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Date: **11 August 2009**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Erkki Kourula
Judge Ekaterina Trendafilova
Judge Daniel David Ntanda Nsereko
Judge Joyce Aluoch

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF
THE PROSECUTOR
*v. OMAR HASSAN AHMAD AL BASHIR ("OMAR AL BASHIR")***

Public Document

**Prosecution's Response to Application under Rule 103 in respect of Prosecution
Appeal against "Decision on the Prosecution's Application for a Warrant of Arrest
against Omar Hassan Ahmad Al Bashir"**

Source: Office of the Prosecutor

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I. Introduction

1. The Prosecution opposes the Application¹ under Rule 103 by the Sudan Workers Trade Unions Federations (SWTUF) and the Sudan International Defence Group (SDIC)² to participate as *amicus curiae* or participants³ and requests that their Application be dismissed.
2. The Applicants would not suitably serve as “friends of the court” on the issue before it.
3. First, the Application does not respect the process of *amicus curiae*. Applicants present substantive arguments and insist that the Court consider their documents,⁴ before they have been granted leave to participate. One of the Applicants states on its website that it succeeded in the past in having the Court consider the materials it submitted, notwithstanding that the Chamber denied it leave to participate as *amicus*.⁵

¹ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Application under Rule 103 in respect of Prosecution Appeal against “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-27, 20 July 2009 (“the Application”).

² The Application describes the SWTUF as “the union of all trade unions of Sudan with affiliates from 25 state unions and 22 professional federations” and explains that its “membership covers the vast majority of the organised working people of Sudan comprising about two million citizens from the government, private and informal sectors” (Application, para. 8). The United States Department of State’s 2008 Human Rights Report on Sudan states that the SWTUF is “government controlled”. <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119026.htm>. So too does the International Trade Union Federation, which further states that “the SWTUF has consistently supported government denials that mass murder has taken place in Darfur, where workers do not even dare to approach the SWTUF for protection”. See <http://survey08.ituc-csi.org/survey.php?IDContinent=1&IDCountry=SDN&Lang=EN>. The Application also describes the SIDG as a “non-governmental committee of Sudanese citizens established out of concern for the negative effects that ICC warrants could have for the peace process in Sudan and for the ordinary people of this country”. *Ibid.* It also states that its aims and initiatives “are supported by many Sudanese NGOs and by the association that coordinates Sudanese NGOs”. BBC News reported on 16 January 2009 that some describe both the SWTUF and the SIDG as “government proxies”. See <http://news.bbc.co.uk/2/hi/africa/7833415.stm>. An unidentified Sudanese human rights activist agrees on this characterisation, though the head of the SIDG disputes it. Rashid Gadeer concedes that his arguments are consistent with the government’s position but explained that “[j]ust because at the particular point, our views correspond with those of the government, this does not in any way mean we are a proxy or organ of the government.” See Institute for War and Peace Reporting, *Sudanese Backing for Bashir Questioned*, 4 February 2009, AR No. 200, available at <http://www.unhcr.org/refworld/docid/498bec9e1a.html> (These sites were last accessed on 11 August 2009).

³ In passing the Applicants suggest that they may also be “participants in the appeal” (Application, para. 13). If they are claiming participant status on some undefined ground, the Prosecution also opposes that position.

⁴ See, e.g., Application, paras. 21-23. See also para. 31 where the Applicants request the Appeals Chamber to consider the materials attached as annexes to a prior filing.

⁵ The SIDG website explains that “Sudan International Defence Group (SIDG), was established to express a view on the intervention of the ICC in Sudan. SIDG is opposed to this intervention and sees it as a dangerous gamble with the future of the whole of Sudan. SIDG tried and succeeded in conveying this message to the

