

Pursuant to Pre-Trial Chamber II's instruction dated 07 December 2016, this document is reclassified as "Public "

ANNEX 1

Confidential



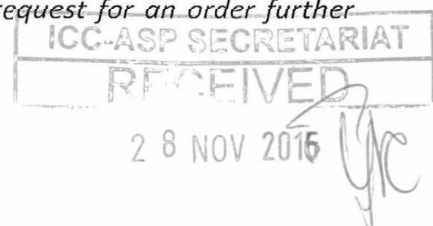
NV 66/2016

The Embassy of the Republic of South Africa presents its compliments to the Secretariat of the Assembly of States Parties and has the honour to request the Court to provide guidance with respect to the rules and procedures governing the processes in terms of Article 97 and Article 87(7) of the Rome Statute, in which South Africa is presently engaged with the Court.

In this respect, it is recalled that on 28 May 2015, the Registrar of the Court wrote to remind South Africa of its obligation to cooperate with the Court in the arrest of President Al Bashir of Sudan and also of its obligations to consult the Court should it face any difficulties in implementing the request for cooperation.

On 12 June 2015, South Africa requested to consult the Court in terms of Article 97 of the Statute. A preliminary meeting between South Africa and the Court took place on 12 June 2015. South Africa's view in respect of this meeting was formally recorded in the minutes of the meeting. It was the understanding of South Africa that the official Article 97 consultations will take place officially on 15 June 2015.

Despite this understanding, on 13 June 2015 the Prosecutor made an urgent request to the Court for clarity regarding the Article 97 consultations, without any notice being given to South Africa of the request and without South Africa being afforded an opportunity to be heard. In response to this request by the Prosecutor, the Pre-Trial Chamber II issued the *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 Al Bashir on the same day, 13 June 2015.

In part the decision, referring to the *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, reads as follows, (see in particular paras 28 to 31):

"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 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."

South Africa responded on 15 June 2015, stating its views that the consultation requested under Article 97 had not been concluded, that it and the South African domestic court system are seized with the matter and that the 13 June 2015 Decision is in violation of South Africa's basic right to fair procedures and more, particularly, the right to be heard.

On 4 September 2015, the Pre-Trial Chamber II of the Court issued an order on *The Situation in Darfur, Prosecutor v Omar Hassan Ahmad Al Bashir: Order Requesting Submissions from the Republic of South Africa for the purposes of Proceedings under Article 87(7) of the Rome Statute*. The Court requested South Africa in terms of Article 87(7) of the Rome Statute to submit its views for the purposes of proceedings under Article 87(7) of the Rome Statute, with particular reference to their failure to arrest and surrender Omar Al-Bashir, no later than 5 October 2015.

On 5 October 2015, South Africa requested an extension of the time limit for submitting its views in terms of Regulation 35 of the Regulations of the Court until such time as the domestic legal processes have been finalised. The Court granted this extension by taking a *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* on 15 October 2015.

Subsequently, progress reports on the domestic court processes in South Africa were submitted to the Court on 21 December 2015, 23 December 2015, 4 May 2016 and 23 May 2016.

The domestic court processes have now been concluded. South Africa wishes to record that the Supreme Court of Appeal of South Africa (whose judgment has of 18 November 2016 become final) has stated that the rule of customary international law pertaining to the immunity of sitting heads of state has not changed.

South Africa will be submitting its views and observations for the purposes of the Article 87(7) proceedings mentioned above.

In this respect, South Africa has the honour to request the Court to provide guidance on the rules and procedures which would govern the submission of its views and observations in terms of Article 87(7), in view thereof that South Africa also wishes the Court to, as part of this process, review the application of Article 97 during the consultations between South Africa and the Court, as well as the finding resulting from these consultations.

In this respect, it is recalled that South Africa is of the view that its right to a fair hearing has been impaired by the way in which the Article 97 consultations were conducted. The domestic processes in South Africa having been now concluded by the Constitutional Court's directive issued on 18 November 2016, South Africa is considering an appeal against the decision of the Pre-Trial Chamber made on 13 June 2015 and requires guidance on how an appeal should be filed.

The Embassy of the Republic of South Africa to the Kingdom of the Netherlands avails itself of the opportunity to renew to the Secretariat of the Assembly of States Parties the assurance of its high consideration.



The Hague
21 November 2016

The Secretariat of the Assembly of States Parties
The Hague