

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORA)**

Case number:

In the matter between:

**THE SOUTHERN AFRICA LITIGATION
CENTRE**

Applicant

and

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

First Respondent

**THE DIRECTOR-GENERAL OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

Second Respondent

**THE MINISTER OF SAFETY
AND SECURITY**

Third Respondent

**THE DIRECTOR-GENERAL
OF SAFETY AND SECURITY**

Fourth Respondent

**THE MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION**

Fifth Respondent

**THE DIRECTOR-GENERAL OF INTERNATIONAL
RELATIONS AND COOPERATION**

Sixth Respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Seventh Respondent

THE NATIONAL DIRECTOR OF PUBLIC

KAC

PROSECTIONS

Eighth Respondent

**THE HEAD OF THE DIRECTORATE
FOR PRIORITY CRIMES INVESTIGATION**

Ninth Respondent

**THE DIRECTOR OF THE PRIORITY CRIMES
LITIGATION UNIT**

Tenth Respondent

SUPPLEMENTARY AFFIDAVIT

I, the undersigned

KAAJAL RAMJATHAN-KEOGH

do hereby make oath and say that:

INTRODUCTION

1. As a representative of the Applicant, the Southern Africa Litigation Centre (SALC), I file these further supplementary affidavit in order to put before the Court:
 - 1.1. Correspondence between the SALC and the Respondents on the issue subject to these proceedings.
 - 1.2. Further legal instruments and decisions pertaining to the immunity of attendees at this week's African Union Summit.

KKA

CORRESPONDENCE

2. On 21 May 2015, SALC addressed a letter to the second and sixth Respondents, the Acting National Director of Public Prosecutions and the Minister of Police, and the Chief State Law Advisor. SALC noted South Africa's international and domestic obligations to take appropriate actions to execute the warrant for President Bashir's arrest. Annexure is marked **KRK11**.

3. On 25 May 2015, SALC received a response from the Chief State Law Advisor in terms of which the letter of 21 May 2015 was acknowledged as received. It was further stated that copies had been transmitted to the second and eighth Respondents. Annexure is marked **KRK12**.

4. On Saturday 13 June 2015, the SALC addressed a letter to the first to tenth Respondents. SALC noted reports that Sudanese President Omar Al Bashir ("President Bashir") was scheduled to speak at the African Union (AU) Summit and expected to arrive in South Africa on 13 June 2015. SALC noted the international arrest warrant against President Bashir and South Africa's obligations under international and domestic law to arrest him should he be present in South Africa. SALC further informed the Respondents that it intended to launch an urgent application to ensure compliance with these obligations and requested a response on an urgent basis. Annexure is marked **KRK13**.

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5. Confirmation that this letter was sent and received electronically is noted in an Affidavit of a member of SALC staff, Caroline James. Annexure is marked **KRK14**.
6. SALC has received no response to this letter.

THE GOVERNMENT GAZETTE NOTICE

7. On 5 June 2015, the fifth respondent, the Minister of International Relations and Cooperation, published Government Notice No 470, which records an agreement reached with the Commission of the African Union on the Material and Technical Organisation of the Meeting of, among others, the 27th Ordinary Session of the Executive Council of the African Union, to afford certain personal diplomatic immunity and privileges. It is attached as **KRK15**.
8. The applicant will argue that, on its terms, the Notice does not grant President Bashir immunity from South Africa's enforcement of the arrest warrant.
9. If, however, this Court determines that it does, then the applicant will contend that it is unlawful and invalid to that extent, and will move to have it set aside.
10. It has also come to our attention that the ICC's Pre-Trial Chamber last night handed down an urgent judgment (ICC-02/05-01/09), confirming that South Africa is under an international obligation on South Africa to arrest President Bashir. It also confirms that President Bashir does not

KRK

enjoy any immunity from such arrest under international law. The judgment is attached marked **KRK 16**.

CONCLUSION

11. The applicant accordingly persists in seeking the relief set out in the Notice of Motion.



KAAJAL RAMJATHAN-KEOGH

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at Pretoria on this the ____th day of June 2015, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.

COMMISSIONER OF OATHS

Full
names.....