4. Second, the Application fails to demonstrate what interest or expertise the Applicants have to offer on the particular legal issue on appeal – *i.e.* the appropriate standard for drawing inferences from circumstantial evidence at the arrest warrant stage. They are the union of all Sudanese trade unions and a new “non-governmental committee of Sudanese citizens established out of concern for the negative effects that ICC arrest warrants could have for the peace process of Sudan”⁶. Their interest is not in the underlying legal issue, but, from the material they submit, in the fact that the prosecution has been initiated.⁷ The bulk of the application and materials submitted in support challenge the prosecution on grounds unrelated to the subject matter of the appeal. The only substantive arguments relevant to the issue pending are presented in paragraphs 37-50 of their Application, and those arguments cite nothing other than the Majority Decision. Thus, they do not offer a substantive contribution to the pending issue.
5. Additionally, the Application proposes to present the adversary position of the defendant, President Omar Al Bashir, without legally representing him. The Applicants openly submitted to the Chamber a response to the Prosecution’s submission. The Applicants urge that they should be allowed to intervene as *amicus* because they made substantive submissions (in the context of their prior unsuccessful effort to be given *amicus* status) and represent Sudanese citizens, and there is no reason for the Chamber to find other qualified lawyers to make the adversary arguments. They are, in effect, seeking to replace the Defence.⁸

international criminal court judges in the Hague, who did read its submissions and decided to reject the applications on legal and technical grounds” (<http://sidgsudan.org/2009/03/03/sudanese-backing-for-bashir-questioned-a-rebuttal/#more-267>). It also quotes the organization’s president, Rasheed Gadir: “Although our application was not successful in bringing the proceedings to a halt, it played a significant role in the debate over the ICC involvement in Sudan, it highlighted many of the shortcomings of the prosecutor’s methods and arguments, and put on the record a strong case against his application.” (<http://sidgsudan.org/2009/05/19/sidg-wins-battle-to-file-1-8-millions-signatures-with-icc/>) (Sites last visited on 11 August 2009).

⁶ Application, para. 8.

⁷ See also Application, paras. 17, 24, 28-30.

⁸ Application, paras. 18-19.

6. The Court needs not rely on the intervention of an *amicus* in order to hear both sides of the issue. When a suspect refuses to recognize the Court's jurisdiction and is not arrested, if the Chamber considers it to be in the interests of justice it may appoint a lawyer to represent the interests of the Defence.⁹

II. Background

7. On 4 March 2009, the Pre-Trial Chamber issued a warrant for the arrest of Omar Hassan Ahmad Al Bashir ("Omar Al Bashir").¹⁰ However, it declined to authorize his arrest on genocide. Following the Prosecution's application for leave to appeal,¹¹ on 24 June 2009, the Chamber authorized the Prosecution to appeal the decision on a single issue: *"Whether the correct standard of proof in the context of Article 58 requires that the only reasonable conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court"*.¹² The Prosecution filed its brief on 6 July 2009.¹³
8. On 20 July 2009 the Applicants filed this Application for leave under Rule 103 to participate as participants or *amicus curiae* in the pending appeal, with three annexes attached.
9. This is the Applicants' second attempt to secure *amicus curiae* status. On 11 January 2009 they sought leave to file an *amicus curiae* submission requesting "that no arrest warrants are issued by the Pre-Trial Chamber at this time".¹⁴ That submission was accompanied by 21 annexes (amounting to almost 700 pages) with five additional boxes of material delivered to the

⁹ Regulations 70 and 76.

¹⁰ ICC-02/05-01/09-3.

¹¹ ICC-02/05-01/09-6-Conf., 10 March 2009. A public redacted version was filed on 13 March 2009. (ICC-02/05-01/09-12).

¹² ICC-02/05-01/09-21.

¹³ ICC-02/05-01/09-25.

¹⁴ ICC-02/05-170, para. 8.

Registry on 9 February.¹⁵ The Pre-Trial Chamber denied leave under Rule 103 on 4 February 2009 and thereafter denied the Applicants leave to appeal that decision, on 19 February 2009.¹⁶

III. Submissions

10. The Applicants' request for leave to participate as participants or *amicus curiae* should be dismissed for the following reasons: (1) by making affirmative arguments on the merits without first obtaining leave to do so the Applicants are abusing the *amicus* process; and (2) the Applicants do not have neither the interest of an *amicus curiae* nor the expertise to assist the Chamber on the legal issue pending before it. Rather, the arguments presented by the Applicants entail challenges to the initiation of the proceedings against the suspect, and are mostly irrelevant to the single issue pending on appeal. This substantiates that the Applicants would not suitably serve as "friends of the court" on the issue before it.

