



Original: English

No.: ICC-02/05-01/09
Date: 23 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 HASSAD AHMAD AL BASHIR***

Public

Request to present views and concerns in 7 April 2017 public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa

Source: Legal Representatives of Victims

Document to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor
Mr. James Stewart, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Ms. Wanda M. Akin
Mr. Raymond M. Brown

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Amicus Curiae

The Southern African Litigation Center

Others

United Nations
Secretariat of the Assembly of States
Parties

REGISTRY

Registrar

Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

The Legal Representatives of Victims a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07, a/0038/07 (“the Victims”)¹ hereby request that Pre-Trial Chamber II (“PTC II”) permit them to present views and concerns on behalf of Victims at the Court’s hearing on non-compliance against South Africa for failing to arrest and surrender Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”). Specifically, it is requested that the Legal Representatives of Victims present views and concerns before the Chamber at the hearing scheduled for 7 April 2017 because South Africa’s conduct has adversely affected the rights of the Victims in *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (“Bashir case”) and situation in Darfur (“Darfur Situation”).

Procedural History

1. On 31 March 2005, acting under Chapter VII of the Charter of the United Nations, the Security Council (the “SC”) adopted Resolution 1593 (2005), referring the Darfur Situation to the Prosecutor of the Court.²
2. On 27 June 2006, Victims (then, Applicants) a/0011/06³, a/0012/06⁴, a/0013/06⁵, a/0015/06⁶ requested to be granted the right to participate in the investigation stage in the Darfur Situation. On 6 December 2006, the report presented to Pre-Trial Chamber I (“PTC I”) by the Victims Participation and Reparations Section (“the VPRS”) was filed.⁷

¹ See “Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07”, 14 December 2007, ICC-02/05-111-Corr 14-12-2007.

² S/RES/1593 (2005).

³ See “Application to participate in proceedings”, ICC-02/05-4-Conf-Exp.

⁴ See ICC-02/05-5-Conf-Exp.

⁵ See ICC-02/05-6-Conf-Exp.

⁶ See ICC-02/05-8-Conf-Exp.

⁷ See ICC-02/05-38-Conf-Exp.

3. On 10 July 2007, Victims (then, Applicants) a/0023/07⁸, a/0024/07⁹, a/0026/07¹⁰, a/0029/07¹¹, a/0036/07¹², a/0037/07¹³, a/0038/07¹⁴ requested to be granted the right to participate in the investigation stage in the Darfur Situation. On 10 July 2007, the report presented to PTC I by the VPRS was filed.¹⁵

4. On 14 December 2007, PTC I granted a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07, and a/0038/07 victim status, allowing them to participate in the proceedings at the investigation stage of the Darfur Situation.¹⁶

5. On 4 March 2009, PTC I issued a warrant of arrest against Omar Al Bashir for crimes against humanity and war crimes.¹⁷

6. On 6 March 2009, PTC I stipulated that States Parties had an obligation to cooperate with the International Criminal Court (“ICC” or “the Court”).¹⁸ PTC I also requested cooperation from all United Nations (“UN”) SC Member States to arrest and surrender Omar Al Bashir.¹⁹

⁸ See ICC-02/05-84-Conf-Exp-Anx4.

⁹ See ICC-02/05-84-Conf-Exp-Anx5.

¹⁰ See ICC-02/05-84-Conf-Exp-Anx7.

¹¹ See ICC-02/05-84-Conf-Exp-Anx10.

¹² See ICC-02/05-84-Conf-Exp-Anx16.

¹³ See ICC-02/05-84-Conf-Exp-Anx17.

¹⁴ See ICC-02/05-84-Conf-Exp-Anx18.

¹⁵ See ICC-02/05-84-Conf-Exp.

¹⁶ See ICC-02/05-111-Corr 14-12-2007.

¹⁷ See “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-3; “Warrant of Arrest for Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-1.

¹⁸ See “Request to all States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir”, ICC-02/05-01/09-7.

¹⁹ See “Request to all United Nations Security Council Members that are not States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir”, ICC-02/05-01/09-8.

