

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/09
Date: 21 December 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

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)

Source: Embassy of the Republic of South Africa

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 Steward

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

Amicus Curiae

Republic of South Africa

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

The Government of the Republic of South Africa (hereinafter referred to as "the Government") makes the following submission on –

- (a) the "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) of Pre-Trial Chamber II and transmitted via Note Verbale (Reference: 2015/ER/166/ebs/JCA) on 16 October 2015 (hereinafter referred to as "the Decision");

And

- (b) the "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 findings" (ICC-02/05-01/09) made by the Office of the Prosecutor (hereinafter referred to as "the Request to be heard").

1. In accordance with the Decision, the Government submits the following report:

- 1.1 The Decision grants the Republic of South Africa an extension of the time limit 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, until such time as the currently ongoing judicial proceedings before the courts of South Africa are finalised. It also ordered the Republic of South Africa to promptly report to the Chamber on any developments in the relevant domestic judicial proceedings as they occur and also orders the competent authorities of the Republic of South Africa, should no such developments occur prior to 15 December 2015, to submit a report detailing the status of the relevant domestic judicial proceedings no later than 31 December 2015.
- 1.2 It will be recalled that in its Submission dated 2 October 2015, the Government indicated that on 23 June 2015, in the *Matter between the Southern African Litigation Centre and the Minister of Justice and Correctional Services and Others and relating to the visit to South Africa by President Al-Bashir*, the High Court (Gauteng Division, Pretoria) made a number of findings against the respondents. The Minister of Justice and Constitutional Development and eleven other applicants then applied to the High Court (Gauteng Division, Pretoria) for leave to appeal this decision to the Supreme Court of Appeal. The North Gauteng High Court denied the applicants such leave on 16 September 2015. (Case number 27740/2015).
- 1.3 The Minister of Justice and Correctional Services and the eleven other applicants then petitioned the Supreme Court of Appeal directly for leave to appeal to that Court on 2 October 2015.
- 1.4 In response, the Supreme Court of Appeal issued a Court Order regarding the "Application for Leave to Appeal: Minister of Justice and Constitutional Development and Eleven Others v Southern African Litigation Centre", dated 24 November 2015, under case number 867/15 (hereinafter referred to as "the Order").

- 1.5 The Court ordered that oral arguments on the application for leave to appeal be presented to the Court by counsel for the applicants and the respondent in terms of Section 17(2)(d) of the *Superior Courts Act, Act No. 10 of 2013*. Section 17(2)(d) provides that the judges of the Supreme Court of Appeal, considering an application for leave to appeal, may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them.
 - 1.6 The Order further directs that the parties must be prepared, if called upon to do so, to address the Court on the merits of the matter. This means that if leave to appeal is granted, the matter will proceed directly to arguments on the merits without any further delay.
 - 1.7 The Order also directs that the applicants must file five additional copies of the application for leave to appeal within one month of the date of the order (24 December 2015) and, in terms of Rule 8 of the *Rules regulating the conduct of proceedings of the Supreme Court of Appeal of South Africa*, to file the record of the proceedings of the North Gauteng High Court within three months of the date of the order (24 February 2016).
 - 1.8 Copies of the relevant the Order, legislation and court rules are attached, for ease of reference.
2. Turning now to the Request to be heard, the Government noted that on 26 October 2015, the Office of the Prosecutor submitted the "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 findings" (ICC-02/05-01/09). In the request, the Prosecutor seeks the following relief:
- (i) the opportunity to be heard on the steps to be taken with respect to a deadline for the Republic of 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;
 - (ii) confirmation that South Africa has a continuing obligation to arrest and surrender Omar Al Bashir should he travel to South Africa again; and
 - (iii) the lifting of confidentiality with respect to the filings relating to these proceedings.
- 2.1 The Government notes that South Africa as a State participating in the present matter, has an inherent right to file a response as provided for in Regulation 24(3) and in terms of its right to be heard by the Chamber provided for in Regulation 109(3).
 - 2.2 As regards the first form of relief sought, namely that the Prosecutor be granted the opportunity to be heard regarding the Decision by the Pre-Trial Chamber to extend the time limit for South Africa to submit its views until such time that the ongoing judicial proceedings before the South Africa's courts are finalised, with interim reporting obligations, the Prosecutor appears to take issue with the fact that it was not granted the opportunity to be heard before

the Decision was made (Paragraph 3 of the Prosecutor's submission). The concern that the Prosecutor raises in this regard relates to the "potentially open-ended time frame that may result from the need for resolution of 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 submission in support of its request for an extension of time" (Paragraph 4). It appears to be furthermore concerned that it was unclear when the proceedings in South Africa will be completed (Paragraph 5) and describes the time frame for completion of proceedings before the Supreme Court of Appeal as "unpredictable" (Paragraph 6). The Prosecutor purports to propose that South Africa should be ordered to submit its final report on its views regarding the events surrounding Al Bashir's attendance of the African Union Summit by 31 December 2015, having been granted an effective extension of three months.

