



Original: English

No.: ICC-02/05-01/09

Date: 9 March 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 HASSAN AHMAD AL BASHIR***

**Public**

**Decision on the “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”**

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

**Counsel for the Defence**

**Legal Representatives of the Victims**

Wanda M. Akin

Raymond M. Brown

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
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

**Other**

**REGISTRY**

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**Registrar**

Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Pre-Trial Chamber II** (“Chamber”) of the International Criminal Court (“Court”) issues this decision on the “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” (“Request”), received on 24 February 2017.<sup>1</sup>

## **I. Background**

1. On 8 December 2016, the Chamber decided to convene a hearing on 7 April 2017, in order to discuss any issues relevant to the Chamber’s determination of whether to make a finding of non-compliance by the Republic of South Africa (“South Africa”) with the Court’s request for arrest and surrender of Omar Al Bashir and refer the matter to the Assembly of States Parties and/or the Security Council of the United Nations under article 87(7) of the Rome Statute (“Statute”).<sup>2</sup>
2. On 24 February 2017, the Chamber received the Request, filed by the legal representatives of victims on behalf of 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.<sup>3</sup> However, the Chamber notes that only a/0011/06, a/0012/06, a/0013/06 and a/0015/06 have been admitted to participate “during the pre-trial stage of the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*”.<sup>4</sup> This decision is therefore taken only in their respect, and not in respect of any other person not admitted to participate in the case.
3. The legal representatives of victims, submitting that they have a right to participate in the Court’s proceedings under article 68(3) of the Statute, request:

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<sup>1</sup> ICC-02/05-01/09-280.

<sup>2</sup> “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.

<sup>3</sup> Request, p. 3.

<sup>4</sup> ICC-02/05-01/09-62.

(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.<sup>5</sup>

4. This decision is issued before the expiration of the time limit for responses under regulation 24 of the Regulations of the Court given that its outcome does not affect the interests of South Africa or the Prosecutor.

## II. Analysis

5. Article 68(3) of the Statute provides that "[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". In the view of the Chamber, the word "proceedings" in the cited provision refers primarily to criminal proceedings and does not extend to proceedings leading to a determination under article 87(7) of the Statute. In general terms, proceedings under article 87(7) of the Statute concern a determination on how to obtain compliance from a State with a request for cooperation or whether a particular course of action should be preferred over another in pursuing the Court's own interests to have its cooperation requests implemented in the context of Part 9 of

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<sup>5</sup> *Ibid.*, para. 44.

the Statute, as opposed to the criminal proceedings to which victims may participate under article 68(3) of the Statute. Proceedings under article 87(7) indeed fall under Part 9 of the Statute (entitled “International cooperation and judicial assistance”) which concerns the relationship between the Court, on the one hand, and a State, on the other hand, and fundamentally differ from the criminal proceedings before the Court.

6. Accordingly, as is evident from the Chamber decision scheduling the hearing for 7 April 2017, the participants in the present proceedings are not the same as in the proceedings on the merits of the case against Omar Al Bashir. The only indispensable participant is South Africa, which has the right to be heard in accordance with regulation 109 of the Regulations. Beyond that, the Chamber also involved 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, as well as the United Nations, considering that the Prosecutor initiated an investigation into the situation in Darfur, Sudan, following a referral by the Security Council. The Prosecutor and the United Nations were involved not as a matter of right but because the Chamber deemed that they could make submissions relevant to the Chamber’s determination.<sup>6</sup>
7. It follows from the above that article 68(3) of the Statute does not provide victims the right to present views and concerns in any proceedings leading to a determination under article 87(7) of the Statute. Moreover, the Chamber is not of the view that the legal representatives of the victims are in position to provide the Chamber with significant information relevant for its determination. Accordingly, there is no basis to involve the legal representatives analogously to the Prosecutor and the United Nations, or under rule 93 of the Rules.

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<sup>6</sup> ICC-02/05-01/09-274, paras 14-15.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.

Done in both English and French, the English version being authoritative.



**Judge Cuno Tarfusser**  
**Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Chang-ho Chung**

Dated 9 March 2017

At The Hague, The Netherlands