

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 13 June 2015

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF**

The Prosecutor v Omar Hassan Ahmad AL BASHIR ("Omar Al Bashir")

**URGENT
Confidential**

**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**

Source: Office of the Prosecutor

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

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**Unrepresented Applicants for
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Credible sources indicate that Omar Hassan Ahmad Al Bashir¹ has entered South Africa today for the purposes of attending an African Union summit.²
2. Consultations pursuant to Article 97 of the Statute between South Africa and the International Criminal Court regarding South Africa's obligation to arrest and surrender Omar Al Bashir took place on 12 June 2015. They featured Presiding Judge Cuno Tarfusser, representatives of South Africa, the Prosecution and the Registry. Since then the Prosecution has learned that the Chief State Law Adviser of the Republic of South Africa has arrived in The Hague.
3. Considering that the article 97 meeting of 12 June 2015 has concluded, and that Omar Al Bashir has arrived or will imminently arrive in South Africa, the Prosecution requests that the Presiding Judge of Pre-Trial Chamber II³ issue a public decision clarifying South Africa's obligation to Arrest and Surrender Omar Al Bashir to the International Criminal Court.⁴
4. The Prosecution requests the Presiding Judge to clarify in his order:
 - a. Whether consultations pursuant to Article 97 have now concluded.
 - b. That South Africa is required to immediately arrest and surrender Omar Al Bashir to the ICC. There is no ambiguity regarding this obligation.
 - c. That issues relating to domestic law do not nullify or change South Africa's obligation under the Rome Statute to arrest and surrender Omar Al Bashir to the ICC.

¹ "Omar Al Bashir".

² See http://suna-sd.net/suna/showNews/250594/en?utm_source=dlvr.it&utm_medium=twitter (last accessed on 13 June 2015).

³ "Presiding Judge"

⁴ "Court".

- d. That South Africa's immediate obligation to arrest and surrender Omar Al Bashir is not subject to any delay, stay or suspensive effect.

Confidentiality

5. The Prosecution submits this filing as confidential pursuant to regulation 23 *bis*(2) of the Regulations of the Court, since it cites confidential discussions and submissions that bear the same classification. The Prosecution requests, however, that the decision resulting from this application be issued publicly.

Procedural history

6. On 31 March 2005, the United Nations Security Council acting under Chapter VII of the Charter of the United Nations adopted Resolution 1593 (2005)⁵ referring the situation in Darfur to the Court. The United Nations Security Council decided in the context of cooperation with, and assistance to, the Court that it "...while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully".⁶

7. On 14 July 2008, the Prosecution filed its application for an arrest warrant for Omar Al Bashir.⁷ On 4 March 2009, Pre-Trial Chamber I issued an arrest warrant for Omar Al Bashir for seven counts of crimes against humanity and war crimes. In the arrest warrant, Pre-Trial Chamber I found that "under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under

⁵ "UNSC".

⁶ Resolution 1593 (2005), adopted by the Security Council at its 5158th meeting, on 31 March 2005. S/RES/1593 (2005), Operative Paragraph 2.

⁷ ICC-02/05-157.

the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes.”⁸

8. On 5 and 6 March 2009, the Registry submitted three filings to Pre-Trial Chamber I, detailing transmission of the warrant of arrest and the requests for its implementation to the Government of the Republic of the Sudan (“the Sudan”),⁹ to all Rome Statute States Parties¹⁰ and to all United Nations Security Council members that are not States Parties to the Rome Statute.¹¹

9. On 12 July 2010, Pre-Trial Chamber I issued a second arrest warrant for Omar Al Bashir for three counts of genocide.¹² The Registry subsequently transmitted requests and supplementary requests for the arrest and surrender of Omar Al Bashir to States Parties, Non-States Parties Members of the United Nations Security Council and the Sudan. Both warrants are valid, are in effect and have been transmitted to South Africa.

