government shall ensure that the above listed equipment as well as the materials for the reproduction of working documents is ready and installed at least two (2) days before the commencement of the Meetings of the Permanent Representatives' Committee on 7 June 2015.
- f) The Government shall also make available, at its own expense, all the office supplies for the Meetings, such as printing and reproduction papers, toner, envelopes, paper-clips, folders, staplers and staples.

**C. FLAGS, NAME PLATES, SECURITY AND CONFERENCE BADGES FOR THE MEETINGS**

- a) The Government shall, at its expense, make available at least three (3) sets of national flags of all Member States and of the African Union for display at the Conference Centre as well as at the premises reserved for Heads of State and Government. Desk flags for the Plenary Hall and Committee Rooms shall also be provided by the Government at its expense.
- b) The Government shall provide, at its expense, pins and security badges for the Meetings of the Executive Council and the Assembly, which shall allow entry into the Conference Centre. These badges shall be issued in consultation with the Commission.

- c) The Commission, on its part, shall print and issue Conference badges which shall allow entry into the Conference Centre, the Members of the Commission and of the other AU Organs, the delegates, observers, technicians, the press and invited guests.
- d) The Commission shall be responsible for providing the nameplates of Member States, the Organs of the Union, the Regional Economic Communities (RECs) as well as the list of observers and invited guests.

#### **D. TELECOMMUNICATION FACILITIES**

- a) The Government shall install, at its expense, in the Offices of the Chairperson of the African Union, the Chairperson and the Deputy Chairperson of the Commission, international communication facilities (telephone and fax) as well as local communication facilities in all the other offices allocated to the Commission.
- b) The Government shall bear the cost of all communications made from the Offices of the Chairperson of the AU, the Chairperson and Deputy Chairperson of the Commission (telephone and fax).
- c) The Government shall, at its expense, install terminals for Internet facilities at the Conference Centre for use by the Staff of the Commission and the delegates.

### **ARTICLE II HOSPITALITY, TRANSPORTATION AND BANKING FACILITIES**

In accordance with Rules 6(2) and 5(2) of the Rules of Procedure of the Executive Council and the Assembly, respectively, the Government shall be responsible for the following:

- a) **Hospitality and Per diem**
  - (i) The Government shall extend hospitality to the Chairperson, the Deputy Chairperson, the Commissioners and Staff of the Commission which, under the present Agreement, shall mean full board and lodging (accommodation, breakfast, lunch, dinner and non-alcoholic beverages) and local telephone calls. This hospitality shall not cover other expenses made on such items as alcoholic drinks, laundry, dry-cleaning, international telephone calls, and expenses incurred on their guests, from the dates of their arrival to the dates of their departure as stipulated in Articles XIII and XIV of this Agreement. However, the

Government shall bear the cost of all telephone communications made from the suite of the Chairperson.

- (ii) In addition, the Government shall pay twenty percent (20%) of per diem in United States Dollars to the Chairperson, the Deputy Chairperson, the Commissioners and to all Staff Members of the **Commission** (see list in the Annex) servicing the Meetings for nights spent in Pretoria and in Johannesburg in accordance with existing UN rates.

Furthermore, the Government shall also pay to all the Members of the **Commission** and Staff Members, the required amount of airport tax payable in **South Africa** (if applicable).

- (iii) It is understood that the Government shall also pay full per diem to the Members of the **Commission** and Staff Members concerned for each full night spent on the way to and from **South Africa** according to the itinerary to be agreed upon between the Parties (if applicable).

**b) Air Transportation**

- (i) The Government shall provide, at its expense, air tickets for the sector **Addis Ababa – Johannesburg - Addis Ababa**, Business Class for the Chairperson, the Deputy Chairperson and the Commissioners; and Economy class for the Staff Members of the **Commission** as listed in the Annex, provided that in accordance with the existing established practice, not more than sixty (60) Staff Members shall be required to travel in one (1) aircraft.
- (ii) The Commission will provide the Government with the schedules of travel of its various teams.

