

Annex I

Confidential

**NV 032/2023**

The Embassy of the Republic of South Africa to the Kingdom of the Netherlands presents its compliments to Registry of the International Criminal Court and has the honour to refer to the Registry's note verbale (ref. NV/2023/EOSS/100/JV/jt) of 28 June 2023 conveying the decision by the Pre-Trial Chamber II of the Court granting the Republic of South Africa leave to submit clarifications on points raised during the hearing of 8 June 2023 pursuant to Article 97 of the Rome Statute of the International Criminal Court.

The Embassy of the Republic of South Africa has the further honour to convey to the Pre-Trial Chamber II its appreciation for the opportunity to submit these clarifications, which are contained in **Annex A** to this note verbale.

The Embassy of the Republic of South Africa to the Kingdom of The Netherlands avails itself of this opportunity to renew to Pre-Trial Chamber II of the International Criminal Court the assurances of its high consideration.



The Hague, 30 June 2023

Registry of the International Criminal Court
The Hague

Annex A

CLARIFICATIONS ISSUED BY THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA IN RELATION TO A HEARING HELD ON 8 JUNE 2023 PURSUANT TO ARTICLE 97 OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Introduction and classification

1. The Government of the Republic of South Africa (“Government”) notes with appreciation the written submission from the Prosecution dated 22 June 2023. The Government wishes to reaffirm its oral submissions presented at the hearing held on 8 June 2023 pursuant to Article 97 of the Rome Statute of the International Criminal Court (“Hearing”).

2. The Government had indicated that it would not provide additional written submissions. The Government respectfully submits these observations with the intention solely to clarify certain points the Government had made during the Hearing, in particular, points that appear from the Prosecution’s written submission not to have been construed correctly or adequately.

3. The Government notes that the proceedings have been classified as confidential in accordance with Regulation 23 *bis*(2). While the Government respects this classification, it wishes to reiterate that it has no objection to these proceedings being disclosed.

Article 98(1)

4. The Prosecution states in paragraph 4 of its written submissions that the Government “ignored that the *Bashir/Jordan* Appeal Judgment has settled relevant questions regarding the operation of articles 27 and 98”. It is important to clarify that the Government did not *ignore* the judgment, but argued that the judgement was controversial. In this regard, we note that the Court itself has been inconsistent in its

reasoning regarding head of state immunities under customary international law.¹ We further wish to refer the Court to writings of renowned international lawyers who have written about the controversial nature of the judgment², as well as others that have written more broadly on the jurisdiction of international courts in relation to customary international law immunity of heads of state in relation to international crimes.³

5. The Prosecution states that the Government did not advance valid reasons not to follow the jurisprudence of the Court's Appeals Chamber. We wish to draw the Court's attention to the reasons presented during the Government's oral submissions, namely that the International Court of Justice (ICJ) in the Arrest Warrant case was *unable to deduce that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and that such a finding extends to immunities in national jurisdictions*.⁴ Paragraph 58 of the Arrest warrant case states:

¹ Contrast the decisions in *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir: Decision requesting observations about Omar Al-Bashir's recent visit to Malawi*, 19 October 2011 (ICC-02/05-01/09-137), 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), the *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, 06 July 2017 (ICC-02/05-01/09-302), the *Judgment in the Jordan Referral re Al-Bashir Appeal*, 06 May 2019 (ICC-02/05-01/09-397)

² Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> (6 May 2019); Ben Batros, *A Confusing ICC Appeals Judgment on Head-of-State Immunity*, <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity> (7 May 2019); Dov Jacobs, *You Have Just Entered Narnia: ICC Appeals Chamber Adopts the Worst Possible Solution on Immunities in the Bashir Case*, <https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/> (6 May 2019).

³ Dapo Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", *Journal of International Criminal Justice* 1 (2003), 618-560; Asad G. Kiyani "Al Bashir and the ICC: The Problem of Head of State Immunity", *Chinese Journal of International Law*, 2013 Vol 12 No. 3, 467-508; William Schabas "Obama, Medvedev and Hu Jintao may be Prosecuted by International Criminal Court, Pre-Trial Chamber Concludes", <http://humanrightsdoctorate.blogspot.com/2011/12/obama-medvedev-and-hu-jintao-may-be.html> (15 December 2011).

⁴ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, para 58.

The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). **It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.** (Our emphasis)

6. Additionally, in 2016, the International Law Commission (ILC) Special Rapporteur on immunity of state officials from foreign criminal jurisdiction concluded that national courts almost unanimously acknowledge that no limitations or exceptions are applicable to personal immunity.⁵

7. The Government also noted that there is no state practice that one state ever arrested a sitting head of state of another country against whom an international arrest warrant was issued.