.....

Business
address.....

Capacity.....**Area**.....

.....

.....

KRK II

SOUTHERN AFRICA LITIGATION CENTRE

Minister of International Relations and Co-operation
Ms Maite Nkoana-Mashabane
Minister@foreign.gov.za

Minister of Justice and Correctional Services
Mr Tshililo Michael Masutha
Ministry@justice.gov.za

Minister of Police
Mr Nkosinathi Nhleko
MonahengAmelia@saps.gov.za

cc. Ms. Nonkululeko Sindane
Director General of the Department of Justice and Constitutional Development
NSindane@justice.gov.za

cc. Chief State Law Advisor
Mr Enver Daniels
ISTein@justice.gov.za

cc. National Director of Public Prosecutions
Mxolisi Nxasana
communication@npa.gov.za

21 May 2015

Dear Honourable Ministers,

RE: Anticipated Presence of President Omar al Bashir at the 25th African Union Summit

I write on behalf of the Southern Africa Litigation Centre (SALC), an organisation concerned with South Africa's international obligations and international criminal justice obligations specifically, in respect of the African Union (AU)'s invitation to President Omar al Bashir in his capacity as a head of state and government for the 25th AU Summit to be held in Johannesburg, South Africa 7-15 June 2015.

In 2009, the former Director-General of the Department of International Relations and Co-operation issued a public statement indicating that, "If today, President al Bashir landed in terms of the provision [of the Rome Statute], he would have to be arrested."¹

I write to affirm your previous position on this matter and aim to remind South Africa of its international criminal justice obligations in this respect.

¹ Director General for International Relations and Cooperation Ayanda Ntsaluba accessed 21 May 2015, available at <http://www.sanews.gov.za/south-africa/sa-obliged-arrest-al-bashir-says-ntsahuba>

KRK

SALC applauds the South African government's uncompromising stance in the past and seeks to ensure that South Africa remains compliant with its commitments made in terms of the international criminal justice framework.

South Africa played an important leadership role in the development of the Rome Statute and thus the establishment of the ICC. This country is also one of the only states in Africa to have domesticated the Rome Statute's provisions into South African law – a crucial step for translating political commitments into action.

In addition, the highest forum of adjudication in the country, the Constitutional Court has ruled decisively that South Africa's international law obligations must be upheld.² Given these notable achievements, SALC respectfully seeks to remind all the relevant parties of South Africa's obligations, as a State Party to the Rome Statute, and in terms of South Africa's own domestic law, the Implementation of the Rome Statute of the International Criminal Court 27 of 2002 (the ICC Act).

In the preamble of the ICC Act, South Africa boldly commits itself to bringing persons who are suspected of committing genocide, war crimes and crimes against humanity, to justice pursuant to its commitment as a signatory to the Rome Statute of the ICC and in terms of its domestic law obligations.

Under former president Nelson Mandela it was made clear that "South Africa's future foreign relations will be based on our belief that human rights should be the core concern of international relations... The time has come for South Africa to take up its rightful and responsible place in the community of nations." It is with that in mind that we urge the South African government to act decisively and within the bounds of the law.

Specifically, were President al Bashir to be present on the territory of South Africa, and the International Criminal Court were to request his arrest and surrender, the Director-General of the Department of Justice and Constitutional Development "*must* immediately on receipt of that request, forward the request and accompanying documents to a magistrate, who *must* endorse the warrant of arrest for execution in any part of the Republic."³

Accordingly, the South African government is required to make it clear, as it has done before, that should President al Bashir accept the AU Summit invitation, the South African government will be duty bound to arrest him.

It is our hope that the government of South Africa will act in accordance with the law and prevent the Republic of South Africa from becoming a temporary safe haven for those who have been indicted by the ICC.

Kind regards,


Kaajal Ramjathan-Keogh
Executive Director

² National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another [2014] ZACC 30

³ See section 8 (2) of the ICC Act.

