

ANNEX 2

CONFIDENTIAL

1 International Criminal Court

2 15th Floor Boardroom

3 Situation: Darfur (Sudan)

4 In the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir

5 ICC-02/05-01/09

6 Single Judge Cuno Tarfusser

7 Meeting with Registry, Prosecution and Ambassador of South Africa

8 (Meeting starts at 5 p.m.)

9 SINGLE JUDGE TARFUSSER: Well, good afternoon, Ambassador. Welcome to the ICC. I
10 think this morning the whole issue was much bigger than it is now, but still we are here for
11 the people to discuss with you.

12 And of course we thank you and South Africa for asking for consultation with the Court
13 because I think this is the first time that it happens and I think it's a sign of taking serious, in a
14 serious way, this very delicate matter of course. So we are first of all grateful for you to be
15 here and for South Africa to have been -- to have sent you here to discuss with us.

16 We had this morning -- I had consultations among -- inside the Court in order to
17 understand which way we should do this consultations, what consultations with the
18 Court means because the Court is the judiciary, is the Prosecution, is the Registry, is
19 altogether, and we didn't really know what the merit of the consultations you wanted
20 to have with the Court was, if it was merely -- well, if it was, say, executive, or if it
21 was political, or if it was judicial, so I thought that the Chamber, the judiciary should
22 take over and then to decide how to proceed as soon as we know what the merit of
23 these requested consultations are, what you want to bring in front of the Court.

24 That's why I would say I would like to give you the floor in order for you to expose to
25 us what the government of South Africa wants to bring before the Court and then we

1 would decide how to -- the way forward.

2 I think maybe we should for the record because -- for the record just say who is here

3 because -- so we have it in the transcript. It's a little bit of -- we are in a -- the immediate

4 position of between a very strict formal status conference and just, say, an informal meeting,

5 so we found this middle way. So I would like you to introduce yourself and the legal

6 advisor of South Africa and then I will give the floor to the Prosecutor, representing the

7 Prosecution, the Registrar and then myself. Thank you very much.

8 MR KOLOANE: My name is Ambassador Bruise Koloane. I'm the ambassador of the

9 Republic of South Africa in The Hague.

10 And I've got with me Ms Thanisa Naidu Lewin.

11 SINGLE JUDGE TARFUSSER: Thank you very much.

12 The Prosecution.

13 MR NICHOLLS: Thank you very much, your Honour. I'm Julian Nicholls, I'm a senior trial

14 lawyer in the Office of the Prosecutor. I'm joined by Rod Rastan, legal advisor, and

15 Pubudu Sachithanandan, who is trial lawyer.

16 SINGLE JUDGE TARFUSSER: Thank you.

17 For the Registrar.

18 MR DUBUISSON: Thank you, your Honour. For the Registry would be Thomas Henquet,

19 head of legal office; and Anne-Aurore Bertrand is the officer; Jasmine Toumaj, who is legal

20 officer in the Office of the Director; and myself, Marc Dubuisson, the Director of the Judiciary

21 Support Section for Herman von Hebel, the Registrar.

22 SINGLE JUDGE TARFUSSER: Thank you very much.

23 I'm Judge Cuno Tarfusser and I am accompanied by Federica Gioia, legal officer, and

24 Silvestro Stazzone, associate legal officer. And I'm Presiding Judge of Pre-Trial

25 Chamber II I think, yes. Thank you.

1 So now we get into the merits. I give you the floor to expose to us the reason for this
2 request. Thank you, Ambassador.

3 MR KOLOANE: Thank you very much for the floor. Well, the reason really for requesting
4 this meeting was premised on the note verbale that we had received at the South Africa
5 Embassy from the office of the Registry with regards to the forthcoming AU Summit which is
6 taking place in South Africa on the 12th. We forwarded such to South Africa for
7 consideration and for guidance, and subsequent to that they then responded.
8 And with the response that they have sent was prepared a note verbale. And we had then
9 requested through the office of the Registry facilitation for a consultation on these matters,
10 and the response we got was that we would be meeting originally with the three Judges, that's
11 what we're told, and then there was a change.

12 And I must say we are -- we reluctantly agreed to all of those processes and
13 procedures, despite recognising that there is no precedent which has been set in terms
14 of how these matters are dealt with, and, to be quite honest, we were taken aback
15 because we felt that as a State Party we have a right to request that meetings for
16 consultations can be requested by a third party, but when we got the response
17 basically almost what everyone is saying we are going for a hearing with the three
18 Judges. I was a little taken aback, and I think I must indicate that.

19 I'm glad we have somewhat also alluded to what I would regard as the status of this
20 discussion that we're having here today, which to us became a little bit dodgy at the
21 time when we were preparing to come here for this meeting.