7. On 10 December 2009, PTC I recognized Victims (then, Applicants) a/0011/06, a/0012/06, a/0013/06, a/0015/06 as victims for the purpose of participating during the pre-trial stage in the *Bashir* case.²⁰

8. On 12 July 2010, PTC I issued a warrant of arrest for Omar Al Bashir for the crime of genocide.²¹

9. On 12 December 2011, PTC I ruled that acceptance of Article 27(2) of the Rome Statute implied a waiver of immunities for the purpose of Article 98(1) of the Rome Statute.²² This reasoning was reiterated in the PTC I ruling on 23 March 2012 with respect to Chad's obligation to arrest and surrender Omar Al Bashir upon entering its territory.²³

10. On 9 April 2014, PTC II found that SC Resolution 1593 (2005) had implicitly waived the immunities granted to Omar Al Bashir, and in failing to arrest and surrender him to the Court, the Democratic Republic of the Congo ("DRC") violated its obligations before both the Court and under international law.²⁴

11. On 13 June 2015, Omar Al Bashir traveled to South Africa, a State Party, to attend a summit of the African Union ("AU Summit"). Despite notification from this Court confirming its obligation to arrest and surrender Omar Al Bashir to the ICC, South Africa did not arrest and surrender the suspect to face trial.²⁵ A detailed

²⁰ See "Decision on Applications a/0011/06 to a/0013/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial State of the Case", ICC-02/05-01/09-62.

²¹ See "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-94.

²² See "Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-139.

²³ See "Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-140.

²⁴ See "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", ICC-02/05-01/09-195.

²⁵ See "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 Omar Al Bashir", 13 June 2015, ICC-02/05-01/09-242.

procedural history of the events surrounding Omar Al Bashir's travel to South Africa and subsequent departure to Sudan on 15 June 2015 has been set out in the Chamber's decision of 8 December 2016.²⁶

12. On 23 June 2015, the Gauteng Division of the High Court of South Africa ("High Court") ruled that South Africa violated its domestic law²⁷ by failing to arrest and surrender Omar Al Bashir to the ICC.²⁸ On 15 March 2016, the Supreme Court of Appeal of South Africa ("SCA") confirmed that South Africa had violated its domestic law by not arresting Omar Al Bashir.²⁹ Despite the domestic courts' decisions, no relevant officials have been held accountable for this failure.³⁰

13. On 4 September 2015, the Chamber opened proceedings pursuant to article 87(7) of the Rome Statute,³¹ and has convened a public hearing on the matter to take place on 7 April 2017.³²

14. On 19 October 2016, South Africa submitted its instrument of withdrawal from the Court to the United Nations.³³ Pursuant to Article 127(1) of the Rome Statute, the withdrawal will go into effect on 19 October 2017, exactly one year after the deposit of

²⁶ See "Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to South Africa", ICC-02/05-01/09-274.

²⁷ The Rome Statute has been incorporated into South African law through the Implementation of the Rome Statute of the International Criminal Court Act of 2002 ("Implementation Act"), and is therefore binding on the State. See *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015), para. 26.

²⁸ See *Minister of Just.*, 2015 ZAGPPHC 402.

²⁹ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016).

³⁰ See "Request for Leave to Submit *Amicus Curiae* Observations by the Southern Africa Litigation Centre (SALC)", 27 January 2017, ICC-02/05-01/09, para. 51.

³¹ See "Order requesting submissions from the Republic of South Africa for the purposes of proceeding under Article 87(7) of the Rome Statute", ICC-02/05-01-09-247.

³² See "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.

³³ C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification), Rome Statute of the International Criminal Court, Withdrawal, South Africa, United Nations, New York (22 February 2017).

the withdrawal document.³⁴ On 22 February 2017, the High Court ruled that South Africa's withdrawal, without prior parliamentary approval, was "unconstitutional and invalid" according to their domestic law.³⁵

15. Allowing Omar Al Bashir to travel to South Africa without consequence triggered concern amongst the participating Victims that conduct of this sort would not only be tolerated, but also continued by other members of Rome Statute and UN. These sentiments give rise to the Victims' desire to present their views and concerns both through written and oral submissions at the 7 April 2017 hearing.

