



Original: English

No.: ICC-02/05-01/09
Date: 26 October 2015

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

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

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Julian Nicholls

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Competent authorities of the Republic of
South Africa

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. In this Request, the Prosecution seeks the following relief:
 - a. the opportunity to be heard on the steps to be taken with respect to a deadline for the Republic of South Africa ("South Africa") to submit its views in relation to proceedings under article 87(7) of the Statute, should the domestic legal proceedings in South Africa not be finalised by 31 December 2015;
 - b. confirmation that South Africa has a continuing obligation to arrest and surrender Omar Al Bashir ("Al Bashir") should he travel to South Africa again; and
 - c. the lifting of confidentiality with respect to the filings relating to these proceedings.

2. The Pre-Trial Chamber issued its "Decision on the request of the Republic of South Africa for an extension of time limit for submitting their views for the purpose of proceedings under article 87(7) of the Rome Statute" on 15 October 2015,¹ before the Prosecution had the opportunity to be heard.

3. The Pre-Trial Chamber granted the relief sought by South Africa, namely, an extension of time to submit its views "on the events surrounding Omar Al Bashir's attendance of the African Union summit in Johannesburg on 13, 14 and 15 June 2015, with particular reference to their failure to arrest and surrender Omar Al Bashir, for the purposes of the Chamber's determination pursuant to article 87(7) of the Statute."²

4. The Prosecution seeks the relief specified above out of concern for the potentially open-ended time frame that may result from the need for resolution of the

¹ ICC-02/05-01/09-249.

² ICC-02/05-01/09-249, para. 6, *referring to* ICC-02/05-01/09-247.

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.

The Pre-Trial Chamber should hear submissions with respect to a deadline for the receipt of South Africa's views if the domestic proceedings in South Africa are not concluded by 31 December 2015

5. The Pre-Trial Chamber granted South Africa an extension of time based on South Africa's submission that its domestic courts are still seized of the legal issues concerning the failure of the South African authorities to arrest Al Bashir.³ Since it was unclear when the proceedings in South Africa may be completed, the Pre-Trial Chamber ordered South Africa to "promptly inform the Court of any developments in the relevant domestic judicial proceedings as they occur" and in the absence of any such developments, by 31 December 2015 at the latest.⁴
6. The time frame for completion of the proceedings currently before the Supreme Court of Appeal is unpredictable; it could last well into 2016.⁵ The Pre-Trial Chamber having requested South Africa provide an update by no later than 31 December 2015, also stated that "it is paramount that the granted extension does not undermine the efficiency and the expeditiousness of these proceedings"⁶ and that the proceedings before this Court are "fully independent from those

³ ICC-02/05-01/09-249, paras. 10-11. *See also* ICC-02/05-01/09-248-AnxI.

⁴ ICC-02/05-01/09-249, para. 11.

⁵ The Prosecution has inquired with an attorney for the South African Litigation Centre ("SALC") when the matter is likely to be disposed of by the Supreme Court of Appeal. The information received indicates that while it is impossible to predict with certainty – as scheduling is within the discretion of the Court of Appeal – it is considered unlikely that a hearing date will be set for this year. The attorney for SALC informed the Prosecution that if the matter reaches the highest court in South Africa, the Constitutional Court of South Africa, the proceedings could stretch to the end of 2016.

⁶ ICC-02/05-01/09-249, para. 11.

ongoing before the South African domestic courts.”⁷ Accordingly, the Prosecution requests that it be heard, at an appropriate time, on the matter of whether any further extension of time should be allowed to South Africa to provide its views, if the domestic proceedings have not been finalised by 31 December 2015.

7. In particular, should there be no relevant domestic judicial developments prior to 15 December 2015,⁸ the Prosecution considers that although South Africa should be provided a reasonable amount of time to submit its views, this should be within a timeframe that is proximate to the 31 December 2015 date in order to enable a timely determination by this Chamber. Given that South Africa had been initially ordered to submit its views by 5 October 2015,⁹ the time frame suggested by the Prosecution – proximate to the 31 December 2015 date – would mean that South Africa will have had at least approximately three months extra to present its views. Overall, this extension provides a reasonable amount of time.

South Africa is under a continuing obligation to arrest and surrender

Al Bashir

8. South Africa’s continuing obligation to arrest and surrender Al Bashir is clear and unambiguous.¹⁰ Nevertheless, South Africa has recently stated in its domestic court filings that “given both bilateral relations between South Africa and Sudan, as well as their co-membership of the African Union, there is every

⁷ ICC-02/05-01/09-249, para. 10.

⁸ ICC-02/05-01/09-249, para. 11.

⁹ ICC-02/05-01/09-247, p. 7.

¹⁰ ICC-02/05-01/09-242, para. 1: “[...] there exists no ambiguity or uncertainty with respect to the obligation of the Republic of South Africa to immediately arrest and surrender Omar Al Bashir to the Court, and that the competent authorities Republic of South Africa are already aware of this obligation.” Para.8: “In particular, the Presiding Judge repeatedly made clear, in unequivocal terms, that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir as soon as on its territory and that the consultation between the Court and the Republic of South Africa under article 97 (or any other further discussion on the point at any later stage) do not trigger any suspension or stay of this standing obligation.” *See also* ICC-02/05-01/09-249, para. 3 (referring to notification by the Registrar).

likelihood that [Al Bashir] will return to South Africa.”¹¹ Indeed, if the article 97 consultations did not “trigger any suspension or stay” of South Africa’s obligation to arrest and surrender Al Bashir – as the Pre-Trial Chamber stated¹² – then neither should domestic legal proceedings. Thus, to avoid any possible doubt, the Prosecution requests that the Pre-Trial Chamber confirm that neither the extension of time it granted to South Africa, nor the continuation of domestic legal proceedings in South Africa, has any bearing on South Africa’s continuing obligation to arrest and surrender Al Bashir, should he travel again to South Africa.