10. On 28 May 2015, the Registry notified a *note verbale* to the Embassy of South Africa in the Kingdom of the Netherlands reminding this State Party of its obligation to arrest Omar Al Bashir and to consult with the Court without any delay, should it foresee any difficulties in implementing the request for cooperation.¹³

11. On 12 June 2015, the Registry submitted a notification regarding consultations requested by South Africa and sought guidance from the Chamber.¹⁴ Later on the same day Judge Tarfusser and representatives of the Prosecution and the Registry met with the Ambassador of South Africa to the Netherlands and an accompanying legal advisor.

⁸ ICC-02/05-01/09-1.

⁹ ICC-02/05-01/09-5.

¹⁰ ICC-02/05-01/09-7.

¹¹ ICC-02/05-01/09-8.

¹² ICC-02/05-01/09-95.

¹³ ICC-02/05-01/09-239-Conf. para.1.

¹⁴ ICC-02/05-01/09-239-Conf.

Submissions

South Africa is obliged to immediately arrest and surrender Omar Al Bashir

12. According to media reports¹⁵ Omar Al Bashir has entered South Africa for the purposes of attending an African Union summit. Hence South Africa is required under the Rome Statute to arrest and surrender Omar Al Bashir to the Court.

13. The Prosecution notes that during the Meeting of 12 June 2015, the Ambassador of South Africa to the Netherlands read out a note verbale where the argument was made that there was a lack of clarity in the law, that article 98(2) applied to the current circumstances, that South Africa was subject to competing obligations and that the situation required a flexible interpretation of the law.

14. However, in response to this, the Prosecution submitted and Judge Judge Tarfusser confirmed that there is no ambiguity: South Africa is legally required under the Rome Statute to arrest and surrender Omar Al Bashir. There is no legal impediment to this obligation, nor is there any lack of clarity.

15. Further, the Prosecution understood that Judge Tarfusser confirmed that no consultations pursuant to article 97, nor any pending or future litigation regarding these matters has any delay, stay or suspensive effect on South Africa's obligation to immediately arrest Omar Al Bashir and surrender him to the Court should he enter South Africa.

16. The Prosecution also notes that in its Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court of 9 April 2014 ("9 April 2014 Decision") Pre-Trial Chamber II held that:

¹⁵ http://suna-sd.net/suna/showNews/250594/en?utm_source=dlvr.it&utm_medium=twitter (last accessed on 13 June 2015).

...by issuing Resolution 1593(2005) the SC decided that the “Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”. Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless. Accordingly, the “cooperation of that third State [Sudan] for the waiver of the immunity”, as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593(2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State.¹⁶

17. Consequently, “...*there also exists no impediment at the horizontal level...*”¹⁷ regarding the arrest and surrender of Mr Al Bashir. Additionally, as per the 9 April 2014 Decision, since the Security Council, acting under Chapter VII, has lifted the immunities of Omar Al Bashir by virtue of Resolution 1593(2005), South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.¹⁸

Request for Relief

18. In light of the foregoing, the Prosecution requests that the Presiding Judge of Pre-Trial Chamber II issue a public decision clarifying South Africa’s obligation to immediately arrest and surrender Omar Al Bashir to the International Criminal Court.

19. The Prosecution requests the Presiding Judge to clarify in his order:

¹⁶ 9 April 2014 Decision at para.29.

¹⁷ 9 April 2014 Decision at para.29.

¹⁸ 9 April 2014 Decision at paras.30-31. The Prosecution notes in this context that by virtue of article 103 of the UN Charter, obligations arising from the SC Chapter VII resolutions, such as Resolution 1593 (2005), prevail over any other international obligation of a member state of the United Nations (see articles 25 and 103 of the UN Charter).

- a. Whether consultations pursuant to Article 97 have now concluded.
- b. That South Africa is required to immediately arrest and surrender Omar Al Bashir to the ICC. There is no ambiguity regarding this obligation.
- c. That issues relating to domestic law do not nullify or change South Africa's obligation under the Rome Statute to arrest and surrender Omar Al Bashir to the ICC.
- d. That South Africa's immediate obligation to arrest and surrender Omar Al Bashir is not subject to any delay, stay or suspensive effect.



Fatou Bensouda, Prosecutor

Dated this 13th day of June 2015

At The Hague, The Netherlands