Submission

I. Recognized Victims Have the Right to Participate in the Court's Proceedings

16. Article 68(3) of the Rome Statute states that the Court shall allow victim participation in ICC proceedings where those victims' personal interests are affected.³⁶ There are three criteria to determine whether victim participation is proper; whether: (1) the personal interests of the victims are affected; (2) the victims' participation is appropriate at that stage of the proceedings; and (3) the manner of participation does not prejudice the rights of the accused, nor impede a fair and impartial trial.³⁷

17. PTC I determined that the language in Article 68(3) imposes a "positive obligation for the Court to enable [Victims] to exercise [the right of access] concretely

³⁴ C.N.786.2016.TREATIES-XVIII.10; See also Rome Statute of the International Criminal Court art. 127(1), July 17, 1998, 2187 U.N.T.S. 90 ("Rome Statute" or "Statute").

³⁵ *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017), Order, para. 1.

³⁶ See Article 68(3) of the Statute.

³⁷ See Article 68(3) of the Statute.

and effectively.”³⁸ This, as stated, creates a “dual obligation” on the Chamber “to allow victims to present their views and concerns, and [...] to examine them.”³⁹

a. The Personal Interests of the Victims are Affected

18. The personal interests of the Victims in the *Bashir* case and Darfur Situation are gravely affected when the accused enters the territory of a State Party, not only without consequence, but with utter impunity. While there have been two domestic rulings against the Government of South Africa for failing to uphold their obligations to arrest and surrender the suspect to the Court,⁴⁰ the State has failed to hold accountable those responsible for the government parties’ actions. This failure is well-documented in the South Africa Litigation Center’s (“SALC”) request for leave to submit *Amicus Curiae* observations⁴¹, and has a profound impact on the psychological well-being of Victims, who not only watched the accused evade justice, but then witnessed as no officials were held to account for South Africa’s failure, despite two domestic rulings to the contrary.

19. Based on the timeline and circumstances of the events leading to Omar Al Bashir’s escape from South Africa,⁴² it is likely that the Government of South Africa was not only aware of Omar Al Bashir’s entry and departure from its territory, but even aided and abetted in his last-minute departure from Waterkloof airport, despite a domestic and ICC ruling for Omar Al Bashir’s arrest and surrender.⁴³

20. When Omar Al Bashir entered South Africa, the Legal Representatives of Victims received numerous communications from their clients, who stated their

³⁸ “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, 17 Jan. 2006, ICC-01/04-101-tEn-Corr, para. 71.

³⁹ ICC-01/04-101-tEn-Corr, para. 71.

⁴⁰ See *Minister of Just.*, 2015 ZAGPPHC 402; See also *Minister of Just.*, 2016 ZASCA 17.

⁴¹ See ICC-02/05-01/09, para. 50-58.

⁴² See ICC-02/05-01/09, para. 29-39.

⁴³ See ICC-02/05-01/09, para. 29-40.

excitement and expectation that South Africa, as a State Party, would arrest the suspect. A mere two days later, the Victims were shocked and hurt to learn that the suspect was escorted out in the thick of night in a private plane back to Sudan, where he posed as a victorious leader for numerous media outlets.⁴⁴

21. In the weeks and months following Omar Al Bashir's visit to South Africa, the Victims and their Legal Representatives have followed, with great concern, both the domestic proceedings in South Africa and the series of events and rulings from this Chamber that have led to the upcoming hearing. The Victims have watched as both the High Court and SCA ruled that the Government of South Africa acted in contravention of their domestic legal obligations.⁴⁵ These rulings largely relied on the fact that the Rome Statute, to which South Africa is a State Party, has been incorporated into South African law, and is therefore binding on the State.⁴⁶ Such decisions provided hope to the Victims that justice would be done, and those responsible for such a breach would be held to account.

22. Where States Parties of the Rome Statute fail to comply with obligations to arrest and surrender a suspect to the Court, the psychological well-being of victims is diminished. Dr. John Charles Yuille testified in the *Ntaganda* case that helplessness impacts the degree of trauma a victim experiences.⁴⁷ Witnessing the accused perpetrator of crimes against you and your community travel to a State Party without consequence, has left the Victims with a sense of helplessness that contributes to further and deeper traumatization. The failure of the South African Government to act according to its obligations under the Rome Statute also undermines the Victims'

⁴⁴ See Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. Times, 15 June 2015; See also Abdelgadir Mohammed, *SA has Become a Partner in Bashir's Crimes*, Sunday Times (Johannesburg), 28 June 2015.