**In the interests of transparency the confidential filings related to
President Bashir’s travel to South Africa in June 2015 should be made
public**

9. The Prosecution takes issue with the way South Africa has represented, in its submissions to the Pre-Trial Chamber in support of its request for an extension of time, how the article 97 consultations involving South Africa and the organs of the Court unfolded. In particular, although the Registry notified South Africa at 12h40 on 13 June 2015 that the article 97 consultations (which had taken place on Friday, 12 June 2015) had ended,¹³ South Africa maintained, in its request for an extension of time,¹⁴ that these consultations constituted a “preliminary meeting between the Government and the Court” and that “it was the understanding of the Government that that the official Article 97 consultations were to take place

¹¹ *Minister of Justice and Constitutional Development and Others v South African Litigation Centre*, Supreme Court of South Africa, HC Case No. 27740/2015, Notice of Motion, 30 September 2015, Founding Affidavit, para. 13: “[...] given both bilateral relations between South Africa and Sudan, as well as their co-membership of the African Union, there is every likelihood that [Al Bashir] will return to South Africa. This is confirmed by the meeting earlier this month between President Bashir and President Zuma in Russia, the public reiteration then by President Zuma of the strong ties between the two countries, and the statement by President Zuma of Government’s wish to invite President Bashir to return to South Africa.”

¹² ICC-02/05-01/09-242, para. 8.

¹³ ICC-02/05-01/09-243, para. 3.

¹⁴ ICC-02/05-01/09-248-AnxI.

on Monday, 15 June 2015.”¹⁵ South Africa further stated that the “Prosecutor made an urgent request to the Court for clarity regarding the Article 97 consultations, without any prior warning or notice to the Government.”¹⁶ Notwithstanding the fact that the Prosecution is under no obligation to inform any party or participating State of its intention to file *prior* to filing a submission before the Court, it did – out of courtesy - immediately inform South Africa of the “urgent request”¹⁷ after it had been filed, and prior to the decision being issued by the Presiding Judge.¹⁸ Lifting the confidentiality of all previous filings associated with South Africa’s failure to arrest and surrender Al Bashir will publicly clarify the record and correct any misconceptions that may have been created about the nature of the article 97 consultations and the filing of the Prosecution’s urgent request.

10. In the interests of transparency, therefore, the Prosecution requests, pursuant to regulation 23*bis* of the Regulations of the Court, that the following Prosecution filings be reclassified as public:

- a. ICC-02/05-01/09-240-Conf: 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;
- b. ICC-02/05-01/09-241-Conf: 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;

¹⁵ ICC-02/05-01/09-248-AnxI, para. 1.3. The South African Government has also publicly expressed the opinion that “what was interpreted by South Africa to be a diplomatic and political process was morphed into a judicial process based on an urgent application by the Prosecutor of the Court for an order on the South African obligations to the Court. South Africa was unfortunately not afforded the opportunity to present legal arguments on this application, and hence it is of the view that the principles of justice were not adhered to.” Republic of South Africa, Department of International Relations and Cooperation, “South Africa’s submission to the International Criminal Court (ICC) regarding the matter of President Al Bashir of Sudan”, available at: <http://www.dfa.gov.za/docs/2015/suda1005.htm> [last accessed 16 October 2015].

¹⁶ ICC-02/05-01/09-248-AnxI, para. 1.4.

¹⁷ ICC-02/05-01/09-241-Conf.

¹⁸ ICC-02/05-01/09-242.

- c. ICC-02/05-01/09-244-Conf: 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;
- d. Annexes 1-6 to the "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".¹⁹

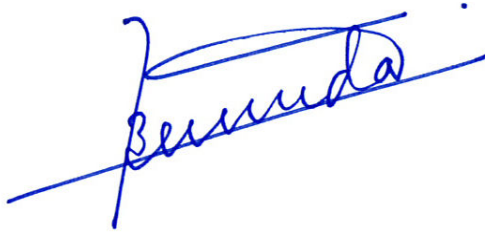
Relief requested

11. For the reasons given above, the Prosecution requests that the Pre-Trial Chamber:

- a. afford the Prosecution the opportunity to be heard on the steps to be taken should the domestic legal proceedings in the Republic of South Africa not be finalised by 31 December 2015, with respect to a deadline for South Africa to submit its views for the purposes of proceedings under article 87(7);
- b. confirm South Africa's continuing obligation to arrest and surrender Al Bashir, irrespective of its domestic proceedings or the extension of time to submit its views; and

¹⁹ See ICC-02/05-01/09-243, para. 12. Annexes 1 to 6 of the Registry filing were filed confidentially "as they concern diplomatic correspondences between the South African authorities and the Court and contain contact details of staff members of the Court and representatives of South Africa." In light of the spirit of article 64(7), and the principle of open proceedings, the Prosecution does not see this as an impediment to reclassification of these documents as public. This is particularly so with respect to the transcript of article 97 consultations. The fact that this consultation occurred, and some of the content of the consultation, has already been referred to publicly by the Pre-Trial Chamber. See ICC-02/05-01/09-247, paras. 5-8.

- c. lift the confidentiality of related filings noted herein.



Fatou Bensouda, Prosecutor

Dated this 26th day of October 2015

At The Hague, The Netherlands