(a) The Applicants failed to seek leave of the Court under Rule 103 prior to presenting submissions on the merits

11. First, this Application does not comply with the *amicus* process in Rule 103 and the Court's interpretation thereof. The Application is not merely a preliminary request for leave to make submissions, it is a substantive pleading. It does not respect the Court's right to agree to accept *amicus* filings before receiving substantive arguments.

12. An application must seek "leave [...] to submit, in writing or orally, any observation or any issue that the Chamber deems appropriate."¹⁷ Rule 103

¹⁵ Annex 4. See ICC-02/05-182, para. 7. Applicants urge the Chamber to consider in deciding the pending appeal "the relevant materials that they have already submitted" in the attached annexes and in their prior unsuccessful application to the Pre-Trial Chamber to appear as *amicus curiae*. Application, para. 31.

¹⁶ Applicants describe their prior effort at great length, including within it a detailed account of the substance of materials they submitted to the Court. Application, pp. 7-11.

does not authorize a person or entity that is neither a party nor an authorized participant to file substantive observations without approval. Instead, it requires that permission be sought and granted in advance.

13. Following Rule 103, Chambers of this Court have consistently stated that an applicant seeking to participate as *amicus curiae* must secure the leave of the competent Chamber before submitting observations pursuant this provision.¹⁸ The Chamber will consider the applicant and its suitability to provide the particular submissions,¹⁹ in particular whether the applicant can assist the proper determination of the case²⁰ by providing information or expertise pertinent to the issue before it.²¹ This assessment is made on a case by case basis.²²

14. Moreover, the Chamber must make that assessment before the *amicus* provides the substantive submissions. By omitting the procedural step of receiving permission before filing arguments and supporting documents, the Applicants are exposing the Chamber to substantive submissions and unrelated materials before the Chamber has agreed to accept them.

15. It is not a technicality to require that an entity shall not make a substantive submission before it has been granted leave to do so. It is critical to the fair administration of justice and, equally important, to the public appearance of fairness, that the Court not receive uninvited and unauthorized submissions. Nor should the Court receive substantive submissions by entities that (a) are

¹⁷ Rule 103(1).

¹⁸ ICC-01/04-01/06-1289; ICC-01/04-373; ICC-01/04-01/06-919-tEN; ICC-02/04-01/05-342.

¹⁹ For example, in the *Bemba case*, Pre-Trial Chamber II authorized Amnesty International to provide submissions on concrete legal issues that the Chamber “may find useful” but stressed that they “must confine its submission to the legal aspects outlined in the Request and refrain from making any indication or link to the specific facts of the cases”. In the *Kony et al. case*, the same Chamber allowed submissions of the Uganda Victims’ Foundation (UVF) and the Redress Trust (Redress) as to “factual information they may be in possession of” but directed that they should refrain “from providing information of a general nature as regards victims’ issues and/or analysis of a legal nature”. See ICC-01/05-01/08-401, para.12 and ICC-02/04-01/05-333, paras.13-14.

²⁰ ICC-01/04-01/06-1289, para. 8.

²¹ ICC-02/04-01/05-342, para.12.

²² IC-01/04-373, para. 3.

not suitable parties to or participants in the proceedings,²³ and (b) as non-parties or non-participants, without having been given *amicus* status, are thereby not answerable to the Court.

16. The Court also should not be seen to be allowing and responding to political pressure from any source. These interests are particularly implicated in this instance, since one of the Applicants states on its website that it succeeded in having the Court consider the materials it submitted, notwithstanding that the Chamber denied it leave to participate as *amicus*.²⁴

17. The Applicants violate these precepts by

- (i) pressing substantive assertions in their Application,
- (ii) filing annexes containing additional argumentative materials, and
- (iii) urging that the Chamber also review boxes of materials that they similarly filed with the Pre-Trial Chamber in conjunction with their earlier unsuccessful application to appear as *amicus curiae* before that body.²⁵

²³ The Appeals Chamber has stated that “the parties [are] the Prosecutor and the Defence.” Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432 OA 9 OA 10, para. 93. Applicants have sought participatory or *amicus* status but, like victims, they have no unfettered right to lead or challenge evidence unless the Chamber has agreed to allow participation. See *ibid.*, para. 99: “instead victims are required to demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow such participation.”