⁴⁵ See *Minister of Just.*, 2015 ZAGPPHC 402; See also *Minister of Just.*, 2016 ZASCA 17.

⁴⁶ See *Minister of Just.*, 2015 ZAGPPHC 402, para. 26.

⁴⁷ *Prosecutor v. Bosco Ntaganda*, Trial Hearing Witness DRC-OTP-P-0933, 18 April 2016, ICC-01/04-02/06-T-84-ENG, Transcript, pg. 23, lines 20-21; See also MONITOR, 18 April 2016, <https://www.ijmonitor.org/2016/04/expert-explains-variance-in-memory-among-trauma-victims/>.

expectations of justice from the Court by allowing the suspect to circumvent the charges levied against him and avoid a fair and impartial trial.

b. The Victims' Participation is Appropriate at This Stage of the Proceedings

23. In the *Ongwen* case, Judge Tarfusser, acting as Single Judge for this Chamber, established broad permissive modalities of victims' participation. The Single Judge stated that during pre-trial proceedings in that case, legal representatives would have "the general right to attend all public and non-public hearings" and "the right to make [...] submissions to the Chamber" as well as to respond to submissions of the parties.⁴⁸

24. This Chamber has limited the opportunity for victims to share their views and concerns in only extremely narrow and specific instances.⁴⁹ One such instance involved the Victims' request to make observations regarding the suspect's anticipated travel to a UN General Assembly ("UNGA") meeting in 2013.⁵⁰ However, the present hearing is distinguishable from the previous instance since extreme urgency required that the Chamber rule on the same day that the Prosecutor's request was made, and therefore did not permit time for the Chamber to receive and consider views and concerns from participating victims.⁵¹ In contrast, no urgency arises in respect to the matter presently before this Chamber. Omar Al Bashir has returned to Sudan from South Africa.⁵² Proceedings regarding a finding of non-compliance have already been underway for many months and will continue beyond April. Any time sensitivity that may

⁴⁸ "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights", 27 November 2015, ICC-02/04-01/15-350, paras. 32-33.

⁴⁹ See "Decision Regarding Omar Al Bashir's Potential Travel to the United States of America", 18 September 2013, ICC-02/05-01/09-162.

⁵⁰ See "Request to make observations regarding Omar Al Bashir's potential visit to the 68th Session of the United Nations General Assembly", 18 September 2013, ICC-02/05-01/09-161.

⁵¹ See ICC-02/05-01/09-162.

⁵² See "Prosecution request for it to be heard should the domestic legal proceedings in the Republic of South Africa not be finalised by 31 December 2015, and for confirmation of South Africa's continuing obligations to arrest and surrender Omar Al Bashir and for reclassification of filings, 15 October 2015, ICC-02/05-01/09-249.

necessitate a denial of participation evaporated when South Africa allowed Omar Al Bashir to leave its territory without his arrest.

25. The importance of victim participation was recently emphasized during the Office of the Prosecutor's 24th report on Darfur to the SC (24th Darfur Briefing) on 13 December 2016.⁵³ Members of both the ASP and the SC, which referred the Darfur Situation to the Court, reiterated the importance of the role of victims and their quest for justice. Senegal's representative stated that, "While the primary responsibility for ensuring access to justice belongs to the State, when justice is not to be found there, the victims are free to seek it wherever it may be found."⁵⁴ The representative of Spain stated that "[...] We owe it to the victims of Darfur... to restore the confidence in the authority of law and justice."⁵⁵

26. Victims in the *Bashir* case and Darfur Situation have long awaited the arrest and surrender of Omar Al Bashir to the Court. With this passing time, not only does their hope and psychological well-being suffer, but also their will to participate in the case. It therefore behooves this Chamber to consider the Victims' views and concerns in the current matter. This will help preserve not only their well-being and confidence in the system, but also their determination to participate. On 19 October 2015, a different group of Victims participating in the *Bashir* case withdrew their participation from both the case and situation, citing a lack of advancement in the case against Omar Al Bashir.⁵⁶ While the Victims represented by the Legal Representatives of Victims in the present submission expressed no interest in withdrawing from the case, it is worth noting that when justice is not done – or seen to be done – victims may lose hope and trust in the system. Witnessing Omar Al Bashir visit South Africa, a State Party,

⁵³ U.N. SCPR, 71st Sess., 7833rd mtg., U.N. Doc. S/PV.7833 (13 December 2016).

