

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 24 June 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

**Confidential
with Confidential Annex A**

**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)**

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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I. Introduction

1. On 18 June 2015, the Registry transmitted a *note verbale* from the Embassy of the Republic of South Africa to the Netherlands ("Embassy") containing the observations of the Government of South Africa ("South Africa") regarding the article 97 consultations that took place on 12 June between the Court and the representatives of South Africa ("Observations").¹
2. The Prosecution wishes to respond to the following submissions made by South Africa in its Observations:
 - i. that no article 97 consultations had taken place prior to the issuance by the Presiding Judge of Pre-Trial Chamber II ("Chamber") of its decision ("Decision")² following the Prosecutor's request for an order further clarifying that the South Africa was under an obligation to immediately arrest and surrender Omar Al Bashir ("Al Bashir");³
 - ii. that South Africa received "no notice whatsoever" of the urgent request made by the Prosecution on 13 June 2015 ("Urgent Request")⁴ prior to the issuance of the Decision.⁵
3. South Africa's assertion that article 97 consultations had not taken place is incorrect:
 - i. Consultations took place at the Court on 12 June 2015 between the Ambassador of the Republic of South Africa to the

¹ ICC-02/05-01/09-243-Conf-Anx6.

² ICC-02/05-01/09-242.

³ ICC-02/05-01/09-243-Conf-Anx6, para.10.

⁴ ICC-02/05-01/09-241-Conf.

⁵ ICC-02/05-01/09-243-Conf-Anx6, para.15.

Netherlands ("Ambassador") and the Court,⁶ prior to the issuance of the Decision.⁷ These consultations ended on that day. The Presiding Judge in his Decision was unequivocal when he stated "as there exists no issue which remains unclear or has not already been explicitly discussed and settled by the Court, the consultations under article 97 of the Statute between the Court and the Republic of South Africa have therefore ended";⁸ and

- ii. It is immaterial whether consultations were concluded prior to the issuance of the Decision as the Presiding Judge made clear in the consultations held on 12 June 2015,⁹ and in the Decision,¹⁰ that the existence of any article 97 consultations had no suspensive or delaying effect on South Africa's obligation to immediately arrest and surrender Al Bashir should he enter South Africa.

- 4. South Africa's assertion in respect of notice is also factually incorrect: immediately after filing the Urgent Request with the Registry the Prosecution emailed a courtesy copy of the Urgent Request to the Ambassador. Shortly thereafter, the Prosecution spoke on the telephone directly with the South African Chief State Law Adviser ("Law Adviser"), who was present in The Hague, and offered to email him a copy of the Urgent Request. The Law Adviser declined to provide his email address to the Prosecution for this

⁶ ICC-02/05-01/09-243-Conf-Anx2, p.10, lns.4-6; p.12, ln.25 to p.13 ln.1; and p.23, lns.7-8.

⁷ ICC-02/05-01/09-242, para.4.

⁸ ICC-02/05-01/09-242, para.8.

⁹ ICC-02/05-01/09-243-Conf-Anx2, p.19, lns.6-12 and p.23, lns.15-19.

¹⁰ ICC-02/05-01/09-242, para.8.

purpose and therefore it was impossible to email him a second courtesy copy of the Urgent Request. The Chamber subsequently issued the Decision.

5. Therefore, there is nothing to reconsider by the Chamber, as requested by South Africa. Rather, the Prosecution submits that in light of the failure of South Africa to arrest and surrender Al Bashir to the Court when it was under an unambiguous obligation to do so, the appropriate response is for the Chamber to open article 87(7) proceedings, during which South Africa may make whatever representations it may deem fit as to the reasons leading to its failure to arrest and surrender Al Bashir.

II. Confidentiality

6. Regulation 23*bis*(2) of the Regulations of the Court requires the Prosecution to file this document confidentially because it is a response to several documents so designated.
7. However, pursuant to the principle of publicity of proceedings and to the spirit of article 64(7), the Prosecution sees no impediment to reclassifying the confidential papers in this litigation as public. Therefore, the Prosecution invites the Chamber to re-classify this filing, Annexes 1 to 6 of ICC-02/05-01/09-243 and the Urgent Request as public.

III. Statement of Facts

8. On 28 May 2015, the Registry notified a *note verbale* to the Embassy reminding South Africa of its obligation to arrest Al Bashir.¹¹

¹¹ ICC-02/05-01/09-239-Conf, para.1.

