



Original: English

No.: ICC-02/05-01/09
Date: 28 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 HASSAN AHMAD AL BASHIR***

Public

Decision on the “Request for leave to submit *Amicus Curiae* Observations by the Southern Africa Litigation Centre (SALC)”

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

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

Amicus Curiae

Southern Africa Litigation Centre

REGISTRY

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 for leave to submit *Amicus Curiae* Observations by the Southern Africa Litigation Centre (SALC)” received on 2 February 2017 (“Request”).¹

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.² In preparation for the hearing, the Chamber also invited the Prosecutor, representatives of South Africa and representatives of the United Nations to make, if they so wish, written submissions prior to the hearing, by 17 March 2017.³ The United Nations subsequently responded to this invitation, stating that it would not be sending a representative to attend the hearing and would not be making written submissions for the Chamber’s consideration.⁴
2. The Request was notified on 2 February 2017. The applicant, the Southern Africa Litigation Centre, requests leave, under rule 103 of the Rules of Procedure and Evidence (“Rules”), to:
 - (i) make submissions “on the relevant South African legal framework, contending that, domestically, the South African government was obliged to arrest and surrender President Bashir”;

¹ ICC-02/05-01/09-275 and annexes.

² “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.

³ *Ibid.*

⁴ ICC-02/05-01/09-282-Anx.

- (ii) make submissions “on the facts regarding what transpired in the days leading up to, and on the day of President Bashir’s escape from South Africa”;
 - (iii) “identify various documents that record what occurred during President Bashir’s visit and escape”; and
 - (iv) “demonstrate the importance of the Chamber’s making a formal finding of non-compliance”.⁵
3. The applicant also requests to be allowed to appear at the hearing of 7 April 2017, “with a view to assisting the Chamber by way of oral submissions, including by answering any questions that arise in respect of the submissions or documentation offered by SALC or by the South African Government”.⁶
 4. As concerns its qualification to make these submissions, the Southern Africa Litigation Centre submits that it is a non-governmental organisation that promotes human rights and the rule of law in Southern Africa,⁷ and that it is “uniquely positioned by the role that it played before the South African courts in attempting to compel the Government of South Africa to arrest President Bashir”.⁸
 5. South Africa filed a response to the Request under regulations 24(3) and 34 of the Regulations of the Court,⁹ on 27 February 2017 (“Response”).¹⁰ South Africa objects to the Request primarily on the grounds that:

[A]llowing SALC, and for that matter any other organisation, to participate in the proceedings will be unduly burdensome, unhelpful, will add nothing

⁵ Request, para. 4.

⁶ *Ibid.*, para. 59.

⁷ *Ibid.*, para. 9.

⁸ *Ibid.*, para. 16.

⁹ In accordance with regulation 34 of the Regulations, the time limit for the response starts running as of the day of notification of the relevant filing. In the present case, the Request was notified to South Africa on 15 February 2017 and the Response has thus been filed within the applicable timeframe.

¹⁰ ICC-02/05-01/09-281.

new of substance and would therefore not be in the interests of justice. Furthermore, the real motive for the Request is questioned in light of the lack of impartiality of SALC in this matter.¹¹

II. Analysis

6. Rule 103 of the Rules provides that the Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate. The Chamber considers that this provision is applicable to the proceedings at hand.
7. The Chamber indicated previously that the purpose of the present proceedings leading to the scheduled hearing of 7 April 2017 is to obtain all pertinent information and resolve all relevant questions in order for the Chamber to take an informed decision on whether a finding of non-compliance by South Africa under article 87(7) of the Statute is warranted. In furtherance of this objective the Chamber takes the view that the proposed submissions are desirable, within the meaning of rule 103 of the Rules, for the proper determination of the pending matter. Moreover, and by the same token, the Chamber does not consider it necessary to restrict the scope of SALC's prospective submissions under rule 103 of the Rules. Rather, the Chamber considers it appropriate to allow SALC to place on the record of the present case any submissions, in fact and law, falling within the scope of the issues defined in the Request, which it wishes to bring to the Chamber's attention. Conversely, the Chamber does not consider it necessary to invite SALC to take part in the hearing of 7 April 2017.
8. The Chamber notes South Africa's submission that SALC should not be allowed to provide observations under rule 103 of the Rules because it is not "neutral"

¹¹ Response, para. 20.

and lacks “impartiality” with respect to the matter at issue.¹² While this Court has previously rejected applications under rule 103 of the Rules for the reason that the applicant was not impartial, this is not *per se* a condition of said rule, and the Chamber does not believe that the applicant’s previous involvement in the matter makes it unsuitable to provide observations under rule 103 of the Rules. Because the participants in the proceedings will have the right to respond and because the Chamber will ultimately determine whether to take any submissions into account for its decision no question of prejudice arises.

9. It is also to be emphasised in this context that the granting of leave to make submissions under rule 103 of the Rules does not grant the applicant any general participatory status or any right beyond what is explicitly authorised by the Chamber. The concerns expressed by South Africa in this regard are therefore unwarranted.
10. With regard of the argument by South Africa that the granting of the present request may lead to a multiplicity of submissions from other organisations, the Chamber observes that its discretionary power under rule 103 of the Rules is an entirely adequate tool to address any such situation, which is at present speculative as there has been no other request to file observations under rule 103 of the Rules.
11. Finally, the Chamber is of the view, also considering the *ratio* of the rule 103 of the Rules, that the fair conduct of the proceedings requires that South Africa, as well as the Prosecutor, be given an opportunity to respond to SALC’s observations authorised by the present decision. To this purpose, the Chamber considers that, rather than establishing a parallel written proceeding and setting a time limit, it is more appropriate in the management of the proceedings to rule

¹² Response, paras 5 and 20.

that the participants, if they so wish, provide any observation to SALC's submissions in their written submissions due on 17 March 2017 or orally at the hearing, which ever they deem more expedient.

FOR THESE REASONS, THE CHAMBER HEREBY

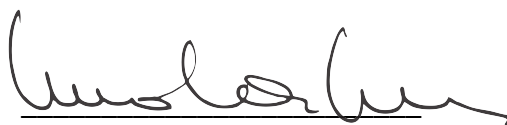
GRANTS the Southern Africa Litigation Centre leave, under rule 103 of the Rules, to provide written submissions, in fact and in law, relevant to the Chamber's determination of whether to make a finding of non-compliance by South Africa with the Court's request for arrest and surrender of Omar Al Bashir 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;

SETS the time limit for the Southern Africa Litigation Centre to provide its written submissions under rule 103 of the Rules at Monday, 13 March 2017;

DECIDES that South Africa and the Prosecutor may respond to the submissions by the Southern Africa Litigation Centre in their written submissions due on 17 March 2017 or orally at the hearing of 7 April 2017;

REJECTS the request by the Southern Africa Litigation Centre to attend the hearing of 7 April 2017.

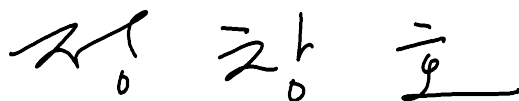
Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated 28 February 2017

At The Hague, The Netherlands