⁵⁴ U.N. Doc. S/PV.7833, pg. 15.

⁵⁵ U.N. Doc. S/PV.7833, pg. 15.

⁵⁶ See "Victims' notification of withdrawal from the case against Omar Hassan Ahmed Al-Bashir", 19 October 2015, ICC-02/05-01/09-250.

without consequence, is an event that has already triggered similar frustrations amongst Victims wishing to participate in the upcoming hearing.

c. The Manner of Participation Does Not Prejudice the Rights of the Accused, Nor Impede a Fair and Impartial Trial

27. The Legal Representatives of Victims remain of the view that “the protection of the rights of the Defence is a fundamental principle, without which the integrity of the criminal proceedings before this Court cannot be safeguarded and justice cannot be done”.⁵⁷ The legal proceedings currently before the Court will not in itself affect the rights of the Defence, as the rights of the accused, and victims, are appropriately protected under the Rome Statute and Rules of Procedure and Evidence (“RPE”).⁵⁸

28. The presentation of the Victims’ views and concerns regarding the events surrounding South Africa’s failure in arresting and surrendering Omar Al Bashir to the Court will not counter or infringe upon any of the rights afforded to the accused under Article 67.⁵⁹ Further, Regulation 24(1) of the Regulations of the Court⁶⁰ allows the Defence to respond to all documents that are submitted by applicants at any stage of the proceedings, including factual findings in the Pre-Trial Stage. Accordingly, a submission from the Victims at this proceeding would not preclude the Defence from participating. Moreover, the Legal Representatives of Victims would in fact encourage the Defence to participate in this proceeding.

29. Despite an active warrant of arrest for Omar Al Bashir, the Chamber has ruled Sudan non-compliant in failing to arrest and surrender the suspect to the Court to face a fair trial. The accused continues to evade justice, which has caused the proceedings

⁵⁷ “Application of Legal Representatives of Victims a/0011/06, a/0012/06, a/0013/06 and a/0015/06 to Participate in and Submit Observations on the Proceedings on Remand In Connection with the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir”, 10 March 2010, ICC-02/05-01/09-75, para 22.

⁵⁸ See e.g. Article 67(1) and 68 of the Statute; Rule 16 and 20 of the RPE.

⁵⁹ See Article 67 of the Statute.

⁶⁰ See Regulation 24 of the Regulations of the Court, ICC-BD/01-02-07.

to remain in the pre-trial stage for almost a decade. Should the Defence choose to respond to submissions at the 7 April 2017 hearing, their participation would be welcomed.

30. Ultimately, the rights of the accused are not prejudiced by the Victims' participation at this stage in the proceedings since the accused is not present, but rather continues to evade arrest and surrender to the Court to face a fair trial. Further, the Victims' presenting views and concerns regarding South Africa's non-compliance will not impede a fair and impartial trial, as there has yet to be a confirmation of charges and start to the trial. Moreover, the Defence is entitled to make appropriate submissions and responses at this hearing.

II. If Granted the Opportunity to Participate in the 7 April 2017 Hearing, Victims Would Argue that: (a) South Africa Failed to Fulfill Its Duty to Cooperate with the Court by not Arresting and Surrendering Omar Al Bashir; (b) A Finding of Non-compliance Should be Referred to the Security Council for Sanctions; and (c) A Finding of Non-Compliance Should be Referred to the Assembly of States Parties for Punitive Measures in Order to Protect Participating Victims and Discourage Future Instances of Non-compliance.

a. South Africa Failed to Fulfill its Duty to Cooperate by not Arresting and Surrendering Omar Al Bashir to the Court

31. If given the opportunity to present their views and concerns, the Legal Representatives of Victims would argue, and present detailed submissions at the hearing, that South Africa failed to fulfill its duty to cooperate with the Court by not arresting and surrendering Omar Al Bashir when he entered its territory in June 2015. This failure produced a detrimental effect on the psyche of the Victims, who watched as the suspect was ushered in and out of a State Party that acted in contravention of its obligation to arrest and surrender him to the Court.