144



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER
P/Bag X9069, Cape Town, 8000
12th Floor, Atterbury House, 9 Riebeeck Street, Cape Town, 8001
Tel (021) 441-4900 Fax (021) 421-7923/7996

Ref: saic2-2015
Enq: Enver Daniels
Tel: (021) 441 4900
E-mail: EDaniels@justice.gov.za
Website: <http://www.doj.gov.za>
Date: 25 May 2015

Kaajal Ramjathan-Keogh
Executive Director
Southern Africa Litigation Centre
PO Box 122
PARKLANDS
2121

Dear Executive Director Ramjathan- Keogh

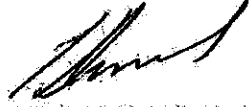
**ANTICIPATED PRESENCE OF PRESIDENT OMAR al BASHIR AT 25TH
AFRICAN UNION SUMMIT**

I, hereby, acknowledge having received, today, a copy of your letter dated 21 May 2015, addressed to the Ministers of International Relations and Co-operation, Justice and Correctional Services and Police. Copies of the letter were also sent to the Director-General of the Department of Justice and Constitutional Development and to the National Director of Public Prosecutions.

Although I do not purport to speak on behalf of the Government of the Republic of South Africa, I am aware that the Government is mindful of its international obligations which it takes seriously. However, should I be required to do so, I shall provide the ministers concerned with advice on the issue raised by you.

You should not, though, expect to receive a further communication from me on the matter, unless I am specifically instructed to engage you on the contents of your letter.

Yours sincerely



**ENVER DANIELS
CHIEF STATE LAW ADVISER**

KRK13

SOUTHERN AFRICA LITIGATION CENTRE

13 June 2015

To:

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

THE DIRECTOR-GENERAL OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT

THE MINISTER OF SAFETY
AND SECURITY

THE DIRECTOR-GENERAL
OF SAFETY AND SECURITY

THE MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION

THE DIRECTOR-GENERAL OF INTERNATIONAL
RELATIONS AND COOPERATION

THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE

THE NATIONAL DIRECTOR OF PUBLIC
PROSECTIONS

THE HEAD OF THE DIRECTORATE
FOR PRIORITY CRIMES INVESTIGATION

THE DIRECTOR OF THE PRIORITY CRIMES
LITIGATION UNIT

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196,
Johannesburg, South Africa
PO Box 122 Parklands 2121 South Africa
| T: +27 (0) 10 596 8538 |
www.southernafricalitigationcentre.org

an initiative of the International Bar Association and the Open Society Initiative of Southern Africa
NPO 138-655

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Dear Sirs and Madams,

Re: URGENT: Attendance of Sudanese President Omar Al Bashir at the African Union Summit in Johannesburg, South Africa

The Southern Africa Litigation Centre (SALC) has seen news reports that the Sudanese President, Omar Al Bashir is on the programme to speak at the African Union Summit (AU Summit), and has received information that President Bashir boarded an aeroplane in Khartoum at 11h30 local time (10h30 South African time), for Johannesburg. President Bashir is therefore expected to arrive in South Africa between 16h30 and 17h00 on 13 June 2015.

President Bashir is the subject of two arrest warrants issued by the International Criminal Court (the ICC) in The Hague, the Netherlands, for war crimes, crimes against humanity, and genocide. South Africa, as a signatory to the Rome Statute of the International Criminal Court (the Rome Statute), has an obligation to assist the ICC. In addition, South Africa has adopted legislation to domesticate the Rome Statute, the Implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002 (Implementation Act) which requires that South Africa cooperate with the ICC. This cooperation includes arresting and detaining fugitives from the ICC to ensure that individuals who have been indicted by the ICC are transported to the Netherlands to stand trial.

Consequently, South Africa would have an obligation, under international and domestic law, to arrest President Bashir should he be present in South Africa. Section 9 of the Implementation Act sets out the procedure to be followed when a fugitive is present in the country. In this regard we refer to our letter of the 21st May which alerted you to these concerns. <http://www.southernafricalitigationcentre.org/2015/05/21/salc-reminds-sa-government-president-bashir-must-be-arrested/>

SALC recognises that when President Bashir was due to attend President Jacob Zuma's inauguration in 2009, the then Director-General of International Relations and Cooperation confirmed that the South African authorities would arrest President Bashir if he arrived in South Africa. At that stage, the Sudanese leader opted not to travel to South Africa.