22 I would like, if you would allow me, Judge, to read the note verbale and I will give
23 you a copy because we are recording the deliberation so that it is also on record. But
24 furthermore, I would also like to request through the Chamber, Honourable Judges, if
25 it's possible that my delegation also be accorded the privilege to get a copy of the

1 transcript of the deliberations thereof.

2 SINGLE JUDGE TARFUSSER: The transcript of this meeting?

3 MR KOLOANE: Of this discussion, of this meeting.

4 SINGLE JUDGE TARFUSSER: Yes, yes.

5 MR KOLOANE: The reference of this note verbale is 39/2015. "The Embassy of the
6 Republic of South Africa to the Kingdom of The Netherlands presents its compliments to the
7 Registry of the International Criminal Court and has the honour to refer to the latter's Note
8 Verbale reference 2015/ER/38/aab/CB of 28 May 2015, forwarding a request for cooperation in
9 the case of the Prosecutor versus Omar Hassan Al Bashir for transmission to the relevant
10 South African authorities.

11 The request was sent in the context of the African Union Summit to be held in
12 South Africa from 7 to 15 June 2015, the Assembly of Heads of State and Government
13 meeting being held on 14 and 15 June 2015, and which may be attended by President
14 Al Bashir of Sudan.

15 The Note requests the relevant South African authorities to cooperate with the Court
16 in the arrest and surrender to the Court of President Al Bashir in accordance with
17 Article 86 and 89 of the Rome Statute, should he enter the territory of the Republic of
18 South Africa to attend the summit.

19 It also invites the authorities, if they can identify any problem which may impede or
20 prevent the execution of the request for cooperation to consult with the Court
21 pursuant to Article 97 of the Rome Statute, in order to resolve the matter.

22 In this regard, the government of the Republic of South Africa wishes to consult with
23 the Court in terms of Article 97 and bring the following matters to the attention of the
24 Court.

25 Invitations to the AU Summit, to be chaired by Zimbabwe and hosted by South Africa

1 in Johannesburg, South Africa have been issued to Heads of State and Government in
2 line with the decisions by the African Union.

3 Furthermore, the Court's attention is drawn to the fact that in terms of the Agreement
4 between the Government of the Republic of South Africa and the African Union on
5 the hosting of the summit, representatives of Member States of the African Union are
6 accorded immunity from personal arrest or detention.

7 It is submitted that Article 98(2) of the Rome Statute is applicable in this respect, as it
8 provides that the Court may not proceed with a request for surrender or assistance
9 which would require a State Party to the Rome Statute to act inconsistently with its
10 obligations under international agreements where the consent of the affected State is
11 required to surrender a person of the State to the Court.

12 It is submitted that the purpose of Article 98(2) is precisely to address the dilemma of
13 possible conflicting obligations as is presently faced by South Africa.

14 South Africa is first and foremost a Member of the African Union. The
15 African Union has been committed to fight impunity, promote human rights and
16 democracy and stressed the importance of safeguarding the sovereignty, stability and
17 integrity of its Member States. In this regard the African Union expressed its strong
18 conviction that the search for justice should be pursued in a way that does not impede
19 or jeopardise efforts to promote lasting peace.

20 To this end, the African Union is in the process of expanding the mandate of the
21 African Court of Justice and Human Rights to try international crimes as such as
22 genocide, crimes against humanity and war crimes. Furthermore, in order to
23 harmonise the objectives of justice and peace, the African Union has on two occasions
24 approached the United Nations Security Council with requests to employ the deferral
25 mechanism contained in Article 16, Article 16 of the Rome Statute with respect to the

1 situation in Darfur. A positive response to any of these approaches would have
2 solved the present impasse between conflicting international obligations, but was
3 unfortunately not forthcoming.

4 The African Union has over the years raised concerns on how the Court has
5 responded to African situations and has taken a number of decisions in this regard.
6 These decisions are binding on member states that are also State Parties to the Rome Statute
7 and consequently such State Parties, including South Africa, are placed in a position of facing
8 conflicting obligations. It is submitted that international law does not prescribe a clear
9 hierarchy between conflicting obligations emanating from the applicable treaties.

10 It's further submitted, with respect to the Court's aforementioned Note and its
11 reference to South Africa's obligation under the Rome Statute, that a flexible
12 interpretation should be given to these obligations in view of their conflict with
13 South Africa's obligations in terms of the Constitutive Act of the African Union.

14 Such an interpretation would allow for balancing this competing obligation in a way
15 that will serve to stabilise the relationship between the Court and the African Union.

16 In this respect, it should be further noted that a narrow interpretation of the
17 cooperation obligations of the African Union Member States that are also States
18 Parties to the Rome Statute, will have the result of placing them at risk of finding a
19 non-cooperation when hosting African Union summits, a situation that would
20 severely undermine the work of the African Union, also in its primary goal of
21 ensuring peace and security in Africa, which coincides in South Africa's foreign policy
22 objectives.