32. Article 86 of the Rome Statute places a general duty on States Parties to cooperate with the Court in its “investigation and prosecution of crimes within the jurisdiction of the Court.”⁶¹ Under Article 87, the Court can also request that any State Party cooperate on matters before the Court.⁶² Where a State Party fails to comply with a request for cooperation, “the Court may make a finding to that effect and refer the matter to the Assembly of States Parties (“ASP”) or, where the Security Council referred the matter to the Court, to the Security Council.”⁶³ Further, under Article 89, the Court may transmit requests to States Parties to arrest and surrender parties to the Court, and said State must comply with such a request.⁶⁴

33. South Africa is a State Party to the Rome Statute. As such, it is under an obligation to cooperate fully with the Court. South Africa’s withdrawal from the Rome Statute does not take effect until 19 October 2017, and therefore South Africa remains a State Party, bound to comply with Chamber’s decisions issued prior to this date.⁶⁵ Furthermore, the High Court recently ruled that South Africa’s withdrawal, without prior parliamentary approval, is unconstitutional and invalid.⁶⁶

34. The Chamber directly informed South Africa of its affirmative duty to arrest and surrender Omar Al Bashir while he was in its territory for the AU Summit.⁶⁷ Despite its obligation as a State Party, South Africa failed to cooperate.⁶⁸ Accordingly, the Chamber opened Article 87(7) proceedings, and continues to await South Africa’s

⁶¹ See Article 68(3) of the Statute.

⁶² See Article 87 of the Statute.

⁶³ See Article 87 of the Statute.

⁶⁴ See Article 89 of the Statute.

⁶⁵ See C.N.786.2016.TREATIES-XVIII.10; See also Article 127(1) of the Statute.

⁶⁶ *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53 (22 February 2017), Order, para. 1.

⁶⁷ See “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 Omar Al Bashir”, 13 June 2015, ICC-02/05-01/09-242, para. 10.

⁶⁸ ICC-02/05-01/09-242, para.10; See also ICC-02/05-01/09.

final views on the events surrounding Omar Al Bashir's visit and the subsequent lack of an arrest and surrender to the Court.⁶⁹

35. South Africa's primary defense for failing to comply with the arrest of Omar Al Bashir rested on the purported immunity Omar Al Bashir enjoys from his position as an acting head of state, as well as on South Africa's purported conflicting obligation with an African Union ("AU") Directive.⁷⁰ However, this Chamber has previously recognized that a State's acceptance of Article 27(2) of the Rome Statute creates an explicit exception to any purported head of state immunity before the Court.⁷¹ PTC II also recently ruled that SC Resolution 1593 (2005) "had effectively lifted the immunities of Omar Al Bashir," and that the AU's decisions did not justify any action contrary to the Resolution's command, or any non-cooperation with the Court's request to arrest and surrender Omar Al Bashir.⁷² Furthermore, the Court has the ultimate authority to decide questions relating to the scope of its own jurisdiction.⁷³

36. The South African position that it is barred from arresting and surrendering Omar Al Bashir to the ICC is thus incongruous with this Chamber's jurisprudence,⁷⁴

⁶⁹ See "Order requesting submissions from the Republic of South Africa for the purposes of proceedings under article 87(7) of the Rome Statute", 4 September 2015, ICC-02/05-01/09-247, para. 17; "Submission from the Republic of South Africa in response to the Order requesting a submission dated 4 September 2015 for the purposes of proceedings under article 87(7) of the Rome Statute", 5 October 2015, ICC-02/05-01/09-248-AnxI; "Prosecution Request for it to be heard should the domestic legal proceedings in the Republic of South Africa not be finalized by 31 December 2015, and for confirmation of South Africa's continuing obligations to arrest and surrender Omar Al Bashir and for reclassification of filings", 26 October 2015, ICC-02/05-01/09-253. See also "Prosecution observations on Victims' notification of withdrawal from the case", 3 November 2015, ICC-02/05-01/09-250.

