

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 Document

**South Africa's objections to the "Request for Leave to Submit *Amicus Curiae*
Observations by the Southern Africa Litigation Centre (SALC)"**

Source: Republic of South Africa

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Amicus Curiae

REGISTRY

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INTRODUCTION

1. On 15 February 2017, the Embassy of the Republic of South Africa to the Kingdom of the Netherlands received a *Note Verbale*¹ from the Registry of the International Criminal Court notifying the Embassy of the “Request for Leave to Submit *Amicus Curiae* Observations by the Southern Africa Litigation Centre (SALC)” dated 27 January 2017 (“the Request”) in which SALC, in terms of Rule 103 of the Rules of Procedure and Evidence (“RPE”) of the Court, seeks leave to submit “written and oral observations, in fact and in law, as *amicus curiae* regarding the Republic of South Africa’s legal obligations in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*”.²
2. In terms of Regulation 24(3) of the Regulations of the Court, the Government of the Republic of South Africa (“South Africa”) hereby responds and objects to the Request and requests that the Pre-Trial Chamber II (“the Chamber”) takes the aspects raised in this submission into account when the Chamber considers the Request.

MOTIVATION FOR OBJECTION

3. On 8 December 2016, the Chamber decided to convene “a public hearing under Article 87(7) of the Rome Statute on 7 April 2017” (“the Decision”) to discuss any issues that are relevant to the Chamber’s determination of whether to make a finding of non-compliance by South Africa.³
4. In paragraph 15 of the Decision, the Chamber indicated that the purpose of the hearing is to obtain all relevant submissions, in fact and in law, with respect to:
 - a) “Whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on South Africa’s territory despite having received a request by the Court under articles 87 and 89 of the Statute for the arrest and surrender of Omar Al Bashir; and, if so,

¹ *Note Verbale*, reference no: NV/2017/EOSS/041/JCA/nv, dated 13 February 2017

² *The Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir*: Request for Leave to Submit *Amicus Curiae* Observations by the Southern Africa Litigation Centre (SALC), 27 January 2017 (ICC-02/05-01/09-275), para 1

³ *The Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir*: 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, 8 December 2016 (ICC-02/05-01/09-274)

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- b) Whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of Article 87(7) of the Statute are warranted.”⁴
5. As this is the first time that a public hearing of this nature in terms of Article 87(7) proceedings will be convened, the Chamber must be cautious in deciding on the present Request as it will indeed be precedent-setting. For the reasons that follow, we submit that Rule 103 should be interpreted narrowly, particularly in proceedings under Article 87(7), and that the Court should only grant leave to participate as an *amicus curiae* to a person or organisation that would be a neutral party to the proceedings. In any event, an *amicus curiae*, at least in Article 87(7) proceedings, should only be granted leave to make written submissions on points of international law.
6. In preparation of the submission by South Africa due on 17 March 2017, it became clear that whilst the rules and regulations in the RPE and in the Regulations of the Court (“Regulations”) provide some guidance for public hearing proceedings under Article 87(7), the RPE and Regulations deal mainly with criminal cases, criminal proceedings and other proceedings before the ICC. This has the result that the RPE and the Regulations have to be interpreted to apply to proceedings under Article 87(7). A case in point is Rule 103 that is now being relied on for a request for leave to participate in the hearing as *amicus curiae*. Rule 103(2) refers to “the defence” having an opportunity to respond to observations that may be submitted by an *amicus curiae*, thus indicating that the Rule is intended for criminal trials, which the Article 87(7) hearing clearly is not. In the Kenya case⁵ there was also a request for leave to participate in the Article 87(7) proceedings as *amicus curiae*, but for these proceedings the Chamber did not invite other parties, such as the representatives of the United Nations and other State Parties, also to make submissions.⁶ The Appeals Chamber, furthermore, never addressed the

⁴ ICC-02/05-01/09-274, para 15

⁵ *Situation in the Republic of Kenya, The Prosecutor v Uhuru Muigai Kenyatta: Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*, 29 April 2015 (ICC-01/09-02/11-1017)