**c) Local Transportation**

- (i) The Government shall accord the Chairperson courtesies at the level of a Head of State. The Government shall further provide, at its expense, nine (9) limousines for the Deputy Chairperson and the Commissioners, and thirty-seven (37) cars for the African Union Special Representatives/Envoys and the Heads of other African Union Organs and the Chief Executives of the Regional Economic Communities (RECs).
- (ii) The Government shall provide sufficient buses to shuttle the Staff of the Commission from their hotels to the two Conference venues, the Department of International Relations and Cooperation in Pretoria and the Sandton International Convention Centre in Johannesburg.

9

(iii) If the need arises, the Government shall place additional vehicles/minibuses at the disposal of the Commission.

(iv) A transportation coordinator that will be on 24 hour duty and reachable, shall be assigned by the Government to liaise with the transportation coordinator designated by the Commission on transportation matters.

**d) Transportation of Documents**

The Government shall transport, at its expense, all the working documents from and to Addis Ababa.

**e) Banking Facilities**

The Government shall provide the Commission and delegates with the necessary foreign currency banking facilities at convenient points, preferably at the DIRCO Conference Centre, the Sandton International Convention Centre and/or hotels.

**ARTICLE III  
HOTEL ACCOMMODATION**

- a) The Government shall also provide, at its expense, a large suite for the Chairperson and suitable suites for the Deputy Chairperson and the Commissioners. The Government shall also make available, at its expense, adequate single room accommodation for each of the Staff Members of the Commission servicing the Meetings.
- b) The Government will advise on appropriate accommodation, at preferential rates, for the freelance Conference Staff preferably in the same hotel where the Staff of the Commission are accommodated or within the vicinity of the Conference Centres, both in Pretoria and in Sandton.
- c) The Government shall endeavour to secure adequate and appropriate accommodation, at preferential rates, for delegates from all African Union Member States, African Union Special Representatives/Envoys, Officials of other African Union Organs and the Regional Economic Committees. The Government shall advise on availability of accommodation for Invited Guests.
- d) The Government shall not be responsible for the expenses for the accommodation in respect of (b) and (c) above.

**ARTICLE IV  
MEDICAL FACILITIES**

1. The Government shall ensure that adequate medical facilities with qualified staff for first aid and during emergencies for all participants and for the Chairperson, Deputy Chairperson, Commissioners and Staff of the Commission shall be available at the venue of the Conferences in both Pretoria and Sandton.
2. For serious emergencies, the Government shall ensure immediate transportation to and facilitate admission of participants in an appropriate medical facility.
3. For serious emergencies with respect to the Chairperson, Deputy Chairperson, Commissioners and Staff of the Commission, the Government shall ensure immediate transportation and admission to a hospital designated by the Government, at the Government's expense.

**ARTICLE V  
PROTECTION AND SECURITY**

1. The general security and safety arrangements shall be the exclusive responsibility of the Government. The Government shall provide such protection, as it may deem necessary for the security of the participants and the smooth running of the Meetings. Regarding the internal security of the Conference Centre, the Government security officers shall work in close cooperation with the African Union Head of Security and Safety Division and in accordance with the African Union established security procedure and practice.
2. Staff Members of the Commission, in particular, shall be given freedom of movement within the Conference Centre in the performance of their official duties so as to ensure the success of the Meetings.

**ARTICLE VI  
LOCAL PERSONNEL**

The Government shall employ, at its expense, and place under the supervision of the Commission, a number of clerks, technicians for the reproduction and distribution of documents, ushers, messengers, telephone operators, cleaners and other manpower which may be required for the smooth conduct of the Meetings. Some of these staff are to be available two (2) days before the opening of the Meetings and two (2) days after the closure of the Assembly Session to help pack the documents and equipment. The local personnel mentioned herein should be able to communicate in English or French.

**ARTICLE VII  
COORDINATION BETWEEN THE GOVERNMENT  
AND THE COMMISSION**

The Government and the Commission shall each appoint a senior official responsible for the various aspects of the Meetings to act as focal points for their respective areas and to coordinate their activities in order to ensure the smooth running of the Meetings.