We applaud this uncompromising stance, and urge that the South African government ensure that President Bashir is arrested if he does arrive in the country this weekend.

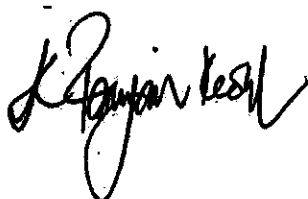
KKX

We are also aware that the African Union has taken a decision not to cooperate with the International Criminal Court and are concerned that South Africa may not take steps to arrest and detain this individual on his arrival in the country.

SALC informs you that we intend to launch an urgent application in the High Court to ensure that the authorities do comply with their obligations under the Rome Statute as well as the Implementation Act to arrest and detain President Bashir pending the application for the domestication of the ICC arrest warrants. We request that you inform us what steps you are taking to effect the arrest.

We realise that the AU Summit is currently in session but in view of the fact that President Bashir may only in be in the country for a very short time, we require your urgent response to this letter. Should we fail to receive an urgent response we will approach a court to seek urgent relief.

Yours faithfully,



Kaajal Ramjathan-Keogh
Executive Director

kaajalr@salc.org.za

084 514 8039

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KRK14

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORA)**

Case number:

In the matter between:

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Second Respondent

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AND SECURITY**

Third Respondent

**THE DIRECTOR-GENERAL
OF SAFETY AND SECURITY**

Fourth Respondent

**THE MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION**

Fifth Respondent

**THE DIRECTOR-GENERAL OF INTERNATIONAL
RELATIONS AND COOPERATION**

Sixth Respondent

THE NATIONAL COMMISSIONER OF THE

KRC
CJ

SOUTH AFRICAN POLICE SERVICE

Seventh Respondent

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECTIONS**

Eighth Respondent

**THE HEAD OF THE DIRECTORATE
FOR PRIORITY CRIMES INVESTIGATION**

Ninth Respondent

**THE DIRECTOR OF THE PRIORITY CRIMES
LITIGATION UNIT**

Tenth Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned

CAROLINE JAMES

do hereby make oath and say that:

1. On 13 June 2015 I sent a letter from the Southern Africa Litigation Centre addressed to the first to tenth Respondents. This letter is attached to the Supplementary Affidavit as Annexure **KRK13**.
2. I sent this letter electronically, and received delivery receipts from the National Commissioner of the South African Police Service (marked Annexure **CJ1**), the Head of

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the Directorate for Priority Crimes Investigation (marked Annexure **CJ2**), the Director General of the Department of International Relations and Cooperation and the Minister of the Department of International Relations and Cooperation (marked Annexure **CJ3**), the Director of the Priority Crimes Litigation Unit (marked Annexure **CJ4**), the Minister of Justice and Constitutional Development and the Director General of the Department of Justice and Constitutional Development (marker Annexure **CJ5**).

3. I received a failed delivery notice from the National Director of Public Prosecutions (marked Annexure **CJ6**).
4. I received a notice indicating that the email sending the letter had been read by the office of the Minister of the Department of International Relations and Cooperation (marked Annexure **CJ7**).



Caroline James

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at Pretoria on this the ____th day of June 2015, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.

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COMMISSIONER OF OATHS

Full names.....

Business address.....

Capacity.....Area.....

✓ KRC

CJ1

Caroline James

From: Microsoft Outlook
To: natcomm@saps.org.za
Sent: 13 June 2015 05:08 PM
Subject: Relayed: URGENT: President Bashir's presence in South Africa

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

natcomm@saps.org.za (natcomm@saps.org.za)

Subject: URGENT: President Bashir's presence in South Africa

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Q

CJZ

Caroline James

From: Microsoft Outlook
To: CorruptionReports@saps.gov.za
Sent: 13 June 2015 05:08 PM
Subject: Relayed: URGENT: President Bashir's presence in South Africa

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

CorruptionReports@saps.gov.za (CorruptionReports@saps.gov.za)

Subject: URGENT: President Bashir's presence in South Africa

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CJ

CJ3

Caroline James

From: Microsoft Outlook
To: Dgdfa@dirco.gov.za; Minister@dirco.gov.za
Sent: 13 June 2015 05:08 PM
Subject: Relayed: URGENT: President Bashir's presence in South Africa

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Dgdfa@dirco.gov.za (Dgdfa@dirco.gov.za)

Minister@dirco.gov.za (Minister@dirco.gov.za)

Subject: URGENT: President Bashir's presence in South Africa



URGENT:
President Bashir' ...