9. On 12 June 2015, in furtherance of a request from the South African authorities,¹² consultations under article 97 took place with regard to the imminent travel of Al Bashir to South Africa. The article 97 consultation involved representatives of the Chamber, South Africa, the Registry and the Prosecution.¹³
10. On 13 June 2015, the Prosecution received information that Al Bashir had arrived in South Africa. The same day, the Prosecution filed the Urgent Request. The Urgent Request was sent to the Registry for filing at 20:52 on 13 June 2015.¹⁴
11. Six minutes later, at 20:58, the Prosecution attempted to send a courtesy copy of the Urgent Request to the Law Adviser, using an email address for the Law Adviser provided by the Registry. However, it was impossible to send the courtesy copy to the email address provided: when the Prosecution attempted to send the courtesy copy of the Urgent Request it received an automated error message reading "This e-mail message cannot be delivered to [the email address provided] because the e-mail address is no longer valid." The Prosecution was unable to resolve this problem.
12. At 21:11 the Prosecution emailed a courtesy copy of the Urgent Request to the Ambassador.¹⁵ The Prosecution decided to send a courtesy copy to the Ambassador because it had been unable to email a copy to the Law Adviser.
13. At 21:13 the Prosecution telephoned the Law Adviser, the representative of the South African Government,¹⁶ and informed him that the Prosecution had just

¹² ICC-02/05-01/09-239-Conf.

¹³ ICC-02/05-01/09-243-Conf-Anx2.

¹⁴ The Prosecution notes that South Africa was put on notice by the Prosecution on Friday, 12 June 2015, that submissions may be filed with the Court over the weekend: "Our position is that, *pending litigation which may start over this weekend* or Monday, cannot be viewed as a valid reason for not effectuating the arrest": ICC-02/05-01/09-243-Conf-Anx2, p.14, lns.1-2 (emphasis added).

¹⁵ Confidential Annex A. The Prosecution used the email address displayed on the personal business card of the Ambassador given to the Prosecution on 12 June 2015 by the Ambassador during the article 97 consultations.

made a filing in the Al Bashir case, and offered to email him a courtesy copy of the Urgent Request.¹⁷ The Prosecution also informed the Law Adviser that it had just sent a courtesy copy of the filing to the Ambassador and explained that the Prosecution did not have the Law Adviser's correct email address. The Prosecution requested the Law Adviser's email address so that a courtesy copy could be sent to him as well.

14. The Law Adviser chose not to provide his email address, stating that he would liaise with the Ambassador regarding the Urgent Request.

15. Later on 13 June 2015, the Chamber issued the Decision.

16. On 15 June 2015, South Africa delivered the Observations to the Registry.¹⁸

17. On 18 June 2015, the Registry filed the "Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Al Bashir from South Africa on 15 June 2015" ("Registry's Article 97 Report").¹⁹ Annex 6 of the Registry's Article 97 Report contains the Observations which purport to express "for the record, [...] Government's interpretation of the procedural issues" in reference to the Urgent Request and the Decision.²⁰

¹⁶ ICC-02/05-01/09-243, para.3 ("On Saturday 13 June 2015 at 12.40, two representatives of Registry met with the Chief State Law Adviser. During this meeting, the Chief State Law Adviser indicated that he was representing the Government of South Africa.")

¹⁷ The Prosecution had received an email address for the Law Adviser from representatives of the Registry. However, the email address was not accepted when attempting to email the Law Adviser a courtesy copy of the Urgent Request. Because the email address provided was faulty, the Prosecution called the Law Adviser directly.

¹⁸ ICC-02/05-01/09-243-Conf-Anx6.

¹⁹ ICC-02/05-01/09-243 and Conf-Anxs1-6 and Anx-7.

²⁰ ICC-02/05-01/09-243-Conf-Anx6, p.2.

IV. Submissions

Article 97 consultations took place prior to the issuance of the Decision

18. *First*, the meeting between South Africa and the Court – at which the Presiding Judge, Prosecution and Registry were present – *was* an article 97 consultation. This consultation took place the day before the Decision was issued. Although during the meeting South Africa took the view that that it was merely a request for consultation and that consultations were not taking place,²¹ the Presiding Judge made it absolutely clear at the time that because of the urgency of the situation, the meeting was in fact a consultation.²²

19. Further, the Decision issued on the very next day stated unambiguously that the article 97 consultations of the previous day had concluded: “as there exists no issue which remains unclear or has not already been explicitly discussed and settled by the Court, the consultations under article 97 of the Statute between the Court and the Republic of South Africa have therefore ended”.²³

20. On the basis of these facts, it is plainly incorrect for South Africa to state now that no consultations in terms of article 97 have taken place.