⁷⁰ *Minister of Just.*, 2015 ZAGPPHC 402 (stating that South Africa's reasoning shifted in its argument at the Supreme Court of Appeal to emphasize the former argument, i.e., that Al Bashir was primarily afforded immunity under customary international law). See *Minister of Just.*, 2016 ZASCA 17.

⁷¹ See ICC-02/05-01/09-195, para. 25; ICC-02/05-01/09-242, para. 9 (determining that Bashir's immunity as head of state had been waived by the Security Council's referral of the Darfur Situation to the Court).

⁷² See "Decision on the non-compliance by the Republic of 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 States Parties to the Rome Statute", 11 July 2016, ICC-02/05-01/09-267, para. 12; "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 States Parties to the Rome Statute", 11 July 2016, ICC-02/05-01/09-266, para. 12.

⁷³ Article 119(1) of the Statute.

⁷⁴ See ICC-02/05-01/09-139; See also ICC-02/05-01/09-140; See also ICC-02/05-01/09-195; See also ICC-02/05-01/09-267, para. 12; See also ICC-02/05-01/09-266, para. 12.

as well as established international law and South Africa's own domestic law.⁷⁵ Article 27 of the Rome Statute and SC Resolution 1593 (2005) have stripped Omar Al Bashir of any immunity he may have possessed by nature of his status as head of state. Thus, South Africa may not evade its duty as a State Party to cooperate fully with the Court, and should be held in non-compliance for having failed to do so.

b. This Chamber Should Refer South Africa's Non-Compliance to the SC with a Request to Impose Sanctions

37. If the Chamber finds South Africa to be non-compliant, the Victims would request that the Chamber refer the matter directly to the SC pursuant to Article 87(7) of the Rome Statute.⁷⁶ Since the SC referred the Darfur Situation, including the case against Omar Al Bashir, to the ICC, it is within the Court's discretion to refer any non-cooperation by States Parties to the SC.⁷⁷ In this instance, South Africa was aware of its obligations to arrest and surrender Omar Al Bashir to the Court, as both past and recent precedent illustrates that all States have an obligation to cooperate with the Court.⁷⁸ Thus, the Court should request that the SC take direct action to effectively stem any future instances of non-cooperation.

38. First, the Victims would present their view that the Chamber should request the SC to make an Article 40 determination that South Africa comply with measures the SC "deems necessary or desirable."⁷⁹ These measures may include an assurance from South Africa that it will arrest and surrender Omar Al Bashir should he return. This

⁷⁵ "I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made." *Minister of Just.*, 2016 ZASCA 17 para. 103. See also *Minister of Just.*, 2015 ZAGPPHC 402.

⁷⁶ See Article 87(7) of the Statute.

⁷⁷ See Article 87(7) of the Statute.

⁷⁸ See, e.g., ICC-02/05-01/09-242, para 16; ICC-02/05-01/09-227, para. 13; ICC-02/05-01/09-195, para. 23.

⁷⁹ U.N. Charter, Article 40.

action would send a strong message to South Africa and other States that cooperation with the Court, pursuant to Articles 86 and 87 of the Rome Statute, is imperative to end impunity for those who commit the world's most heinous crimes.

39. Next, the Victims would ask that the Court request the SC to make an Article 39 determination that South Africa's breach constitutes a "threat to the peace."⁸⁰ Via this "gatekeeping" article, the SC could impose Article 41 sanctions on South Africa.⁸¹

c. Alternatively, This Chamber Should Refer South Africa's Non-Compliance to the Assembly of States Parties with a Request to Impose Punitive Measures

40. When the Court makes a finding of non-cooperation against a State Party under Article 87(7), it may refer the matter to the ASP for further action pursuant to the Assembly's responsibilities under Article 112(2)(f).⁸² As previously noted, deterring non-cooperation is integral to maintaining the Court's effectiveness in ending impunity. The ASP has also verified that part of the Assembly's responsibility is to prevent Member States' non-cooperation by using political and diplomatic punitive measures.⁸³

41. Thus, the Victims would argue that the Chamber make a recommendation to the ASP to use all available punitive measures, both diplomatic and political, against South Africa in light of its non-compliance, and in accordance with the ASP's mandate to promote cooperation and effectively respond to non-cooperation.⁸⁴ The severity of

⁸⁰ U.N. Charter, Article 39 (providing that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace . . . and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security").

