



Original: English

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

Date: 28 February 2017

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 a request for guidance from the Prosecutor

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

Other

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber II (“Chamber”) of the International Criminal Court (“Court”) issues this decision on a request for request for guidance received from the Prosecutor.

1. On 8 December 2016, the Chamber decided to convene a hearing on 7 April 2017 for the purposes of obtaining submissions on whether to make a determination under article 87(7) of the Rome Statute with respect to the Republic of South Africa (“South Africa”) following Omar Al-Bashir’s visit to South Africa in June 2015.¹ In preparation for the hearing, the Chamber also invited the Prosecutor, representatives of South Africa and representatives of the United Nations to make, if they so wish, written submissions prior to the hearing, by 17 March 2017.² The United Nations subsequently responded to this invitation, stating that it would not be sending a representative to attend the hearing and would not be making written submissions for the Chamber’s consideration.³
2. On 23 February 2017 – in the context of a response to a request by South Africa for extension of the page limit for its upcoming written submissions – the Prosecutor requested that the Chamber “provide additional guidance on the issues it considers most relevant to the Written Submissions”.⁴
3. As explained in the decision of 8 December 2016, “a number of issues [...] may impact on the determination whether or not a finding of non-compliance [by South Africa] is warranted” and the hearing has been convened “[i]n order to resolve all the relevant questions”.⁵ The right to make written submissions in advance of the hearing was accorded by the Chamber to the participants at the

¹ “Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa”, ICC-02/05-01/09-274.

² *Ibid.*

³ ICC-02/05-01/09-282-Anx.

⁴ ICC-02/05-01/09-279, para. 6(b).

⁵ ICC-02/05-01/09-274, paras 13-14.

hearing “[i]n the interest of a focused and streamlined discussion at the hearing”.⁶

4. In this context, the Chamber does not consider it helpful at the current stage to attempt to identify specific issues that the participants are expected to address in their written submissions. Rather, the Chamber is interested in receiving any submission, in law or fact, concerning the subject-matter of the present proceedings which, as described in the decision of 8 December 2016,⁷ are intended for the Chamber to take an informed decision on the issues of:

- (i) whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on South Africa’s territory despite having received a request by the Court under articles 87 and 89 of the Statute for the arrest and surrender of Omar Al Bashir; and, if so,

- (ii) whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute are warranted.

5. Any submission which the Prosecutor and South Africa consider relevant to these issues and wish to bring to the Chamber’s attention in their written submissions is welcome and will be considered, as appropriate, for the Chamber’s eventual determination following the hearing. No further guidance in this regard, other than that already provided in the decision of 8 December

⁶ *Ibid.*, para. 16.

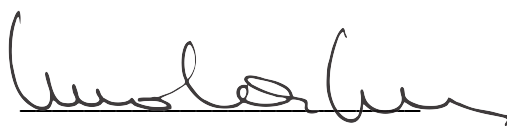
⁷ *Ibid.*, para. 15.

2016, is thus warranted at this stage with respect to the content of the upcoming written submissions by the Prosecutor and South Africa.

FOR THESE REASONS, THE CHAMBER HEREBY

DECIDES that no further guidance, in addition to that already provided by the Chamber, is warranted as to the issues that the Prosecutor and South Africa should address in the written submissions in advance of the hearing which are due by 17 March 2017.

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



Judge Cuno Tarfusser
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated 28 February 2017

At The Hague, The Netherlands