²⁴ The SIDG website explains that “Sudan International Defence Group (SIDG), was established to express a view on the intervention of the ICC in Sudan. SIDG is opposed to this intervention and sees it as a dangerous gamble with the future of the whole of Sudan. SIDG tried and succeeded in conveying this message to the international criminal court judges in the Hague, who did read its submissions and decided to reject the applications on legal and technical grounds” (<http://sidgsudan.org/2009/03/03/sudanese-backing-for-bashir-questioned-a-rebuttal/#more-267>). It also quotes the organization’s president, Rasheed Gadir: “Although our application was not successful in bringing the proceedings to a halt, it played a significant role in the debate over the ICC involvement in Sudan, it highlighted many of the shortcomings of the prosecutor’s methods and arguments, and put on the record a strong case against his application.” (<http://sidgsudan.org/2009/05/19/sidg-wins-battle-to-file-1-8-millions-signatures-with-icc/>). These sites were last visited on 11 August 2009.

²⁵ Application, para. 31. Notably, the Pre-Trial Chamber dismissed the submissions and boxes of materials as irrelevant.

Such tactics disregard the requirements of Rule 103, force upon the Court materials that the Court has not agreed to accept, and will encourage future circumventions of the Rule.

(b) The Applicants do not qualify to act as amicus curiae in this appeal

18. As a second reason for denying the Application, the Applicants fail to show an interest and expertise on the issue sufficient to justify their contribution to the appeal. The Applicants are the union of all Sudanese trade unions and a new “non-governmental committee of Sudanese citizens established out of concern for the negative effects that ICC arrest warrants could have for the peace process of Sudan”. They do not demonstrate either interest or expertise to share on the particular legal issue on appeal – *i.e.* the appropriate standard for drawing inferences from circumstantial evidence at the arrest warrant stage, an issue that will affect this Court’s jurisprudence and thus has implications far beyond the fate of the particular suspect. Nor do the Applicants offer a relevant factual perspective that would aid in a proper understanding of the legal issue.

19. Chambers have taken into consideration the composition and knowledge of applicants when allowing them to present submissions under Rule 103.²⁶ This approach is also the normal practice in other international institutions when assessing the suitability of a non-party to act as *amicus curiae*.²⁷

²⁶ See ICC-01/05-01/08-401, para.12, and ICC-02/04-01/05-333, paras.13-14. See also ICC-02/04-01/05-342, para. 12.

²⁷ For example, the Tribunal in the International Centre for Investment Disputes (in an order of May 19, 2005), considered when judging the suitability of petitioners their expertise, experience, and independence. “To be in a position to assess these factors, the Tribunal required that the petition for leave to submit an *amicus curiae* brief include information on the petitioner itself, its interest in the case, any support received from the Parties or other persons associated with the case, and the reasons why the Tribunal should accept the petition.” After this order, ICSID adopted the new Arbitration Rule 37(2) which authorizes non-party submissions if leave granted by the Tribunal. Among the factors to consider for granting leave, the Rule includes that the non-disputing party brings a particular knowledge different from the parties, has a significant interest in the proceeding and shall not disrupt the proceeding or unduly burden or unfairly prejudice either party. See *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal v. Argentina: Order in Response to a Petition by Five Non-*

20. Thus, an *amicus* who seeks to contribute to the Court's understanding of an issue must generally present a particular insight, relevant additional facts, or interest in the resolution of, or an expertise capable of offering a unique theory or perspective on, the pending issue, in this instance the appropriate standard for inferences at this stage of the proceedings. The Appeals Chamber has stressed in the past that applications to participate in an interlocutory appeal must be linked to the specific issues raised in that appeal, rather than being based on the case generally.²⁸ In the present instance, and considering the nature and composition of the Applicants - a union of all Sudanese trade unions and newly founded organization composed by "concerned citizens" -, there is no indication of their expertise or insight on the precise legal issue. The only substantive arguments relevant to the issue pending are presented in paragraphs 37-50 of their Application, and those arguments cite nothing other than the Majority Decision. Applicants also fail to identify any real interest in the resolution of the question raised.²⁹

21. The Applicants claim to represent two million people opposed to President Al Bashir's prosecution. They also urge that the prosecution would be

Governmental Organizations for Permission to make an Amicus Curiae Submission, 12 February 2007, paras. 13-14. See also *Biwater Gauff (Tanzania) Ltd. v. Tanzania: Procedural Order No. 5*, 2 February 2007, para. 50.