⁶ *Situation in the Republic of Kenya, The Prosecutor v Uhuru Muigai Kenyatta: Order in relation to the Africa Centre for Open Governance’s “Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence”*, 30 April 2015 (ICC-01/09-02/11-1018)

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submissions of the *amicus curiae* in the Kenya case, on the basis that they were outside the allowed scope.⁷

7. The Chamber took care to identify and invite very specifically the participants that the Chamber felt could provide relevant submissions “in writing and prior to the hearing”, if they so wish.⁸ This invitation extended to interested State Parties and to the representatives of the United Nations to make submissions at the Article 87(7) proceedings, which is a first in the history of the Court.⁹
8. In its Decision, the Chamber provided motivations for why it was deemed appropriate to extend this invitation to the specific participants. The Chamber stated that “[i]n order to resolve all the relevant questions, the Chamber considers it appropriate to accord South Africa, as well as 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, an opportunity to fully present their views in a public hearing before the Chamber. Considering that the Prosecutor initiated an investigation into the situation in Darfur, Sudan, following a referral by the Security Council of the United Nations, representatives of United Nations, as appropriate, shall also be given an opportunity to attend the hearing hereby scheduled and be heard.”¹⁰
9. The Chamber indicated that “considering that the issue is of general importance, the Chamber considers it appropriate to permit, under rule 103 of the Rules, all interested States Parties to the Statute to provide, if they so wish, any relevant submission, in writing and prior to the hearing, which they would wish to bring to the attention of the Chamber for the purposes of its final determination on the matter.”¹¹
10. It is submitted that by referring directly to Rule 103, the Chamber would also have invited organisations to make submissions if it reasoned that further submissions would be

⁷ *Situation In The Republic Of Kenya, In The Case Of The Prosecutor v. Uhuru Muigai Kenyatta: Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute”, 19 August 2015 (ICC-01/09-02/11-1032), para 28*

⁸ ICC-02/05-01/09-274, para 17

⁹ ICC-02/05-01/09-274, paras 14 and 17

¹⁰ ICC-02/05-01/09-274, para 14

¹¹ ICC-02/05-01/09-274, para 17

required. By not inviting other organisations to make submissions, the Chamber clearly was of the view that such submissions would bring no added value.

11. It is difficult to imagine that if the Chamber would allow one organisation to make submissions it would not allow any of the many others, which may lead to a multiplicity of submissions from other organisations. South Africa is already the first State that will most probably have to reply to other submissions and to allow even more submissions will severely burden South Africa's preparations for the hearing. It would, furthermore, turn the public hearing into a cumbersome and lengthy proceeding that will detract from the stated intent of the Chamber to have a "focused and streamlined discussion at the hearing".¹²
12. It is also noted that SALC requested to submit oral observations, which none of the other interested States Parties have been invited to do.¹³ We submit that it would be injudicious to allow SALC to make oral submissions when other organisations are limited to written submissions prior to the hearing.
13. Apart from Rule 103 of the RPE, there appear to be no practice rules of the Court on which we could rely to determine what specific factors the Chamber would take into account when deciding on the Request. It is, however, accepted that the contribution of an *amicus* must be helpful to the Court and in the interests of justice. What would therefore be required, is for the *amicus* to be an independent and impartial intervener having no standing in the proceedings.¹⁴ SALC has been deeply involved in the litigation of this matter before the South African courts and can hardly be described as independent, let alone impartial. Evidence thereof is clearly contained in paragraphs 50-58 of the Request, wherein SALC sets out the "Benefit of a Formal Finding of Non-Compliance" and concludes with effectively requesting the Court to make a finding of non-compliance.¹⁵

¹² ICC-02/05-01/09-274, para 16

¹³ ICC-02/05-01/09-275, para 1

¹⁴ *Situation in the Republic of Kenya: Decision on Application for Leave to Submit Amicus Curiae* Observations, 18 January 2011 (ICC-01/09-35), para 6

