



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 for leave to submit *Amicus Curiae* Observations by the Helen Suzman Foundation (HSF)”

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

Other

Helen Suzman Foundation

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 Helen Suzman Foundation (HSF)” (“Request”), received on 1 March 2017.¹

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
2. On 28 February 2017, the Chamber granted the Southern Africa Litigation Centre leave, under rule 103 of the Rules of Procedure and Evidence (“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.³
3. The Request was notified on 1 March 2017. The applicant, the Helen Suzman Foundation, requests leave, under rule 103 of the Rules of Procedure and Evidence (“Rules”), to make written and oral submissions in support of the following propositions:
 - (i) that customary international law has developed to a stage where it no longer supports an absolute right to immunity of heads of state charged with crimes against humanity;

¹ ICC-02/05-01/09-285.

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 “Decision on the ‘Request for leave to submit *Amicus Curiae* Observations by the Southern Africa Litigation Centre (SALC)”, ICC-02/05-01/09-283.

- (ii) that there has been an implicit waiver of immunity by the Republic of Sudan (“Sudan”) by virtue of Security Council Resolution 1593 (2005);
 - (iii) that any claim to immunity of President Al Bashir from arrest and surrender to the ICC has been waived by Sudan by virtue of its accession to the Genocide Convention; and
 - (iv) that the South African constitution, together with other relevant domestic law, regards international crimes as crimes in South Africa and does not afford absolute immunity to heads of state who *prima facie* appear to have committed such crimes, but imposes an obligation on the South African government to arrest, detain, surrender and/or prosecute any person charged with such crimes.⁴
4. As concerns its qualification to make these submissions, the Helen Suzman Foundation submits that it is “a non-governmental, public interest organisation which has as its purpose the promotion of South African democracy and constitutionalism”.⁵ It further informs the Chamber that it previously acted as *amicus curiae* before South African courts in proceedings brought by the Southern Africa Litigation Centre relating to the (non-)arrest of Omar Al Bashir.⁶
5. 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.
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

⁴ Request, para. 9.

⁵ *Ibid.*, para. 3.

⁶ *Ibid.*, para. 5.

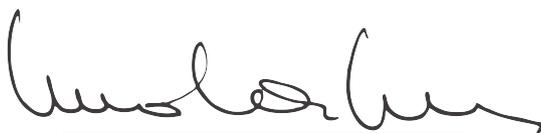
issue that the Chamber deems appropriate. The Chamber recalls that this provision is applicable to the proceedings at hand.

7. The Chamber is of the view that the prospective submissions would not be significantly different from those that the Southern Africa Litigation Centre has previously been authorised to make. This is apparent from the Request, and also from the fact that the Applicant occupies an effectively identical position to that of the Southern Africa Litigation Centre, as concerns both its knowledge of facts and the position it takes on the matter. The added value of the prospective submissions, if any, is therefore minimal. Moreover, any such limited value is in any case outweighed by the disruption that would be caused if submissions by the Applicant were authorised at this late stage of the present proceedings.
8. Accordingly, the prospective submissions are not desirable for the proper determination of the matter, within the meaning of rule 103 of the Rules.

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