- 2.3 This argument is flawed in two respects. Firstly, as President Al Bashir is not present in South Africa, there is no urgency to the matter of the submission of South Africa's views. Any deadline that is imposed in this respect would therefore be artificial, and will only serve to prevent facts potentially relevant to make a determination on South Africa's obligations, being put before the Pre-Trial Chamber. In fact, the imposition of such an artificial deadline for which there is no basis on the facts of the matter, may substantially harm South Africa's interests as it would prevent it from obtaining and placing relevant facts that may serve in its favour before the Pre-Trial Chamber.
- 2.4 Secondly, the assertion that the court processes in South Africa are "unpredictable" should not go unchallenged. As is pointed out in this Submission, the Court processes in South Africa are conducted in terms of strict peremptory time limits contained in the relevant legislation and rules of Court, and which are conscientiously imposed by the Courts. Court processes are therefore highly regulated and predictable. South Africa will continue to report on the proceedings in the South African courts including on the time limits imposed by the Courts, in order to ensure that the Pre-Trial Chamber will at all times be informed about the course of domestic proceedings.
- 2.5 Furthermore, it appears that the Prosecutor's concern regarding the deadline is more driven by the assertion (Paragraph 4) that Al Bashir may visit South Africa again, which also underlies the second form of relief sought, namely that "to avoid any possible doubt.... 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 to South Africa again."
- 2.6 It appears that in formulating this form of relief, the Prosecutor was influenced by speculation that President Al Bashir would visit South Africa again for the Summit meeting of the Forum on China-Africa Cooperation, that was held in Johannesburg from 4-5 December 2015. This event, held at the level of Heads of State and Government, has passed and it is common knowledge that President Al Bashir did not attend it.

- 2.7 It will therefore serve no useful purpose for the Pre-Trial Chamber to engage in a fruitless and superfluous exercise of reminding South Africa of obligations that are only triggered when an accused possibly visits South Africa in the future. The basis of the obligations of a State Party is the Rome Statute, not reminders by Chambers triggered by speculation. Even if such speculation had been contained in an application before a South African court, it remains exactly that: mere speculation. A request by the Prosecutor to the Pre-Trial Chamber to "remind" any Rome Statute Member State of its obligations under the Statute is unusual and unwarranted and should not be entertained by the Pre-Trial Chamber.
- 2.8 As regards the third form of relief sought, namely that the confidential filings related to President Al Bashir's travel to South Africa in June 2015 be made public "in the interests of transparency", South Africa submits that this request is premature, inappropriate and unnecessary. It appears that the Prosecutor takes issue with certain interpretations by South Africa on the process followed to engage with the Court in terms of Article 97 of the Statute, specifically the Prosecutor's application for an order on the South African obligations to the Court.
- 2.9 South Africa's concern in this respect is well-known. South Africa was the first State Party to avail itself of the possibility of consultations and experienced first-hand the challenges created for State Parties resulting from the absence of clear procedures to guide them in implementing the right to consultations. The Fourteenth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, held in The Hague from 18 – 26 November 2015, acknowledged that inadequate provision has been made for procedures to guide States Parties in the implementation of Article 97¹.
- 2.10 It is submitted that in view of the above, no useful purpose will be served by reclassifying confidential documents as public documents in order to release them into the public domain. It will not solve the challenges faced by the Court and affected States Parties in terms of the implementation of Article 97. It can only serve to undermine confidence between a State Party and the Court and result in fraying relations unnecessarily. Rather, a concerted effort should be undertaken by States Parties to develop appropriate procedures, while the Office of the Prosecutor and South Africa should continue to engage bilaterally on the concerns that they may have on the way that the Article 97 consultations of June 2015 were conducted.

¹ ICC-ASP/14/L.1, para 61. The relevant text reads as follows: "Following the plenary debate held at the fourteenth session of the Assembly on the supplementary item introduced by South Africa, States Parties expressed their willingness to consider, within the framework of the appropriate subsidiary body of the Assembly, proposals to develop procedures for the implementation of Article 97".



Thanisa Naidu-Lewin
Legal Counsellor
South African Embassy, Kingdom of the Netherlands

Dated this 21st day of December 2015.

At The Hague, Netherlands