

ANNEX

Public



**Service public fédéral
Justice**

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SUBJECT **International Criminal Court**
The case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*
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, of 8 December 2016
Belgium's observations pursuant to rule 103(3) of the Rules of Procedure and Evidence

Dear Sir,

With reference to the Decision of Pre-Trial Chamber II of the International Criminal Court of 8 December 2016, 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, in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, forwarded by the Secretariat of the Assembly of States Parties at the Court's request, and in accordance with Article 2, indent 4, and Article 5 of the Belgian Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals, as well as the declaration made by the Kingdom of Belgium pursuant to article 87(2) of the Statute, I have the honour of submitting to you herein the amicus curiae filed by the Belgian Central Authority on behalf of the Kingdom of Belgium, under rule 103(3) of the Rules of Procedure and Evidence.

For all intents and purposes, I should like to specify that these observations are not being submitted as confidential, and may therefore be made public.

Please be assured, Mr Registrar, of my highest consideration.

ON BEHALF OF THE KINGDOM OF BELGIUM,
For the Central Authority:

[signed]

Gérard Dive
Head of the Central Authority

SITUATION IN DARFUR (SUDAN)**IN THE CASE OF
*The Prosecutor v. Omar Hassan Ahmad Al Bashir*****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 of 8 December 2016****OBSERVATIONS OF THE KINGDOM OF BELGIUM****20 February 2017**

Considering article 13(b) of the Rome Statute of the International Criminal Court ("the Statute"),

Considering resolution 1593 (2005) adopted on 31 March 2005 by the Security Council, referring the situation in Darfur, Sudan to the Prosecutor of the International Criminal Court ("the Court"),

Considering the Decision of the Presidency of the Court of 21 April 2005 assigning the situation in Darfur, Sudan to Pre-Trial Chamber I,¹

Considering the Decision of the Presidency of the Court of 15 March 2012 assigning the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* ("Omar Al Bashir") to Pre-Trial Chamber II,²

Considering articles 21, 27, 86, 87, 89, 91 and 98 of the Rome Statute;

Considering the warrants of arrest for Omar Al Bashir issued on 4 March 2009³ and 12 July 2010⁴ by the Court's Pre-Trial Chamber I,

Considering the notification to South Africa, as a State Party to the Statute, of these warrants of arrest through requests for the arrest and surrender of Omar Al-Bashir to the Court, dated 5 March 2009 and 16 August 2010,⁵

Considering the request for cooperation notified to South Africa by the Court's Registrar on 28 May 2015 requesting South Africa: (i) to arrest and surrender the suspect to the Court should he enter into the territory of South Africa; and (ii) to consult with the Court without delay in order to resolve the matter,⁶

Considering that South Africa did not arrest the suspect while he was on South Africa's territory between 13 and 15 June 2015 and did not surrender him to the Court,⁷

Considering Pre-Trial Chamber II's decision of 8 December 2016 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,⁸

¹ ICC-02/05-1-Corr.

² ICC-02/05-01/09-143.

³ ICC-02/05-01/09-1.

⁴ ICC-02/05-01/09-94.

⁵ ICC-02/05-01/09-274, para. 12.

⁶ ICC-02/05-01/09-239-Conf-Anx1.

⁷ ICC-02/05-01/09-274, para. 6.

⁸ ICC-02/05-01/09-274.

Considering that in this Decision, the Court submits that:

[i]n order to resolve all the relevant questions, the Chamber considers it appropriate to accord South Africa, as well as the Prosecutor, whose request to the Chamber under article 58 of the Statute is at the origin of the warrants of arrest against Omar Al Bashir, an opportunity to fully present their views in a public hearing [...]⁹

Considering that the Court specifies that:

[t]he purpose of this hearing is to obtain all relevant submissions, in fact and in law, with respect to:

- (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 [...], 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 and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute are warranted,¹⁰

Considering that it states that:

considering that the issue is of general importance, the Chamber considers it appropriate to permit, under rule 103 of the Rules, all interested States Parties to the Statute to provide, if they so wish, any relevant submission, in writing and prior to the hearing, which they would wish to bring to the attention of the Chamber for the purposes of its final determination on the matter. The present decision is therefore notified to the Secretariat of the Assembly of States Parties for transmission to the States Parties as appropriate,¹¹

Considering that, for these reasons, the Court:

INVITES any interested State Party to the Rome Statute, if they so wish, to make written submissions on the matter, by 24 February 2017,¹²

Considering the declaration made by the Kingdom of Belgium pursuant to article 87(1) of the Rome Statute, ("the Statute") stipulating that "the Kingdom of Belgium declares that the Ministry of Justice is the authority competent to receive requests for cooperation",