²⁸ ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 43 and 71; ICC-01/04-01/06-1335 OA 9 and OA 10, 16 May 2008, paras. 35-36; ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 90; ICC-01/04-01/06-1453 OA 13, 6 August 2008, para. 7; ICC-02/04-01/05-324 OA2, 27 October 2008, para. 8; ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 2, 44 and 46; ICC-01/04-01/06-925 OA8, 13 June 2007, para. 23; ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 35; ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28. Although these observations were made in the context of applications by victims to participate in appeal, and that *amicus curiae* have a different status and role in proceedings, the principle stands that an application to participate in an appeal must be based on the specific issues on appeal.

²⁹ See *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal v. Argentina: Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission*, 12 February 2007, paras. 13-14. See also *Prosecutor v. Laurent Semanza*, Decision on the Kingdom of Belgium's Application to file an Amicus Curiae Brief and on the Defence Application to Strike out the observations of the Kingdom of Belgium concerning the preliminary Response by the Defence, ICTR-97-20-T, 9 February 2001, para. 1. The Belgium Government argued that Belgium "was affected particularly by the events that took place in Rwanda from April to June 1994. This explains its *special interest* in following certain cases before the Tribunal and in filing an *amicus curiae* brief in Bagasora and Ntuyahaga cases on certain points of international law". The Chamber acknowledged that "it may be useful to gather additional legal views on the scope of the applicability of Article 3 common of the four Geneva Conventions and Additional Protocol II. The Chamber determines that the Belgian Government's submission is maintainable with respect to the legal principles involved, and not with respect to the particular circumstances of this or any other case." (para. 10).

detrimental to “various peace agreements and national security and stability in Sudan”, to “initiatives taken in Sudan to ensure justice for the crimes committed in Darfur by processes constituting and/or leading to African solutions for African problems”, and they assert that the Prosecutor’s decision to pursue charges is political.³⁰ These political views are beyond the reach of this Court and unrelated to the present proceedings.

(c) The Applicants should not seek to replace the defence

22. The Applicants urge that the Chamber should grant them *amicus curiae* status and accept its submissions because “[w]ithout such submissions the Appeals Chamber would only have the benefit of the Prosecution’s arguments”³¹ and that the Appeals Chamber should “[...] try to find experienced lawyers to act as *amici curiae* to argue the position in support of the other view”.³² They additionally contend that they should be allowed to serve in that role because of their “filings to date [...], the representative character of the Applicants in Sudanese society”³³, because they have already “placed on the record a large body of materials and expert opinion”³⁴, and because there is “no reason *not* to turn to” their experienced lawyers “to argue the position in support of the other view”.³⁵

23. If the Chamber considers that it is in the interests of justice it may appoint counsel to represent the interests of the suspect.³⁶ Indeed, Chambers have appointed counsel specifically to represent the interests of suspects in other cases before this Court.³⁷

³⁰ Application, para. 8.

³¹ Application, para. 3.

³² Application, para. 19; see also para. 18.

³³ Application, para. 19.

³⁴ Application, para. 20.

³⁵ Application, para. 19.

³⁶ Regulation 76.

³⁷ See e.g., ICC-02/04-01/05-134; ICC-02/04-01/05-312; ICC-02/04-01/05-320.

24. The Applicants' experienced lawyers, however, are representing other groups and cannot appropriately appear to represent the interests of the true party to this proceeding, the suspect himself.
25. Reliance on *amicus* counsel or on the subterfuge of an *amicus* as a front for the accused himself is not necessary or desirable.

IV. Conclusion

26. The Applicants have, for the second time, misused Rule 103 in an attempt to act as *de facto* parties in the current proceedings by presenting substantive submissions and placing before the Court extrajudicial material without legal basis or judicial authorization. The Prosecution submits that the Application shall be dismissed as it does not meet the criteria to grant leave under Rule 103.

V. Relief Requested

27. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber dismiss the Application.



Luis Moreno-Ocampo,
Prosecutor

Dated this 11th day of August 2009

At The Hague, The Netherlands