Q KKK

CJ4

Caroline James

From: Microsoft Outlook
To: communication@npa.gov.za
Sent: 13 June 2015 05:08 PM
Subject: Relayed: URGENT: President Bashir's presence in South Africa

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

communication@npa.gov.za (communication@npa.gov.za)

Subject: URGENT: President Bashir's presence in South Africa



URGENT:
President Bashir' ...

KPK
Q

CTS

Caroline James

From: Mail Delivery System <MAILER-DAEMON@mail2.justice.gov.za>
To: Ministry@justice.gov.za; NSindane@justice.gov.za
Sent: 20 February 2015 04:52 AM
Subject: Relayed: URGENT: President Bashir's presence in South Africa

This is the mail system at host mail2.justice.gov.za.

Your message was successfully delivered to the destination(s) listed below. If the message was delivered to mailbox you will receive no further notifications. Otherwise you may still receive notifications of mail delivery errors from other systems.

The mail system

<Ministry@justice.gov.za>: delivery via localhost[127.0.0.1]:10025: 250 2.0.0
Ok: queued as 9C9A830DD28

<NSindane@justice.gov.za>: delivery via localhost[127.0.0.1]:10025: 250 2.0.0



Message Headers

Ok: queued as 9C9A830DD28

10/11
Q

Caroline James

From: Microsoft Outlook
To: pfmabanga@npa.gov.za
Sent: 13 June 2015 05:08 PM
Subject: Undeliverable: URGENT: President Bashir's presence in South Africa

za-smtp-1.mimecast.co.za rejected your message to the following email addresses:

pfmabanga@npa.gov.za (pfmabanga@npa.gov.za)

A problem occurred while delivering your message to this email address. Try sending your message again. If the problem continues, please contact your email admin.

za-smtp-1.mimecast.co.za gave this error:

Invalid Recipient -

http://kb.mimecast.com/Mimecast_Knowledge_Base/Administration_Console/Monitoring/Mimecast_SMTP_Error_Codes#550

Diagnostic information for administrators:

Generating server: DB5PR04MB1239.eurprd04.prod.outlook.com

pfmabanga@npa.gov.za
 za-smtp-1.mimecast.co.za

Remote Server returned '550 Invalid Recipient -

http://kb.mimecast.com/Mimecast_Knowledge_Base/Administration_Console/Monitoring/Mimecast_SMTP_Error_Code_s#550'

Original message headers:

Received: from DB5PR04MB1240.eurprd04.prod.outlook.com (10.162.156.142) by DB5PR04MB1239.eurprd04.prod.outlook.com (10.162.156.141) with Microsoft SMTP Server (TLS) id 15.1.190.14; Sat, 13 Jun 2015 15:07:59 +0000
 Received: from DB5PR04MB1240.eurprd04.prod.outlook.com ([10.162.156.142]) by DB5PR04MB1240.eurprd04.prod.outlook.com ([10.162.156.142]) with mapi id 15.01.0190.013; Sat, 13 Jun 2015 15:07:58 +0000
 From: Caroline James <CarolineJ@salc.org.za>
 To: Kaajal Ramjathan-Keogh <Kaajalr@salc.org.za>, "Caroline James <CarolineJ@salc.org.za" <Caroline James <CarolineJ@salc.org.za>
 Subject: URGENT: President Bashir's presence in South Africa
 Thread-Topic: URGENT: President Bashir's presence in South Africa
 Thread-Index: AdCl6t3NjM8gcqViTmik0JpIwnxuYQ==
 Disposition-Notification-To: Caroline James <CarolineJ@salc.org.za>
 Return-Receipt-To: <CarolineJ@salc.org.za>
 Date: Sat, 13 Jun 2015 15:07:58 +0000
 Message-ID: <DB5PR04MB1240484BA29639E8DCFAD9BAFDBA0@DB5PR04MB1240.eurprd04.prod.outlook.com>
 Accept-Language: en-ZA, en-US
 Content-Language: en-US
 X-MS-Has-Attach: yes
 X-MS-TNEF-Correlator:
 authentication-results: salc.org.za; dkim=none (message not signed)

