

ANNEX 2

Public

Democratic Republic of the Congo
MINISTRY OF JUSTICE AND HUMAN RIGHTS

[Code of Arms]

Kinshasa, 13 March 2014

The Minister

N/R: 428/JM 267/D/CAB/MIN/J&DH/2013

Transmitted, with copy for information to:

- His Excellency the President of the Republic, Head of State;
(With most humble respects)
- His Excellency the Prime Minister, Head of Government;
(With the assurances of my highest consideration)
- His Excellency the Vice Prime Minister, Minister of National Defence and Veteran Affairs;
- The Minister of Foreign Affairs, International Cooperation and Francophonie;
- The Minister of the Interior, Security, Decentralisation and Customary Affairs;
- The Vice Minister of Human Rights;
- The State Prosecutor;
- The Auditor General at the Supreme Military Court;
(All) in Kinshasa/Gombe

 To Ms. Silvana ARBIA
 Registrar of the International Criminal Court,
 Maanweg, No. 174; 2516 AB
The Hague / Netherlands

Subject: Transmission of the observations of the DRC on the visit of Mr Omar Al Bashir to the DRC

Madam Registrar,

I have the honour to acknowledge receipt of your correspondence No. NV/2014/3236/ab/AK of 6 March 2014 and its annex of 26 February 2014, requesting the authorities of the Democratic Republic of the Congo to file observations on Mr Omar Al Bashir's visit to the DRC and hereby assure you that its content retained my full attention.

Hence, kindly find hereto attached the observations of the Democratic Republic of the Congo on that matter.

Kindly accept, Madam Registrar the assurances of my highest consideration.

[Signature]
Wivine MUMBA Matipa

Democratic Republic of the Congo
MINISTRY OF JUSTICE AND HUMAN RIGHTS

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The Minister

OBSERVATIONS OF DRC AUTHORITIES ON THE DECISION OF PRE-TRIAL CHAMBER II OF THE INTERNATIONAL CRIMINAL COURT REQUESTING FOR OBSERVATIONS ON OMAR AL BASHIR'S VISIT TO THE DEMOCRATIC REPUBLIC OF THE CONGO

I. INTRODUCTION

By decision No. ICC-02/05-01/09 of 3 March 2014, whose operative provisions are set out below, Pre-Trial Chamber II of the International Criminal Court:

“ a) invites the competent authorities of the Democratic Republic of the Congo to submit, no later than Friday 14 March 2014, any observations with regard to:

- (1) the failure to execute the requests for arrest and surrender of Omar Hassan Ahmad Al-Bashir to the Court and;
- (2) the alleged failure to consult with the Court in case of any problems identified which might have impeded the execution of the requests for his arrest and surrender during his visit to the country;

b) instructs the Registry to transmit the present decision to the Democratic Republic of the Congo; and

c) orders the Registry to prepare a report to the Chamber after having received the Government's observations to be filed in due course.”

II GENERAL OBSERVATIONS ON PROCEDURE

The authorities of the DRC recall that the Democratic Republic of the Congo is a State party to the Rome Statute of the International Criminal Court and duly remember that:

1. By Resolution No. 1593 (2005) of 31 March 2005, the UN Security Council referred the situation in Darfur to the International Criminal Court;

2. On 6 March 2009 and 21 July 2010, the Registry of the International Criminal Court, acting at the request of Pre-Trial Chamber I, published decisions requesting States to arrest and surrender Mr Omar Al Bashir to the ICC. These decisions called for the cooperation of States pursuant to Articles 89(1) and 91 of the Rome Statute of the International Criminal Court;
3. On 25 February 2014, the President of Sudan, Mr Omar Al Bashir arrived on DRC territory, honouring an invitation to attend a Head of States summit closing the 17th session of the Common Market of East and Southern Africa (COMESA);
4. On 26 February 2014, the Chamber published a "Prosecution's Notification of Possible Travel by President Omar Al Bashir in the Case of *The Prosecutor vs. Omar Al Bashir*". In her notification, the Prosecutor, relying on public sources, mentioned the possibility that President Omar Al Bashir could travel to the Democratic Republic of the Congo to attend a COMESA summit in Kinshasa scheduled for 26 and 27 February 2014. The Prosecutor requested that the Chamber should take the necessary measures to:
 - ensure execution of the warrant of arrest for Mr Omar Al Bashir;
 - request information from the authorities of the Democratic Republic of the Congo about the alleged visit; and
 - communicate to said authorities their standing obligation to arrest persons for whom arrest warrants have been issued by the ICC.
5. On 26 February 2014, the Chamber rendered its "Decision Regarding Omar Al-Bashir's Visit to the Democratic Republic of the Congo" in which it requested the DRC to immediately arrest Omar Al-Bashir and surrender him to the International Criminal Court and ordered the Registry to prepare a report concerning the said visit and submit it to the Chamber in due course.
6. In the morning of 27 February 2014, President Omar Al-Bashir left Congolese territory.