23 South Africa has the further honour to request that its concerns as outlined in this Note
24 Verbale will enjoy the urgent and serious consideration of the Court, with a view to find an
25 amicable solution.

1 The Embassy of the Republic of South Africa avails itself of this opportunity to renew
2 to the Registry of the International Criminal Court the assurance of its highest
3 consideration."

4 Thank you very much. And I have a copy of the very same Note Verbale that I can
5 hand over. I'm not sure whether to your Honourable Judge or to the Registry.

6 SINGLE JUDGE TARFUSSER: It's the same thing. Thank you. Thank you very much,
7 Ambassador.

8 Prosecutor.

9 MR NICHOLLS: Thank you very much, your Honour. Thank you very much to the
10 Ambassador for South Africa for making the position clear. I'll try to respond briefly.

11 First of all, this response I understand from public source documentation that
12 President Bashir is scheduled to arrive in South Africa or travel to South Africa
13 tomorrow. The note verbale was delivered two weeks ago in which it asked that if
14 there were any problems that South Africa foresaw with the arrest, that they be
15 brought under the Statute to the Court as is happening now without delay.

16 My submission is, unfortunately, this is with great delay at the 11th hour.

17 Second, I have to say that I'm a little bit surprised because the issues raised have all
18 been completely litigated and disposed of before in very clear, precise public
19 decisions which cover each and every argument which has just been made.

20 I will not go through those decisions in detail, suffice to say that I'm referring to the 9
21 April 2014 Pre-Trial Chamber II public decision on the cooperation of the Democratic
22 Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court.

23 And specifically paragraphs 30 and 31 deal with the question of the African Union's
24 balancing, allegedly, theoretically balancing obligations.

25 It is abundantly clear from the jurisprudence of Pre-Trial Chamber II that Mr Bashir,

1 President Bashir, enjoys no immunity as head of state and no immunity as a member
2 of the AU that would relieve a State Party of its obligation to comply with the Court's
3 warrants for the arrest and transfer of Mr Bashir.

4 So I thank South Africa very much for making the position clear.

5 The Prosecution's position is that there is no legal issue here that has been raised that
6 would prevent or that should relieve South Africa of its obligation to effect the arrest
7 should Mr Bashir -- President Bashir, excuse me, arrive in South Africa.

8 The ambassador spoke about the balancing of various factors, which is -- which are
9 understandable concerns, but my position would be that when there is an arrest
10 warrant for crimes of this gravity issued by this Court and very clear jurisprudence
11 on the obligations of State Parties that there is no balancing to be performed. The
12 warrants must be acted upon. He should be arrested and transferred to the Court.
13 Thank you.

14 SINGLE JUDGE TARFUSSER: Anybody else? No.

15 From the Registrar, I don't think that there is anything to say? No.

16 I mean, Mr Ambassador, I again thank you for this opportunity of course. But I am
17 always also a little bit surprised. I think in the note verbale, in some way,
18 you reading the note verbale I heard something like a flexible interpretation. But
19 what can a flexible interpretation be? Or if we go one line or we go the other, there
20 is no possibility, there is an arrest warrant pending. There is a clear, very clear
21 decision, which is not, certainly the last, but there is another one before this on the
22 same line taken by the Chambers of this Court interpreting what now is considered a
23 conflicting -- conflicting obligations which we consider are not conflicting but very
24 clear. So I think that here it is the State who has to take responsibility for himself
25 and just to decide to go one or the other way and then accepting the consequences of

1 one or the other outcome of this way. I don't think we can here, now and here start
2 sort of an exchange or trying to find a third solution, because there is no third solution.

3 There is only a decision to be taken by South Africa if President Al Bashir comes to
4 South Africa. And the fact that it is Zimbabwe to make the invitation, I think this
5 doesn't -- doesn't take away the responsibility of South Africa because it's on the soil
6 of South Africa where Mr Al Bashir is coming.

7 So I think I'm afraid there is not very much space to deal with. I mean, we have a
8 clear position and this clear position is stated in judicial decisions. No such thing
9 like trying to compromise is at this stage possible. There is this pending arrest
10 warrant. It has to be implemented by a member State. If the member State doesn't
11 implement the warrant of arrest, there are consequences like was in the decisions
12 referred to by the OTP. That's it. I mean, I don't think there is much space to make
13 any other consideration.

14 Yes, you have the floor. Thank you.

15 MR KOLOANE: Honourable Judge, thank you very much. Maybe can I just get clarity just
16 to make sure that my understanding is correct.

17 Am I correct in hearing that the response is a refusal for consultations because the
18 matter, according to the International Criminal Court, has been discussed
19 exhaustively, there is no need for any detailed discussions? Is that the
20 understanding I got correctly from the Prosecutor as well as confirmed by the Judge?