CJ7

Caroline James

From: Mpolokeng, G Ms : Office of Minister, DIRCO <MpolokengG@dirco.gov.za>
To: Caroline James
Sent: 13 June 2015 05:45 PM
Subject: Read: URGENT: President Bashir's presence in South Africa

Your message

To: Mpolokeng, G Ms : Office of Minister, DIRCO
Subject: URGENT: President Bashir's presence in South Africa
Sent: Saturday, June 13, 2015 3:07:58 PM (UTC) Monrovia, Reykjavik

was read on Saturday, June 13, 2015 3:45:06 PM (UTC) Monrovia, Reykjavik.

Q 144

DIPLOMATIC IMMUNITIES AND PRIVILEGES ACT, 2001

MINUTE

In accordance with the powers vested in me by section 5(3) of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), I hereby recognize the "Agreement between the Republic of South Africa and the Commission of the African Union on the Material and Technical Organization of the Meetings of the 30th Ordinary Session of the Permanent Representatives Committee from 7 to 9 June 2015; the 27th Ordinary Session of the Executive Council from 10 to 12 June 2015 and the 25th Ordinary Session of the Assembly on 14 to 15 June 2015 in Pretoria (7 and 8 June 2015) and Johannesburg (10 to 15 June 2015), Republic of South Africa" for the purposes of granting the immunities and privileges as provided for in the Agreement between the Government of the Republic of South Africa and the Commission of the African Union as set out in the Notice.

Maite Nkoana-Mashabane

Minister of International Relations and Co-operation

SCHEDULE

AGREEMENT BETWEEN THE REPUBLIC OF SOUTH AFRICA AND THE COMMISSION OF THE AFRICAN UNION ON THE MATERIAL AND TECHNICAL ORGANIZATION OF THE MEETINGS OF THE 30TH ORDINARY SESSION OF THE PERMANENT REPRESENTATIVES COMMITTEE FROM 7 TO 9 JUNE 2015, THE 27TH ORDINARY SESSION OF THE EXECUTIVE COUNCIL FROM 10 TO 12 JUNE 2015 AND THE 25TH ORDINARY SESSION OF THE ASSEMBLY ON 14 TO 15 JUNE 2015 IN PRETORIA (7 AND 8 JUNE 2015) AND JOHANNESBURG (10 TO 15 JUNE 2015), REPUBLIC OF SOUTH AFRICA

**ARTICLE VIII
PRIVILEGES AND IMMUNITIES**

1. The Government shall accord the Members of the Commission and Staff Members, the delegates and other representatives of Inter-Governmental Organizations attending the Meetings the privileges and immunities set forth in Sections C and D, Articles V and VI of the General Convention on the Privileges and Immunities of the OAU.
2. Without prejudice to the provisions of the preceding paragraph, all participants and persons performing duties in connection with the Meetings shall enjoy such facilities and courtesies as are necessary for the efficient performance of their duties.
3. The representatives of the Inter-Governmental Organizations and the Observers accredited to the African Union attending the Meetings shall enjoy the necessary immunities and privileges as provided for in the General Convention referred to in paragraph 1 above.
4. The Government shall provide all the necessary facilities for the entry and exit to and from South Africa to all those persons who are mentioned above and/or who are performing duties connected with the Meetings. Entry visas shall be granted to them preferably before the opening of the Meetings in accordance with the laws of South Africa and in accordance with the modalities for issuance of visas as contained in Annex II.
5. Staff members of the Commission and other organs of the AU holding AU Passport or Laissez-Passer shall not be required to obtain entry visa as per Decision AHG/OAU/AEC/Dec.1 (II) adopted by the Assembly of Heads of State and Government in Ouagadougou, Burkina Faso, in June 1998.