Considering Article 2, indent 4, and Article 5 of the Belgian Act of 29 March 2004 on Cooperation with the International Criminal Court and the International Criminal Tribunals, designating the International Humanitarian Law Section (Ministry of Justice) as the Belgian Central Authority for Judicial Cooperation with the International Criminal Court,

Considering the declaration made by the Kingdom of Belgium pursuant to article 87(2) of the Statute, stipulating that "the Kingdom of Belgium declares that requests by the Court for cooperation and any documents supporting the request shall be in an official language of the Kingdom",

Considering the notification of the aforementioned Decision translated into French, forwarded by the Secretariat of the Assembly of States Parties to the Statute, including the Kingdom of Belgium, of 20 December 2016,

⁹ *Ibid.*, para.14.

¹⁰ *Ibid.*, para. 15.

¹¹ *Ibid.*, para. 17.

¹² *Ibid.*, para. 3 of the operative part, p.8.

Considering rule 103 of the Rules of Procedure and Evidence,

The Belgian Central Authority for Judicial Cooperation with the International Criminal Court submits, on behalf of the Kingdom of Belgium (“Belgium”), the following observations.

These observations will begin with a brief overview of the circumstances motivating Belgium’s decision to submit its observations in response to the Court’s invitation (point A).

Belgium will then provide the Court with a concise explanation of its current interpretation of article 98(1) of the Statute within the context of the circumstances given above (point B), and subsequently comment on the impact a Security Council resolution on this matter could have on its analysis (point C).

Lastly, it will present its closing remarks (point D).

A. Particular circumstances motivating Belgium’s decision to submit its written observations, in response to the Court’s invitation.

The instant case which spurred the Court’s decision by which it invited all States Parties to submit relevant observations fits into a particular context which can be summarized as follows: a suspect who is the subject of a warrant of arrest issued by the Court enters the territory of a State Party to the Statute to take part in a diplomatic meeting organized by an international or regional organization, as a member of his country’s delegation.

Belgium could be confronted with a similar situation, as it hosts the headquarters of a number of international and regional organizations, primarily in Brussels. Meetings, sometimes at the highest diplomatic levels, are held daily; international and regional diplomatic conferences take place regularly in Belgium, regardless of whether there are headquarters agreements with those organizations.

Generally, representatives of the States invited to these meetings are protected by international immunity for the benefit of these organizations and not Belgium. Such international immunity is enshrined in international law provisions, specific to each case, by which Belgium is bound. This immunity, when it exists, could fall under the scope of application of article 98(1) of the Statute.

Belgium could consequently find itself in the situation that South Africa had to address in the case in question.

Accordingly, it considers that it would be of great use if the Court, taking the example of the instant case, could specify how it deems article 98 of the Statute should be interpreted in such a situation.

For this reason, Belgium has accepted the Court’s invitation and is submitting the following observations.

B. Observations of the Belgian authorities on the interpretation of article 98(1) of the Rome Statute

Article 98(1) of the Rome Statute is worded as follows:

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity [...].

Under this provision, a State Party to the Statute may refuse to comply with a request for surrender, if doing so would require it to breach an obligation by which it is bound under international law with respect to the State or diplomatic immunity of a person, unless the Court has obtained the agreement of that third State to lift the immunity.

It is unquestionable that the notion of “third State”, referred to in article 98(1) above, encompasses not only States which are not parties to the Statute, but also all other subjects of international law outside this treaty.

In fact, the Court itself recognized the merits of this interpretation when it concluded cooperation agreements with international and regional organizations.

An example concerning an international organization is the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, which was initialled on 7 June 2004¹³ and entered into force on 4 October 2004.¹⁴ Article 19 of this agreement, entitled “Rules concerning United Nations privileges and immunities”, is worded as follows:

If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if, in the circumstances, such person enjoys, according to the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the United Nations, the United Nations undertakes to cooperate fully with the Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with the Convention on the Privileges and Immunities of the United Nations and the relevant rules of international law (our emphasis).

It is clear that under Article 19, the Court must first obtain the waiver of such immunity from the United Nations in order to pursue the execution of a warrant of arrest for a person enjoying international immunity granted for the benefit of the United Nations, in accordance with the Convention on the Privileges and Immunities of the United Nations and relevant rules of international law.

The same applies for regional organizations, an example of which is the Agreement between the International Criminal Court and the European Union on Cooperation and Assistance dated 10 April 2006,

¹³ <https://treaties.un.org/doc/Publication/UNTS/Volume%202283/II-1272.pdf>

¹⁴ Further to the adoption of resolution 58/318 by the United Nations General Assembly, 13 September 2004. See also ICC-ASP/3/Res.1.

which entered into force on 1 May 2006.¹⁵ The text of Article 12 of the agreement, entitled “Privileges and immunities”, nearly mirrors that of Article 19 of the aforementioned agreement with the United Nations and applies the same legal reasoning.