21 SINGLE JUDGE TARFUSSER: It depends on what you mean by "consultation." If
22 "consultation" means that we tried to find --

23 MR STAZZONE: Negotiate.

24 SINGLE JUDGE TARFUSSER: Yeah. Well, if the consultation is negotiation, I think I feel
25 there is negotiation possible, because we have two clear roads to go or, well, which has to be

1 decided by South Africa of course. We obviously respect any position South Africa will take,
2 but then we will follow what is the law or what is the law which was agreed upon by all
3 States, South Africa as well.

4 We are a judicial body. We stick to the law. So it depends on what you mean by
5 "consultation," because this -- that we are sitting here, we are consulting. This is a
6 consultation. The consultation is not now trying to -- we are not in a position here to
7 do -- to find solutions different from those which -- from those the law are stating.
8 That is what I think.

9 MR KOLOANE: Okay.

10 SINGLE JUDGE TARFUSSER: Yes, please.

11 MR RASTAN: Sorry to intervene, just a short comment.

12 Our understanding of the consultation provision is Article 7 is that consultation is a process,
13 not a result. So what we are engaged in now is consultation. It may not achieve the aim of
14 the particular party involved, but this is still a hearing or a meeting that's being organised
15 under Article 7 for the purpose of consultation.

16 Now, of course, South Africa has presented its position in relation to a number of issues. The
17 Prosecution's response, as will be the Chamber's, is that many of these issues or all of these
18 issues have already been decided; therefore, it's not a situation where these are issues that are
19 yet to be litigated, in which case there may be still unclarity in terms of which way the Court
20 may go.

21 The response, at least from the Prosecution, is that these issues have already been resolved.

22 So unless there are new issues South Africa would like to put on the table, there doesn't seem
23 to be any alternative but to follow the existing case law.

24 So although, you know, you perhaps wish to have a different result, I don't think one should
25 go away from this meeting thinking that the Court refused to consult. The Court has

1 consulted in its process, but perhaps the Court refused to accept your submissions in this
2 regard. But the consultation is currently underway and I believe it's happening as we speak.
3 MR KOLOANE: Honourable Judge, if I may, I started by saying that the South Africa
4 embassy requested a meeting with the Registry with a view of requesting an audience for
5 consultation and that the Registry indicated back to us that, no, we'll be meeting with the
6 three Judges. That's why I said we were taken aback because we don't have a hearing, when
7 all we wanted was to make a request for consultation.
8 In our view, that's why I'm pressing the issue of the status of the meeting earlier,
9 because I am definitely not an authority or an expert on judicial matters. I'm just the
10 ambassador of the Republic. And what experts back at the capital would deal with
11 this issue.
12 And all they've done is they've requested me, through the minister, to actually place their
13 request on record that they would like to consult with the Court. I am not the person who is
14 authorised to do the consultations, like I said, because I'm under no illusion that I'm an
15 authority on the issues and, therefore, it's not in my mandate to do that. So I'm not trying to
16 correct that. I don't take this as a consultation. But for us, we came here to request for
17 consultation. And because there is no precedence in terms of how this request in terms of
18 this Article 97 can be dealt with, we did not know how to proceed. If there was a precedent,
19 we would have followed it. But we just made the request fundamentally because this is an
20 issue and also may be linked to -- the Office of the Prosecutor has also indicated that there
21 was a delayed response. And I may agree with him, but I think I also want to bring to the
22 attention of the Court and everybody present in this room today that governments
23 surrounded by ministers who put many other modifications, and this matter has had to go
24 through cabinet and all government structures. So the fact that within a matter of a day or
25 two, a week, sometimes you cannot get a response is normal in most countries in the world.

1 And the reason why also this has happened in this particular instance is fundamentally
2 because the matter had to go through the council of ministers, back to our legal division, go to
3 cabinet for discussion, feedback be provided, hence it led to this particular response, and the
4 note verbale clarified.

5 So for me there are two things I would like to emphasise: We do not regard this as a
6 consultation. We regard this as a request for consultation so that we can bring our experts as
7 well to deal with these particular issues.

8 I would therefore not want to express my own personal opinions on the
9 interpretations that have been made about whether the issues of universality are no
10 longer of importance to the Court or not, because the AU has raised its own issues
11 about that. But I'm sure the experts will deal with those particular issues.

12 But particularly also given the fact that we all recognise that there is still a challenge of
13 universality of the Rome Statute and, therefore, we've got State Parties within the continent
14 which are not members and signatories of the Rome Statute but who are members of the
15 African Union. So these are all the issues relating to universality. But I'm sure my
16 authorities and experts that will come and engage with you at whatever time will be suitable
17 to yourself will be better positioned to deal with those issues.