⁸¹ U.N. Charter, Article 41 (describing sanctions to include "a complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations").

⁸² Articles 87 and 112 of the Statute; See also Article 90 of the Statute (stating competencies of the ASP).

⁸³ International Criminal Court, *Assembly procedures relating to non-cooperation*, ICC-ASP/10/Res.5, at annex B(6), (21 December 2011).

⁸⁴ ICC-ASP/10/Res.5, at annex B(6).

this particular instance,⁸⁵ coupled with the psychological consequences on Victims wishing to participate in this hearing, necessitates a strong and principled response. As Article 112(2)(f) of the Rome Statute allows the ASP to consider any question relating to non-cooperation pursuant to Article 87, the Chamber should specifically request that the ASP impose punitive measures against South Africa.

42. Political pressure alone has proven to be ineffective in preventing non-cooperation by States in the arrest of Omar Al Bashir. This is evidenced by Omar Al Bashir's frequent and continued travels to both States Parties and non-States Parties alike, with over 15 visits in this past year alone.⁸⁶ Witnessing coverage of these travels – without consequence – has a profoundly negative effect on Victims' psyche, will to participate, and faith in the system, and should not be tolerated.

43. The Court has an expectation of cooperation from the States that created it. Since the functioning of the Rome Statute system is entirely dependent on State cooperation, where government officials block essential cooperation (especially the arrest and surrender of an accused), robust action must be taken. Accordingly, stronger political and diplomatic measures are necessary to preclude future instances of non-cooperation. Thus, the Victims would submit that the Court request the ASP to apply sanctions to South Africa.⁸⁷

⁸⁵ Despite two domestic proceedings against South Africa for contravening its domestic law, Omar Al Bashir is portrayed in the media to have traveled back to Sudan victorious and immune from prosecution. See *Minister of Just.*, 2016 ZASCA 17; See also *Minister of Just.*, 2015 ZAGPPHC 402; Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. Times, 15 June 2015; Abdelgadir Mohammed, *SA has Become a Partner in Bashir's Crimes*, Sunday Times (Johannesburg), 28 June 2015.

⁸⁶ See e.g., *BashirWatch*, available at Bashirwatch.org; See also "Sudan's president has made 74 trips across the world in the seven years he's been wanted for war crimes.", Quartz Africa, available at <https://qz.com/630571/sudans-president-has-made-74-trips-across-the-world-in-the-seven-years-hes-been-wanted-for-war-crimes/>.

⁸⁷ Sanctions may include, *inter alia*, denying South Africa the right to vote in ASP meetings, as is the practice when a State is in arrears. See Article 112 of the Statute.

Relief Sought

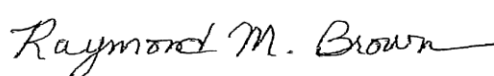
44. The Legal Representatives of Victims request:

(a) The ability to present their views and concerns regarding Omar Al Bashir's travel to South Africa from 13-15 June 2015 through written and oral submissions at the 7 April 2017 hearing;

(b) If granted permission to participate:

- a. That South Africa be found in non-compliance with their obligation to arrest and surrender Omar Al Bashir to the ICC; and
- b. That a finding of non-compliance be referred to the SC with a request to levy sanctions and to the ASP with a request to impose punitive measures on South Africa.

45. Strong actions would send a clear message to South Africa and other potentially noncompliant States Parties that the Court has power and will to deter and punish States that do not comply with its directives. It would also reinforce the importance of the Victims' perspective in the Court's pursuit of international justice and the end of impunity.

Wanda M. Akin and Raymond M. Brown

Legal Representatives of Victims a/0011/06, a/0012/06, a/0013/06, a/0015/06, a/0023/07, a/0024/07, a/0026/07, a/0029/07, a/0036/07, a/0037/07, a/0038/07

Done in English

Dated this 23rd day of February, 2017

At Newark, New Jersey,
United States of America