It reads as follows:

If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if such person enjoys, according to the relevant rules of international law, any privileges and immunities, the relevant institution of the EU undertakes to cooperate fully with the Court and, with due regard to its responsibilities and competencies under the EU Treaty and the relevant rules thereunder, to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with all relevant rules of international law (our emphasis).

It should be noted that article 98(1) of the Statute was intended (as its language so demonstrates) to settle a potential conflict of provisions between, on the one hand, the obligation to arrest and surrender, arising under articles 86, 87, 89 and 92 of the Statute, and on the other hand, a pre-existing obligation pertaining to international immunity.¹⁶ The immunity invoked must therefore be grounded in a legal provision that already existed when the Statute came into force for the State Party that refers to article 98(1) when refusing to comply with a request for arrest and surrender, in accordance with article 89(1), first part of the last sentence, of the Statute.

C. Impact of United Nations Security Council resolution 1593 (2005) on the analysis presented in point B

The instant case was referred to the Court after the United Nations Security Council (“the Council”) adopted resolution 1593 (2005) of 31 March 2005.

Paragraph 2 of this resolution,¹⁷ adopted under Chapter VII of the United Nations Charter (“the Charter”) states that the Council:

[d]ecides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully; [...] (our emphasis).

By a decision of 9 April 2014, the Court’s Pre-Trial Chamber II specified the interpretation that the Court intended to give to this resolution, reading it together with article 98(1) of the Statute:

[...] by 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

¹⁵ https://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf.

¹⁶ See Kimberly Prost and Angelika Schlunck, “Article 98”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court - Obersever’s Notes, Article by Article*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, pp. 1131 to 1133.

¹⁷ S/RES/1593 (2005), 31 March 2005.

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 (our emphasis).¹⁸

This case law was just recently confirmed by two new decisions of the Court¹⁹ to similar effect.

Yet, in the three specific cases, the three States Parties that invoked the existence of international immunity as an impediment the obligation to arrest and surrender Omar Al Bashir, in accordance with article 98(1) of the Statute, based this claim solely on the international immunity attached to his status as Head of State of Sudan,²⁰ that is to say, international immunity granted by international law to Sudan alone, a non-State Party that is bound to cooperate with the Court under the same terms as a State Party – as emphasized by the case law above – in the light of the aforementioned resolution, adopted under Chapter VII of the Charter.

With regard to existing immunities for international and regional organizations, the UN resolution merely recalls the relative effect of treaties and acknowledges that international and regional organizations are not bound by the obligations arising for States Parties under the Statute. As presented above, the resolution merely “urges” these organizations to cooperate fully with the Court. In the instant case, this could be interpreted as a pressing invitation to these organizations to lift the international immunities they would enjoy under international law, if these immunities might hinder compliance with a request by the Court for arrest and surrender.

Nonetheless, Belgium is not aware of any explicit examples in this connection in the Court’s case law and therefore will refrain from assuming the Court’s position and making a conclusive decision on this matter, leaving it to the Court’s discretion to do so, if it deems it necessary in the instant case.

¹⁸ “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, para. 29.

¹⁹ “Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute”, 11 July 2016, ICC-02/05-01/09-266, para. 11, and “Decision on the non-compliance by Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute”, 11 July 2016, ICC-02/05-01/09-267, para. 11.

²⁰ It should nonetheless be noted that, in the case of the Democratic Republic of the Congo (DRC), the purpose of Omar Al Bashir’s visit was Sudan’s participation in the Common Market for Eastern and Southern Africa (COMESA) summit in Kinshasa on 26 and 27 February 2014. The DRC, however, never invoked the existence of any international immunity in favour of COMESA that might be enjoyed by State representatives at COMESA summits. Furthermore, Belgium is unaware of any treaty binding the DRC to COMESA which may have entered into force before the Statute’s entry into force for the DRC, and which would have granted such immunity to representatives of COMESA’s member States for the organization’s summits.

D. Closing remarks

Belgium has submitted these observations in response to the Court's invitation in its aforementioned decision of 8 December 2016, and defers to the wisdom of the Court to make a determination.

Consequently, no inference should be made from these observations on Belgium's stance on the issue of whether or not South Africa breached its obligation to cooperate with the Court in the case at hand.

Done in Brussels, 20 February 2017

FOR THE KINGDOM OF BELGIUM

On behalf of the Central Authority for Judicial Cooperation
with the International Criminal Court,

[signed]

Gérard Dive,
Head of the Central Authority