18 So the request really is to -- we do not believe that we are only addressing this problem now,
19 but we are saying this is a problem that's going to be facing us for time on end, and that
20 unless we find institutional mechanisms of dealing with these issues through a process by
21 experts on both parties, I think we -- I'm not sure that we'll be doing justice to the issue.

22 SINGLE JUDGE TARFUSSER: Ambassador, you're right, it's a request for consultation, but
23 as it was urgent, because it seemed or it seems, I don't know if yet if President Al Bashir is
24 travelling or not, it seems not, it seems yes, I really don't know, as it was urgent, and I'm quite
25 proactive, I thought we shorten the whole thing and make out of your request of consultation

1 a consultation. This is what -- how I saw it, because we have to come to a -- we didn't know
2 what you, what your government will bring to us in terms of material to be consulted upon.
3 So this was -- we just didn't go the long way, but the very short way to have not only a
4 request, a request for consultation and then some consultation, but we shortened the whole
5 thing and did it this way.

6 Of course, I don't think that the Office of the Prosecutor wanted to blame the government for
7 being late, but just to signalise the fact that their response has been some time. We all
8 understand that in issues like these, delicate issues like this, the consultations take some time.
9 So the fact is that we had to in a few hours convene this meeting in order to satisfy your
10 request for consultations and to try to do everything before the event of the travel or no travel
11 of Mr Al Bashir happens and this is -- you requested the floor to speak?

12 MR NICHOLLS: May I make just two points, your Honour? And thank you. And it's
13 not -- I speak on my -- the first reference to the timing is not a criticism, but just the fact that
14 this is now in an urgent stage.

15 SINGLE JUDGE TARFUSSER: Yes.

16 MR NICHOLLS: I'd just like to briefly make two points: One is that the note verbale is a
17 reminder, and it's important, but it doesn't trigger the obligation. Even if there was no note
18 verbale delivered to South Africa, South Africa would be under exactly the same obligation
19 because of the arrest warrants and requests it has received years ago in order to effect and
20 execute the warrants.

21 The second is that my understanding, and I'd just like to request clarity on this, is that
22 the fact that consultations may have been requested, filings may be coming, the
23 ambassador referred to experts who will later provide some arguments or some
24 further information, that none of that stays the obligation to arrest Mr Bashir,
25 President Bashir should he arrive in South Africa and the territory.

1 Our position is that, pending litigation, which may start over this weekend or
2 Monday, cannot be viewed as a valid reason for not effectuating the arrest, because
3 otherwise invariably what will happen is that while these requests are pending or
4 while the actual experts who are coming to bring these legal issues to the Registry to
5 discuss, by that time Mr Bashir will have left South Africa and gone back to Sudan
6 and the whole issue will be moot at that point.

7 So our position is that these requests and any further requests or litigation or filings
8 should not be viewed in any way as a stay or suspending the obligation for execution
9 of arrest. Thank you.

10 SINGLE JUDGE TARFUSSER: Mr Ambassador. Maybe before though the Registrar you
11 can reply. Well, okay, Mr Dubuisson.

12 MR DUBUISSON: Thank you, your Honour. It's right what has been mentioned just now
13 by the Prosecutor by the fact that, yes, we have already notified the 13 March 2009 by note
14 verbale dated 5 March 2009 the arrest warrant and the 28 August 2010. That's when we sent
15 and, that's true, we sent a reminder in accordance with the recent order of the Pre-Trial
16 Chamber, which were dated from 15 April 2015.

17 But I could understand the difficulty in which we are today because when we
18 received the request we have, of course, immediately think Article 97 and the fact that
19 it was a reference to a consultation process. And this Article 97 is made in advance
20 to the Court. And in such matters we decided, in such matters the Court must be the
21 Chamber and not the Registrar only. That may be where we have some difficulty. I
22 have a thought to make a reference to some exchange that we have in which an
23 advocate was -- to be together with us, which is not the case, and of course this
24 advisor of the department of justice would have maybe be the right person as
25 mentioned by His Excellency Ambassador of South Africa.

1 Of course we, the Registry, would never enter litigation which is not the whole of
2 Registry, very clear, but I think where we are here is more an Article 97, at least it was
3 how it was presented to us, and mainly I will say the point C of this Article 97 which
4 was more in relation to the consultation process for some of the reason why it's
5 difficult to happen.

6 That's to give you an idea of why we bring to the Chamber today the specific topic. And of
7 course as we were not totally assured by the way of the understanding, that's why we have
8 provided so this room as the best forum to discuss, which is a way in between a courtroom, a
9 real courtroom, and maybe a place where a kind of consultation process which are more or
10 less formal to take place.

11 But we at least on all sides try to achieve -- when Mr Ambassador referred to we are impeding
12 justice, I think we are giving justice and it's a constitution process. Maybe some point to be
13 clarified regarding the reason why, at least what are the proposals of the situation process
14 more than to discuss the legal basis for a response, which is something else which I think is
15 not occurring at point A, B and C of this Article 97. Just to clarify.