21. *Second*, even it were to be accepted, only for the sake of the argument, that the 12 June 2015 meeting did not constitute a consultation or that consultations were due to continue, there is no confusion whatsoever regarding the repeatedly articulated fact that South Africa’s obligation - as an ICC State Party - to immediately arrest and surrender Al Bashir should he enter South Africa’s

²¹ ICC-02/05-01/09-243-Conf-Anx2, p.12, lns.5-7.

²² ICC-02/05-01/09-243-Conf-Anx2, p.12, ln.25 to p.13, ln.1.

²³ ICC-02/05-01/09-242, para.8.

territory was non-negotiable, unaffected by any consultations or lack thereof, and legally certain.

22. In his Decision, referring to existing ICC jurisprudence, the Presiding Judge reiterated that there was “no ambiguity in the law and that the Republic of South Africa is under the obligation to arrest and surrender to the Court Omar Al Bashir”.²⁴ The Presiding Judge also “repeatedly made [it] clear” at the 12 June 2015 meeting that South Africa was under an obligation to immediately arrest and surrender Al Bashir as soon as he entered South African territory, and that because there was no issue left to resolve, consultations had ended.²⁵

23. *Third*, the question of whether article 97 consultations had taken place or had ended is completely irrelevant to the obligation to arrest and surrender Al Bashir because even if consultations had been set to continue they would not suspend the arrest warrant and would not suspend or delay South Africa’s unequivocal obligation to execute the arrest warrant. This point was repeatedly made by the Court at 12 June 2015 meeting²⁶ and reiterated in the Decision.²⁷

South Africa was on notice of the Urgent Request and the Decision because it was provided with a courtesy copy of the Urgent Request shortly after it was filed with the Registry and before the Chamber issued the Decision

24. In its Observations, South Africa alleges that “the Urgent, Confidential Request was submitted to the Court and the Decision was made by the Court without any notice whatsoever to the Republic of South Africa.”²⁸

²⁴ ICC-02/05-01/09-242, para.5. See also ICC-02/05-01/09-243-Conf-Anx2, p.20, ln.20 to p.21, ln.6.

²⁵ ICC-02/05-01/09-242, para.8.

²⁶ ICC-02/05-01/09-243-Conf-Anx2, p.19, lns.6-12; p.23, lns.15-19.

²⁷ ICC-02/05-01/09-242, para.8.

²⁸ ICC-02/05-01/09-243-Conf-Anx6, p.4, para.12, see also para.15.

25. South Africa's position that it received no notice of the Urgent Request is factually incorrect: not only was a courtesy copy of the Urgent Request emailed to the Ambassador shortly after the Urgent Request was filed, but also the Prosecution attempted to email the Urgent Request to the Law Adviser.
26. As explained in paragraphs 10 to 14 above, the Prosecution emailed a courtesy copy of the Urgent Request to the Ambassador immediately after filing the Urgent Request with the Registry. Shortly thereafter, during a telephone conversation with the Law Adviser - who was present in The Hague - the Prosecution offered to email him a copy of the Urgent Request. As the Law Adviser declined to provide his email address to the Prosecution for this purpose it was impossible to email him a second courtesy copy of the Urgent Request.
27. Therefore, contrary to the assertions of South Africa, the Prosecution did indeed put South Africa on notice of the Urgent Request.

The appropriate course of action for the Chamber is to open article 87(7) proceedings.

28. In the Prosecution's view, South Africa's submissions distract from the real issue – South Africa's failure to arrest and surrender Al Bashir to the Court when it was under a clear and unambiguous obligation and duty to do so.
29. As stated above, in light of the failure of South Africa to arrest and surrender Al Bashir to the Court when it was under an unambiguous obligation to do so, the appropriate response is for the Chamber to open article 87(7) proceedings,

during which South Africa may make whatever representations it may deem fit as to the reasons leading to its failure to arrest and surrender Al Bashir.



Fatou Bensouda, Prosecutor

Dated this 24th day of June 2015

At The Hague, The Netherlands