¹⁵ ICC-02/05-01/09-275, para 58

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14. South Africa further submits that the Request goes far beyond a request for leave but is, in fact, already a submission as the Request gives a detailed account of SALC's subjective version of the facts and circumstances that led to this matter coming before the South African courts. In the Request, SALC provides its own analysis of the Government's positions before the courts in South Africa and it quoted at length, to the Chamber, selective paragraphs from judgements made by the various courts in South Africa. SALC even attaches a number of documents to the Request as if the Chamber has already granted it leave to make a submission. We submit that these documents have not been attached with a view to assist the Chamber to decide on the admission of the Request, but rather to put documents before the Chamber pre-emptively to guide the Chamber towards a finding of non-compliance on the part of South Africa in the Article 87(7) proceedings.
15. South Africa objects strongly to this and is of the view that even if the Chamber refuses leave to SALC to make a submission, South Africa has already suffered prejudice by the manner in which the Request was made.
16. Furthermore, SALC bases its request to be admitted as an *amicus curiae* on the following four grounds:
- “4.1 first, SALC will provide the Chamber with submissions on the relevant South African legal framework, contending that domestically, the South African government was obliged to arrest and surrender President Bashir (sic);
 - 4.2 second, SALC is particularly well-placed to advise the Chamber on the facts regarding what transpired in the days leading up to, and on the day of, President Bashir's escape from South Africa;
 - 4.3 third and relatedly, SALC can identify various documents that record what occurred during President Bashir's visit and escape, which the Court may wish to consider in determining this matter; and
 - 4.4 fourth, SALC will demonstrate the importance of the Chamber's making a formal finding of non-compliance. To date, the South African government



authorities have failed sufficiently to investigate and to prosecute the government parties' actions. A formal finding of non-compliance would thus serve as an important accountability mechanism."

17. SALC's application does not speak to the specific questions that the Chamber identified, and on which it invited submissions. In fact, SALC indicated that its submission will be based on the four grounds, set out in paragraph 16 above, which deal only with factual and selective aspects related to the South African legal framework and domestic court proceedings.

18. There is no indication in the Request that SALC intends to address the substantive international law issues that the Chamber has requested submissions on. It is trite that the Court does not have jurisdiction to pronounce on the interpretation of a State's domestic law. In the Malawi case, Pre-Trial Chamber I confirmed this in Paragraph 20 of its Decision when it confirmed that "Article 98(1) of the Statute only refers to international law and thereby excludes any possibility for the requested State to rely on its national law."¹⁶

19. As the Chamber stated itself in the Decision, that the facts and circumstances of this matter are relatively clear¹⁷, it is difficult to imagine how a submission by SALC can assist the Chamber to make, in SALC's words, "a proper determination".¹⁸ All the facts and documents that SALC alluded to have been thoroughly addressed in the South African courts and are all already in the public domain.

CONCLUSION AND APPROPRIATE RELIEF

20. We are of the view that allowing SALC, and for that matter any other organisation, to participate in the proceedings will be unduly burdensome, unhelpful, will add nothing new of substance and would therefore not be in the interests of justice. Furthermore, the

¹⁶ *Situation in Darfur, Sudan, The Prosecutor v Omar Hassan Ahmad Al Bashir*: 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), 12 December 2011

¹⁷ ICC-02/05/01/09-274, para 13

¹⁸ ICC-02/05-01/09-275, para 14

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real motive for the Request is questioned in light of the lack of impartiality of SALC in this matter.

21. For the reasons given above, the Republic of South Africa requests that the Pre-Trial Chamber II:

- a. Rejects the Request for Leave to Submit *Amicus Curiae* Observations by the Southern Africa Litigation Centre; and
- b. Not to take into consideration the detailed contents of the Request.

22. It is submitted that, should the Chamber, despite the serious objections from South Africa, nonetheless decide to allow the Request, it would be in the interests of justice and fairness if the Chamber set clear and strict conditions for, and restrictions to, the participation of SALC, including that submissions be in writing prior to the hearing and limited to points of international law. This will be in line with accepted legal practice throughout the world in respect of the participation of *amici*. Such conditions and restrictions should include, but not be limited to, restrictions on the contents of the submission, that no new facts and evidence that is not before the Chamber be introduced and the imposing of appropriate limitations regarding the submissions.



Ambassador VB Koloane

on behalf of

The Government of the Republic of South Africa

Dated this 27th of February 2017

At The Hague, The Netherlands