16 SINGLE JUDGE TARFUSSER: Ambassador.

17 MR KOLOANE: Honourable Judge, I'm not sure maybe whether I'm missing something
18 here. I do not remember in reading the note verbale the government of the Republic of
19 South Africa saying they will not honour its obligation. Nowhere did I say that. So I think
20 I'm just trying to get that on record to be clear, because I don't want insinuations which
21 presupposes that we're actually going away from our obligations. I think I want to have that
22 on record particularly since this is being recorded.

23 But secondly, generally speaking, you know, when you request a meeting, you want
24 to know who is going to be in the meeting, you get told. When the status quo of that
25 meeting changes drastically and I'm prepared for meeting three people to the whole

1 team, I could easily say I'm being ambushed and therefore I feel uncomfortable.

2 But in the spirit of cooperation again we are sitting down sharing with you the note verbale

3 that we have.

4 Thirdly, it's very unfortunate because indeed we had requested that the minister of

5 justice, which is the custodian of the file, be the one who comes because they could

6 shed some more light because they are the ones who are directly in consultations and

7 are very active player within the AU framework who would have had a better insight

8 into the real issues and all the complexities therein. But unfortunately she got to the

9 airport and they told her you need a visa, he had brought only an official passport,

10 permit to travel, and you don't need a visa and therefore they stopped him.

11 So therefore I can tell you it happens all the time, some people get allowed to go

12 through, some they get stopped at the airport even on diplomatic passport. So it

13 was not deliberate. She was already in the airport, ticket was already bought and a

14 copy of it we can share with you as evidence.

15 SINGLE JUDGE TARFUSSER: No, no. Was she stopped in South Africa?

16 MR KOLOANE: In South Africa at the airport they couldn't allow to board the plane. That

17 was the problem last night. So I think that is the issue.

18 I really want to state again that no one is calling for a compromise and no one has

19 said that there is a compromised position. All we said is because of the conflicting

20 obligations that we find ourselves in, we are a State Party, friend of the Court, so as a

21 State Party we have got obligations as a member of the African Union. We equally

22 have obligations as signatories of the Statute. It's easier for the Court to say there are

23 no conflicting obligations, but for the State itself, which operates in a particular

24 environment, these become realities.

25 I can give a very dissident example which maybe doesn't really talk to this directly.

1 South Africa voted for the no fly zone in Libya because we believed in it, not knowing
2 that we were giving permission for an offensive, a military offensive on Libya. The
3 whole of the African continent turned against South Africa. We became alienated.
4 Not a single original overseas organisation came to our rescue. So we had to work
5 very hard again to revive relations with the countries of the continent.
6 So when we request an audience therefore for consultations it's because we want to deal with
7 these issues exhaustively. We are not necessarily saying I think the note verbale that we
8 received has prompted the reaction and says, by the way, we need to be engaging on these
9 issues. All we are requesting therefore is that South Africa will be granted a meeting to
10 express through our appropriate expert and authorities our views and share in terms of the
11 process like I said earlier, I mean not unless there is something also that we're missing out, we
12 are not sure if any other State Party before has actually invoked this Article and therefore
13 there is a precedent that's been set, this is how you deal with this issue.
14 But if not, because we did not know about that, that's why we go to the Registrar to request.
15 And I think that is again a repetition of what I said earlier.

16 SINGLE JUDGE TARFUSSER: May I just say I said at the beginning that we are most
17 grateful to South Africa, because I think this is the first time that we are engaged in this
18 process. And we appreciate it very much, because we consider that this matter is taken
19 seriously by South Africa, which -- and not in the cases before it wasn't done like this. So we
20 appreciate very much that South Africa took this position, this step. So just to be clear on
21 this side.

22 And for myself I do understand perfectly what you call the conflicting obligations.
23 The problem is that to us from my point of view there are no -- there is no conflict.
24 This is the problem, because we have already decided what prevails, what legally
25 from our point of view prevails. That doesn't mean that I do not understand that

1 from your point of view the thing is a little bit more tricky and different of course, but
2 that's why we are doing this 97 consultations.

3 And another problem I see is what the OTP also said, that in this note verbale you read out,
4 and now it's also on the record, there is nothing new. There is nothing that we have not
5 already decided upon. Because if you have something new, obviously we get in the process
6 of trying to solve also this problem from a legal point of view. But there is -- I couldn't hear
7 any novelty because all what is in here we have already decided.

8 So of course we are very happy to see -- to read filings of South Africa on this matter in the
9 future, but it must also be clear that from our point of view, if Al Bashir, President Al Bashir
10 comes to South Africa, the obligation South Africa has for us is quite clear, to comply with the
11 arrest warrant.