8. Importantly, South Africa's concern with the *Jordan* decision lies more with the interpretation of the application of head of state immunity on the horizontal plane. In the first instance, it has the effect that States are able to create treaties that bind non-States Parties, which is contrary to Article 34 of the Vienna Convention on the Law of Treaties. Secondly, if the interpretation offered by the Appeals Chamber is applied, Article 98 of the Rome Statute would have no application. Such an interpretation would be contrary to the rules of treaty interpretation as contained in

⁵ Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, 14 June 2016 (A/CN.4/701), para 121.

Article 31(1) of the Vienna Convention on the Law of Treaties, which requires that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

9. The Government understands that the Court has interpreted Article 98(1) not to confer immunities but rather to serve as a procedural rule. The Government understands Article 98(1) as requiring firstly, that it be established whether immunity applies; secondly, if a head of state has immunity under customary international law, the Court is then required to obtain a waiver of such immunity from the relevant state before it may request States Parties to cooperate by carrying out a provisional arrest.

10. In the Government’s view, the absence of head of state immunity for a third state in situations that have not been referred to the Court by the Security Council has not been established, for the reasons set out in paragraphs 4 to 7 above, and therefore a waiver is required.

Article 98(2)

11. The Government wishes to note that it did not address Article 98(2) during the Hearing.

Domestic law

12. The Government wishes to clarify that at no time in the Hearing did the Government argue that its domestic law does not allow it to give effect to the warrant of arrest. Rather it stated that it has indeed enacted legislation to give domestic effect to its international obligations under the Rome Statute.

13. Article 59 of the Rome Statute provides that a State Party shall take steps to arrest a person in respect of whom a request for provisional arrest has been received “**in accordance with its laws**”. The Government sought to explain that there is a separation of powers in terms of the Constitution of the Republic of South Africa. Whilst the Executive arm may have received the request to effect a provisional

warrant of arrest, it is for the Judicial arm to endorse that warrant, following an assessment of whether the requirements set out by the implementing legislation, which incorporates the entirety of the Rome Statute itself, have been met.⁶ Pursuant to Article 59 and in exercising its judicial function, a South African court will consider South African law, including the Constitution, relevant legislation and common law principles, as well as conventional and customary international law. The outcome of such an adjudicative process cannot be predicted with certainty, not least in this case, the facts of which are distinguishable from the *Bashir* case.

Peace negotiations

14. The Government's concern regarding this request for cooperation relates not to ordinary inter-state relations, but is closely linked with the argument it raised in relation to Article 16 and peace negotiations, in which in-person contact is essential.

15. Peace negotiations are very sensitive. It would not be reasonable to consider that such negotiations can be conducted virtually. Additionally, the dynamics at play in peace negotiations often require that they be held on neutral terrain. As such, it is a real possibility that one of the States Parties to the Rome Statute may need to host peace negotiations between states engaged in an armed conflict.

16. The Prosecution indicated that the Government requested the ICC to defer the proceedings in a similar manner to Article 16 of the Rome Statute.

17. The Government wishes to clarify that it has not requested the Court to defer the proceedings. Instead it was highlighting that:

- a. the Statute itself recognises the value of considering any peace negotiations when implementing its mandate. This is a valid factor to consider when deciding whether Article 97 consultations are apposite. It is also a valid factor in deciding on whether or not a state that is

⁶ See section 9(1) and (2) of the Implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002.

participating in peace processes has validly shown it has difficulties in implementing a request; and

- b. there may be circumstances in which it would be necessary to host peace negotiations in the territory of a State Party to the Rome Statute. In light of the prevailing geo-politics, obtaining a deferral from the United Nations Security Council can be assumed currently to be unlikely. In this regard, the Government noted that Article 97 consultations may serve as a mechanism through which a State Party could indicate that it may be necessary for the Court to acknowledge the difficulty that that State Party may have in giving effect to an arrest warrant while hosting peace talks in its territory. In this regard, it should not be forgotten that while justice is imperative, it may need to be preceded by a peace agreement to ensure justice is indeed attained.

18. As such, the Government sought to highlight that Article 16 deferrals may be too limiting in certain circumstances and the Court may need to consider consultations with a State Party in terms of Article 97 should such a scenario arise.

Conclusion

19. The Government emphasises that it reaffirms its position as put forward at the Hearing, and submits these written submissions with a view to clarifying any possible misunderstandings concerning the submissions it has made.

20. For the reasons set out on behalf of the Government of the Republic of South Africa during the hearing held on 8 June 2023, as clarified above, the Government therefore requests the Court to find:

- a. that the request for cooperation is incomplete for lack of a waiver of immunity in accordance with Article 98(1) of the Rome Statute; and
- b. that problems exist in respect of this request for cooperation that impedes or prevents execution of the request by South Africa.