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KRK16

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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***

URGENT

Public

**Decision following the Prosecutor's request for an order further clarifying
that the Republic of South Africa is under the obligation to immediately
arrest and surrender Omar Al Bashir**

KRK

To be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Cuno Tarfusser, Presiding Judge of Pre-Trial Chamber II, issues this urgent decision following the Prosecutor's urgent request for an order clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir, who has entered today the territory of the Republic of South Africa for the purposes of attending an African Union summit (ICC-02/05-01/09-241-Conf).

1. In the present circumstances, any further reminder or clarification to the Republic of South Africa is unnecessary. *In claris not fit interpretatio*. Indeed, it is plain from the following that 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.

2. Omar Al Bashir is subject to two warrants of arrest, issued by the Chamber on 4 March 2009 and 12 July 2010, respectively, for seven counts of war crimes and crimes against humanity and three counts of genocide. Immediately after their issuance, both warrants of arrest, together with cooperation requests for the arrest and surrender to the Court of Omar Al Bashir, have been transmitted, *inter alia*, to all States Parties to the Rome Statute, including the Republic of South Africa.

3. On 28 May 2015, the Court, via the Registrar, notified a *note verbale* to the Embassy of South Africa in the Kingdom of the Netherlands reminding it of South Africa's obligation to arrest Omar Al Bashir and surrender him to the Court, and, in case of any difficulties in implementing the request for cooperation, to consult with the Court without any delay in accordance with article 97 of the Statute.

4. On 12 June 2015, upon request of the Republic of South Africa, the Presiding Judge, in the presence of representatives of the Registrar and the

Office of the Prosecutor, met with the Ambassador of South Africa to the Netherlands and an accompanying legal advisor, for consultations under article 97 of the Statute. The Ambassador of South Africa to the Netherlands read out a *note verbale* making the argument that there was lack of clarity in the law and that the Republic of South Africa was subject to competing obligations.

5. In response to this, the representatives of South Africa were explained that there is 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. In particular, they were reminded of the decision (which is publicly available) issued on 9 April 2014, in which the Chamber settled the very same matters, at that time raised by the Democratic Republic of the Congo.¹

6. In particular, in that decision, the Chamber stated:

[B]y 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. (paragraph 29)

7. In this sense, the Chamber clarified that "there also exists no impediment at the horizontal level" regarding the arrest and surrender to the Court of Omar Al Bashir (paragraph 29). In addition, the Chamber stated that

¹ Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, 9 April 2014, ICC-02/05-01/09-195 (*see, in particular*, paras 28 to 31).

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since the Security Council, acting under Chapter VII of the UN Charter, had lifted the immunities of Omar Al Bashir by virtue of Resolution 1593(2005), the Republic of the Democratic Republic of Congo could not invoke any other decision, including that of the African Union, providing for any obligation to the contrary (paragraph 31).

8. The same applies squarely to the Republic of South Africa as well. The delegation from the Republic of South Africa was reminded of this during the meeting of 12 June 2015. 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. 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.

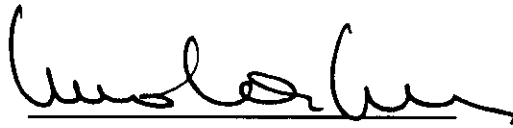
9. In conclusion, the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court, as it is aware of the Court's explicit position (as publicly expressed, most recently, on 9 April 2014 and reiterated during the consultations with the South African delegation on 12 June 2015) that the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005) referring the situation in Darfur, Sudan to the Prosecutor of the Court, and that the Republic of South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.

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10. Accordingly, it is unnecessary to further clarify that the Republic of South Africa is under the duty under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the Court, as the existence of this duty is already clear and needs not be further reiterated. The Republic of South Africa is already aware of this statutory duty and a further reminder is unwarranted.

11. The Registrar is hereby directed to immediately notify the present decision to the competent authorities of the Republic of South Africa.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Presiding Judge of Pre-Trial Chamber II

Dated this 13 June 2015

At The Hague, The Netherlands