12 OTP?

13 MR RASTAN: Thank you, your Honour.

14 Just to also respond on the consultations. I think as South Africa noted it's perfectly proper
15 as we say that you come before the Court. Indeed the purpose of consultations is to try to
16 resolve issues that arise. And as the Registrar has noted, there is specific types of examples.
17 The purpose of consultation is to for example say that the information the Court provided in
18 its request is insufficient or another issue has arisen because you can't locate the items and so
19 on. And then indeed under provision (c) that we're discussing now it's your belief as a State
20 that the request in its current form would cause you to breach a pre-existing obligation and
21 you seek consultations with the Court in order to resolve the legal issue that has arisen, the
22 fact that you believe you have a pre-existing obligation, in this case your belief in the African
23 Union's resolution and asking the Court to consult with you in order to resolve the matter.
24 And I think indeed the only concern in relation to that aspect, the concerns that you have
25 expressed today quite properly have all been resolved previously by the Court.

1 So we for example were expecting that perhaps there will be other concerns or additional
2 concerns not already treated by the Court that needed resolution, but in this case our opinion
3 is that the issues that you have raised have all already been resolved by the Court; therefore,
4 there is not a situation we would believe in which South Africa might be unclear as to the
5 extent of its obligations falling within the scope of 70 -- 97(c).

6 And in that regard also just to again recall our concern that such consultations of
7 course do not interrupt the pending obligation that exists. So of course should
8 President Bashir arrive tomorrow, the fact that you have sought consultations or you
9 may even seek further consultations would not interrupt that pending obligation.

10 That's one of the reasons we are --

11 SINGLE JUDGE TARFUSSER: No suspensive effect.

12 MR RASTAN: No suspensive effect. And we are very keen for the Court, for this Chamber,
13 for the Single Judge and for the Chamber to indeed confirm that obligation forthwith before
14 President Bashir does arrive in South Africa, if he does so.

15 SINGLE JUDGE TARFUSSER: Please, Mr Ambassador.

16 MR KOLOANE: Honourable Judge, I think we are belabouring the issue, the same points.

17 But again, I want to be emphatic. We have not said we want to run away from our
18 obligations. I'm repeating myself in this area. All we have said is we had called for
19 consultations, and what I am hearing you say, and I'm only trying to get clarity, is that all the
20 issues that have been discussed and therefore there is no need for that consultation because
21 we have decided on all issues; is that the response you obtained? I'm trying to get clarity
22 first before I move on to the other one.

23 MR RASTAN: The only point I was making is that the purpose of that provision is where
24 there is uncertainty or doubt for the State Party in terms of what they should do in relation to
25 such pre-existing obligation, and it so happens in your case that it's the same arguments,

1 pretty much similar arguments, were raised by another African Union member State who is
2 also a State Party and all of those issues were resolved by the Court. So in that context
3 ordinarily the decision of the Chamber previously on this issue would similarly bind
4 South Africa.

5 So unless South Africa has questions as to the extent of that decision perhaps or
6 uncertainty which can be resolved now, there is -- the purpose of consultation
7 provision is not to relitigate a decision that has already been rendered. It's not a
8 litigation forum, but a forum in which any doubts or uncertainties could be resolved.
9 And if the Chamber is able to resolve any of those uncertainties that you have in terms of the
10 previous decision, then I think that can definitely be sought today. Other than that, to ask
11 the Chamber to revisit a previous decision already taken and publicly known would be a
12 request for reconsideration of a decision, which is not the purpose of consultation.

13 SINGLE JUDGE TARFUSSER: Please, Mr Ambassador.

14 MR KOLOANE: Honourable Judge again, you know, I'm a layperson so I'm not eloquent.
15 So can I get clarity as a layperson? You are saying because these matters have been
16 discussed before they were presented, there is no more need for further consultations on them,
17 not unless we bring anything outside what we have written?

18 MR NICHOLLS: May I respond, your Honour?

19 SINGLE JUDGE TARFUSSER: Sure.

20 MR NICHOLLS: No. Let me first be clear that nothing I said or that we said is meant to
21 suggest that we expect or are saying that South Africa would not fulfil its obligations as a
22 State Party. We don't expect that.

23 The point about the note verbale is not that there were no points for consultation.

24 What we are doing now is having consultations. The point that I raised and that my
25 colleague raised is that hearing the topics in your response to the note verbale where

1 you said the issues that South Africa faced, each and every one of those issues I say
2 identical issues have been decided.

3 And I understand that you're a layperson, but I would say that once an issue has been
4 decided, it's only decided once. So it cannot be raised again and again once it has been
5 decided because it's a question of law. That question of law has been resolved in a certain
6 way and in that case there isn't anything to discuss because the law is clear.