III. SPECIAL OBSERVATIONS

The Democratic Republic of the Congo remains aware of its legal obligations to the International Criminal Court and reiterates its commitment to the Rome Statute and its unflinching determination to combat impunity.

However, regarding President Omar Al-Bashir's visit to Kinshasa, enforcement of the decision of Trial Chamber I of the International Criminal Court to arrest him was obstructed by two major obstacles, namely:

- time constraints; and
- a series of legal constraints.

1. Time constraints

- a. The Democratic Republic of the Congo is a member-State of COMESA and had accepted to host its 17th session in Kinshasa.
- b. On the occasion of the COMESA Heads of States' Summit which closed the session, scheduled for 26 to 27 February 2014, the COMESA Secretariat sent invitations to national delegations and the composition of such delegations was communicated very late to the DRC State Protocol Service.
- c. The DRC's status as a State Party of the International Criminal Court, its membership in the African Union and the presence on its territory of a foreign Head of State, namely President Omar Al-Bashir, invited by a regional organisation and not by the Democratic Republic of the Congo, all combined to create a complex, ambiguous and major situation for DRC authorities.
- d. The time lapse between President Omar Al-Bashir's arrival on DRC territory in the evening of 25 February 2014, receipt of the Court's decision on 26 February 2014 and his departure in the morning of 27 February 2014 prior to the end of the summit, placed the Democratic Republic of the Congo in a delicate and unmanageable situation given the sensitive context of making a decision within such a short lapse of time. This difficulty was exacerbated by the fact that the Democratic Republic of the Congo has signed several development and security cooperation agreements with a certain number of States in the sub-region.
- e. In light of the foregoing, it was materially impossible, within such a short time, for the Democratic Republic of the Congo to take a decision fraught with so many legal, diplomatic, political and security implications and which came with such heavy consequences for the DRC State.
- f. Of course, the Democratic Republic of the Congo acknowledges that without this time constraint, it would have contacted the Court and presented the aforementioned difficulties upon receipt of the decision of Pre-Trial Chamber II. However, the DRC remains at the disposal of the Court to address any additional issues related to this matter.

2. Series of legal constraints

Mr Omar Al-Bashir was indeed in Kinshasa and, pursuant to articles 87 and 89 of the Rome Statute, the DRC was under an international obligation to arrest him.

However, articles 87 *et seq.* must be read in conjunction with article 98(1) of the same Statute which provides that:

“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.”

It follows from the above that the DRC’s obligation in the instant case to arrest and surrender the President of Sudan to the ICC became increasingly complex in light of article 98(1) and on account of the notion of immunity.

This complexity is all the more manifest because the same provision requires the Court to first obtain the cooperation of the third State for a waiver of immunity.

In the instant case, the President of Sudan, in accordance with international custom, enjoys certain immunities which come with his position as Head of State; immunities which, though ineffective under the Rome Statute (article 27), still remain valid considering that the prosecuted person is the Head of a member State of the African Union.

Indeed, at the Extraordinary Session of the African Union Conference held on 12 October 2013, the pan-African organisation decided that:

“To safeguard the constitutional order, stability and integrity of member states, no serving AU Head of State or Government or anybody acting or entitled to act in such a capacity, shall be required to appear before any international court or tribunal during their term of office”.

IV CONCLUSION

The Democratic Republic of the Congo establishes a parallel between the African Union Decision and article 98(1) of the Rome Statute, in that both instruments recognise the notion of immunity and construe it as an international legal constraint.

DRC authorities note that the request to arrest and surrender Mr Omar Al-Bashir to the Court became inconsistent with their obligation to respect the immunities that come with the position of Head of State, pursuant to the abovementioned African Union decision.

The DRC Minister of Foreign Affairs, in paragraph 5 of his correspondence No. 130/125/2014 of 5 March 2014 to Ms Tiina Intelman, President of the Assembly of States Party to the Rome Statute of the International Criminal Court (copy appended hereto) states the following:

“The DRC’s status as a State Party of the International Criminal Court, its membership in the African Union whose resolutions are legally binding on all member-States, including the DRC, and the presence on its territory of a foreign sitting Head of State invited by a regional organisation have all combined to create a complex, ambiguous and bothersome situation for DRC authorities. In this sensitive context, characterized by conflicting standards in which the DRC cannot make a determination at short notice, the DRC adopted an approach that is most consistent with its obligations under the Rome Statute while respecting the letter of its commitments to the African Union and to COMESA as well as the requirements of peace and stability for itself and the entire sub-region.”