**ARTICLE VIII  
PRIVILEGES AND IMMUNITIES**

1. The Government shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU.
2. Without prejudice to the provisions of the preceding paragraph, all participants and persons performing duties in connection with the Meetings shall enjoy such facilities and courtesies as are necessary for the efficient performance of their duties.
3. The representatives of the Inter-Governmental Organizations and the Observers accredited to the African Union attending the Meetings shall enjoy the necessary immunities and privileges as provided for in the General Convention referred to in paragraph 1 above.
4. The Government shall provide all the necessary facilities for the entry and exit to and from South Africa to all those persons who are mentioned above and/or who are performing duties connected with the Meetings. Entry visas shall be granted to them preferably before the opening of the Meetings in accordance with the laws of South Africa and in accordance with the modalities for issuance of visas as contained in Annex II.
5. Staff members of the Commission and other organs of the AU holding AU Passport or Laissez-Passer shall not be required to obtain entry visa as per Decision AHG/OAU/AEC/Dec.1 (II) adopted by the Assembly of Heads of State and Government in Ouagadougou, Burkina Faso, in June 1998.

**ARTICLE IX  
INDEMNITY AND CLAIMS**

1. The Government shall be responsible for dealing with any action, claim, or other demands against the Commission and its Officials arising out of:
  - (a) Injury or damage to persons or property in the conference or office premises provided by the Government;
  - (b) Transportation provided by the Government; and
  - (c) Personnel provided or arranged for by the Government for the Conference.
  
2. However, when the Government and the Commission accept that the damage caused resulted from a deliberate act or serious negligence on the part of the Commission or its Staff, the Government shall decline every responsibility in this respect. The Government and the Commission will assess and determine claims, accordingly.
  
3. The Government shall assume full responsibility for the repairs arising from any damage to the premises in the conference areas, the Department of International Relations and Cooperation Conference Centre, OR Tambo Building, Soutpansberg Road, Rietondale, Pretoria, and the Sandton International Convention Centre, Sandton, Johannesburg, as well as to furniture or equipment therein.
  
4. Without prejudice to the confidentiality of documents in the possession of the African Union, the Commission shall render reasonable assistance and shall exert its best efforts to make available to the Government relevant information, evidence and documents which are in possession or under the control of the African Union, to enable the Government to deal with any action, claim or demand contemplated in this Article.

**ARTICLE X  
RECRUITMENT OF FREELANCE CONFERENCE STAFF**

The Commission shall be responsible for the selection, recruitment and payment of per diem and salaries of the entire freelance Conference Staff as well as the cost of their transportation to and from the Republic of South Africa.

**ARTICLE XI  
MEETINGS WORKING DOCUMENTS**

The Commission shall be responsible for the preparation, reproduction and distribution of all the Meetings working documents in the four (4) African Union working languages.

**ARTICLE XII  
PREPARATION OF THE MEETINGS**

The Commission shall send to South Africa, before the opening date of the Meetings, two African Union teams, at the expense of the Government, on an evaluation and advisory mission. The teams shall comprise not more than eight (8) members. The actual dates of this mission shall be agreed upon through consultations.

**ARTICLE XIII  
ARRIVAL OF THE STAFF OF THE COMMISSION IN SOUTH AFRICA**

The Staff of the Commission assigned to service the Meetings shall arrive in Johannesburg and Pretoria, Republic of South Africa, as follows:

- Advance team of not more than eight (8) members shall arrive four (4) days before the opening of the Meetings, excluding the day of travel, i.e. 2 June 2015 in line with the commencement of the Permanent Representatives Committee meetings on 7 June 2015.
- The rest of the Staff Members, travelling in groups of not more than sixty (60) each, shall arrive one (1) day before the commencement of the Meetings, excluding days of travel, i.e. on 5 and 6 June 2015, at the latest.

**ARTICLE XIV  
DEPARTURE OF THE STAFF OF THE COMMISSION FROM SOUTH AFRICA**

Depending on the availability of commercial/charter flights, the Staff of the Commission shall depart from South Africa one (1) or two (2) days after the closure of the Meetings i.e. 16 and 17 June 2015, at the latest.