7 SINGLE JUDGE TARFUSSER: Well, may I say something which may be the reverse a little
8 bit of what you say.

9 MR NICHOLLS: Yes.

10 SINGLE JUDGE TARFUSSER: Because of course you can raise the same questions again in
11 another, in another similar case, and maybe all three Judges, another Chamber could decide in
12 a slightly different way. I cannot imagine completely opposite, but in a slightly different
13 way. But before that there must be a procedure ongoing. It's not us here who can decide
14 against a decision taken by -- against the initial decision. I could not say to you in any case:
15 Don't worry, don't arrest Al Bashir because tomorrow I'm going to my colleagues and I will
16 withdraw, we will withdraw the arrest warrant.

17 I mean, these are facts. I mean, there is an arrest warrant. The Court on the basis of the
18 arrest warrant itself and of decision taken thinks that the State Parties has to comply with it by
19 arresting. Of course, maybe we in a future case of litigation, if South Africa or another State
20 gets into litigation on this issue, it could be that there is a change in the jurisprudence.

21 I don't see very, very optimistically, but as it stays today 12 June, this is the state of art, and
22 this state, there is no novelty in here to what is stated in the decision in the DRC case which is
23 very similar to this one.

24 MR KOLOANE: Honourable Judge, I think, like I said, I'm having issues because there is
25 consistent referral to South Africa's responsibility and expectations to honour as if there was a

1 request not to honour. And I want to go on record again that it's been raised more than five
2 times we've been in this room the same point. I'm not sure why, why that is, but nonetheless,
3 I would request then, because I don't think there is anything new now that's going to come of
4 the discussion, that maybe because we have presented the note verbale to the Registry, I
5 assume that they will do the quickest thing, which would be to provide a written response to
6 the note verbale and then that will be the basis for going forward because we need to be clear
7 that we would know what to say to the capital.

8 SINGLE JUDGE TARFUSSER: Yes.

9 MR KOLOANE: Are we saying all the issues that I have raised we have been told that they
10 have been discussed exhaustively and therefore they will not change, it is only for
11 consultations? We need to know that. Or if you want more information, whatever the case
12 may be, so that we know what it is that we're expected to live on. But again I want to go on
13 record we did not come here to request that we put a deferral on the implementation of what
14 is binding on all State Parties. I think we would have been naive as a State if we came for
15 that.

16 We came here because we were prompted by the note verbale to initiate discussions because
17 we have a vested interest as well in this Court as much as we have a vested interest in
18 ensuring that it becomes an appropriate response at the same time and some of the things that
19 happened do have a negative effect some of these issues and that's why we believe that we
20 can engage, consult and without necessarily saying --

21 SINGLE JUDGE TARFUSSER: We are --

22 MR KOLOANE: -- consultations are undermining what already has been agreed upon.
23 Consultations will be between experts on both sides with a way of finding solutions for other
24 challenges facing the Court. And that's why I said I don't regard this as a consultation but a
25 request for consultation where experts who are dealing with this issue, who are challenging

1 the law on a day-to-day basis would be better placed to make recommendations for things
2 that may need further consideration.

3 But I said I think we've exhausted the issues and I want to thank of course the Honourable
4 Judge and everybody who is here for your time and we hope you have not wasted your time.
5 And we look forward to getting the formal response where from Registry once they have been
6 able to put one together.

7 SINGLE JUDGE TARFUSSER: Ambassador, we are happy to have been in these
8 consultations. I think the State Parties are our owners; therefore, we have an obligation
9 toward State Parties, all State Parties, therefore we are happy that we have these
10 considerations from State Parties I say once again.

11 So thank you for having taken this time to engage with us. We will obviously continue these
12 consultations in driving or in decisions. I will invite also the Registrar to provide you with a
13 copy of this decision of 9 April where all these questions you raised in the note verbale are
14 decided so you have also the hard copy of this.

15 Again, this does not in any case -- what further happens in these consultations does not
16 suspend the arrest warrant for Mr Al Bashir in any case. So I think that this must be clear
17 and it must be clear that in this respect then South Africa has to, if he will come to
18 South Africa, of course, has to take a position, whichever South Africa thinks to have to take
19 on this issue.

20 So thank you for being here. Thank you to your government for sending you here to
21 consult with us. Thank the OTP, the Registry, my two colleagues and obviously you.
22 Well, that's it. Thank you.

23 MR KOLOANE: Sorry, Honourable Judge, just one, what is the procedure as well for
24 requesting the transcript of the deliberation so that we don't also --

25 SINGLE JUDGE TARFUSSER: No, there is no procedure. I order the Registrar to give you

- 1 a copy without any formality, so as a hard copy of this as soon as we have it. Maybe not
- 2 immediately but tomorrow, after tomorrow or Monday probably, okay?
- 3 MR KOLOANE: No problem.
- 4 SINGLE JUDGE TARFUSSER: Thank you very much.
- 5 MR NICHOLLS: Thank you, your Honour.
- 6 (Proceedings concluded at 5.58 p.m.)