Besides, the Court itself recognizes that immunity is an obstacle since the Rome Statute requires that it must first obtain a waiver of immunity from the third State, namely Sudan.

Since the Court did not comply with that requirement, the DRC could not act beyond what it is legally permitted to do.

Furthermore, several recent international practices caused the DRC to wonder about the decision it should take, since Mr Omar Al-Bashir has already visited States parties to the ICC such as Chad, Djibouti, Kenya and Nigeria. We wondered whether these countries were guided by the principle of immunity since he was a sitting Head of State. However, for want of time, we did not analyse the matter further in order to reach a decision.

Done at Kinshasa, on 13 March 2014

For the authorities of the Democratic Republic of the Congo

[signature]

Wivine MUMBA Matipa

Minister of Justice and Human Rights

Democratic Republic of the Congo

*Ministry of Foreign Affairs,
International Cooperation and Francophonie*

[CODE OF ARMS]

THE MINISTER

*Kinshasa, 05 March 2014
No. 130/125/2014*

To Ms Tiina Intelman,
President of the Assembly of States Parties to the
Rome Statute of the International Criminal Court
New York, USA

Subject: Your Letter No. ASP/NY/2014/48

Madam President,

I have the honour to acknowledge receipt of your letter of 25 February 2014 referenced above. In response thereto, I wish to bring the following points to your attention:

1. The DRC is aware of its legal obligations vis-à-vis the ICC and reiterates its commitment to the fight against impunity. Indeed, it is aware of the imperative need to prosecute those who bear the greatest responsibility for the most serious crimes, namely war crimes, crimes against humanity and genocide. It is also aware of the relevance of international justice and, in particular, of the ICC in crisis situations in which national judicial systems are incapable or too weak to prosecute such crimes. The actions implemented by DRC authorities over the last 10 years, recent statements by the President of the Republic and the adoption of an amnesty law hailed as a decisive step towards resolution of the conflict situation in the Eastern part of the country, which excludes from its scope crimes within the jurisdiction of the Court, all confirm this commitment to justice as a factor of peace and attest to the DRC Government's strong determination to pursue active and positive cooperation with the ICC.
2. Victims of the abovementioned serious crimes, regardless of whether they are Congolese, African or of other origin, have a right to justice and the DRC has resolved to do all in its power to ensure that justice is rendered. This will be done through the ongoing national judicial capacity-building

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- efforts, initiatives in favour of the specialized chambers and complementarity with the ICC.
3. With respect to such complementarity, the DRC has been cooperating with the ICC over the last 10 years and will continue to do so for as long as it can, including through the surrender of suspects sought by the ICC if the opportunity arises and through support to the Court where necessary. Hence, from 2006 to date the DRC has surrendered four suspects to the Court. Four other Congolese nationals, including a former Vice President of the Republic and a former General of the FARDC are currently detained at The Hague within the framework of the Court's investigations in the DRC and CAR situations.
 4. Transnational cooperation and regional integration are crucial to the economic development of the DRC. More importantly, the institution of peaceful relations with its neighbours and partners in Africa is a prerequisite to the DRC's own stability. Indeed, like any other State, especially one emerging from several years of devastating conflict, the DRC has to rely on stable and lasting partnerships with neighbouring countries as well as close economic and trade allies to ensure its own development. Hence, the DRC joined the Common Market of Eastern and Southern Africa (COMESA) and accepted to host its 17th Summit of Heads of State and of Government in Kinshasa. As it is the case on such occasions, the DRC State Protocol Service was informed of the composition of the various delegations only so that it could organise reception arrangements and, indeed, informed very late in most cases, including that of Sudan.
 5. The DRC's status as a State Party of the International Criminal Court, its membership in the African Union whose resolutions are legally binding on all member-States, including the DRC, and the presence on its territory of a foreign sitting Head of State invited by a regional organisation have all combined to create a complex, ambiguous and bothersome situation for DRC authorities. In this sensitive context, characterized by conflicting standards, in which the DRC cannot make a determination at short notice, the DRC adopted an approach that is most consistent with its obligations under the Rome Statute while respecting the letter of its commitments to the African Union and to COMESA as well as the requirements of peace and stability for itself and the entire sub-region.

Please accept, Madam President, the assurances of my highest consideration.

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[SIGNATURE]

Raymond TSHIBANDA N'TUNGAMULONGO

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