**ARTICLE XV  
SETTLEMENT OF DISPUTES**

1. The Parties shall endeavour to settle any dispute arising out of the interpretation, application or implementation of the provisions of this Agreement amicably through consultation or negotiations between the Parties.
2. Any dispute that cannot be settled in accordance with paragraph (1) shall be referred to a tribunal for arbitration at the request of a Party.

3. The tribunal shall consist of one (1) arbitrator appointed by each Party and a third person, appointed by both arbitrators shall be the chairperson of the tribunal.
4. If within sixty (60) days of the request for arbitration, a Party has not appointed an arbitrator or if within sixty (60) days of the appointment of the two (2) arbitrators, the third arbitrator has not been appointed; either Party may request the President of the Permanent Court of Arbitration to make the necessary appointment.
5. The decision of the majority of the tribunal shall be binding on the Parties.
6. The tribunal shall fix the procedure of the arbitration and shall give its decision within thirty (30) days following its constitution.
7. The tribunal shall provide for the reimbursements of its members and the distribution of expenses between the Parties.
8. The tribunal's decision on all questions of procedure and substance shall be final and, even if rendered in default of one (1) Party, be binding on both Parties.

#### **ARTICLE XVI APPLICABLE LAW**

The present Agreement shall be construed and interpreted in accordance with International Law.

#### **ARTICLE XVII AMENDMENTS AND SUPPLEMENTARY ARRANGEMENTS**

This Agreement may be amended by mutual consent of the Parties through an Exchange of Notes between the Parties through the Diplomatic Channels.

#### **ARTICLE XVIII ENTRY INTO FORCE**

The present Agreement shall enter into force on the date of signature by the competent authorities of the two Parties, the effective date of signature being the date of the last signature. It will terminate on 18 June 2015, unless otherwise extended by the Parties.

IN WITNESS WHEREOF, the duly authorised representatives of the Government and the Commission have signed the present Agreement.

Done at PRETORIA on this 5 day of JUNE Two Thousand and Fifteen, for the Government of the Republic of South Africa and at ACCRA on this 4 day of JUNE Two Thousand and Fifteen for the Commission of the African Union.

M. E. Nkomo  
.....  
For the Government of the Republic of South Africa

Erastus Mwencha  
.....  
For the Commission of the African Union

Name: M. E. NKOMO MASIKAZANE

Name: Erastus Mwencha

Title: MINISTER

Title: Deputy Chairperson

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

*Embassy of The Republic of The Sudan*  
Pretoria - South Africa



سفارة جمهورية السودان  
بريتوريا - جنوب أفريقيا

SEP/RSA/DFA/141/2015

14<sup>th</sup> June 2015

**NOTE VERBALE**

The Embassy of the Republic of the Sudan presents its compliments to the Department of International Relations and Cooperation of the Republic of South Africa and has the honor to inform the esteemed Department that H.E Mr. Omer Hassan Ahmed Al-Bashir, President of the Republic of the Sudan, will be attending the 25<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the African Union from 14<sup>th</sup> to 15<sup>th</sup> June 2015.

The Embassy of the Republic of the Sudan would be most grateful if the esteemed Department could inform our Mission of the protocol and logistical arrangements for the arrival and stay of the H.E Mr. Omer Hassan Ahmed Al-Bashir.

The Embassy of the Republic of the Sudan avails itself of this opportunity to renew to the Department of International Relations and Cooperation of the Republic of South Africa the assurances of its highest consideration.

To : Department of International Relations and Cooperation Pretoria

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NV 13/2017

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 Decision of the Pre-Trial Chamber II of the Court dated 8 December 2016 in the matter of *The Situation in Darfur, Prosecutor v Omar Hassan Ahmad Al Bashir* convening a public hearing on 7 April 2017 for the purpose of a determination under Article 87(7) of the Statute with respect to the Republic of South Africa (ICC-02/05-01/09). In its decision the Chamber also invited South Africa 'to submit, no later than by 17 March 2017 a written submission'.

The Embassy has the honour to inform the Registry that it has received the attached submission from the Government of the Republic of South Africa and transmits the same to the Chamber. The Embassy accordingly requests the Registry to transmit the submission to the Chamber with a copy to the Presidency of the Court.

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  
17 March 2017

The Registry  
International Criminal Court  
The Hague

