

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

Case number:

In the matter between:

**THE SOUTHERN AFRICA LITIGATION
CENTRE**

Applicant

and

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

First Respondent

**THE DIRECTOR-GENERAL OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

Second Respondent

THE MINISTER OF POLICE

Third Respondent

THE COMMISSIONER OF POLICE

Fourth Respondent

**THE MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION**

Fifth Respondent

**THE DIRECTOR-GENERAL OF INTERNATIONAL
RELATIONS AND COOPERATION**

Sixth Respondent

THE MINISTER OF HOME AFFAIRS

Seventh Respondent

**THE DIRECTOR-GENERAL OF
HOME AFFAIRS**

Eighth Respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Ninth Respondent

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECTIONS**

Tenth Respondent

**THE HEAD OF THE DIRECTORATE
FOR PRIORITY CRIMES INVESTIGATION**

Eleventh Respondent

**THE DIRECTOR OF THE PRIORITY CRIMES
LITIGATION UNIT**

Twelfth Respondent

NOTICE OF MOTION

PLEASE TAKE NOTICE that the Applicant intends to make application to this Honourable Court on 14 **JUNE 2015** at 11h00 or so soon thereafter as the matter can be heard for orders:

1. Declaring the application to be a matter of urgency and dispensing insofar as is necessary in terms of Rule 6(12) with the usual forms and service provided for in the Uniform Rules of Court;

2. Declaring the conduct of the Respondents, to the extent that they have failed to prepare to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir ("President Bashir"), to be inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;

3. Compelling the Respondents forthwith to take all reasonable steps to prepare to arrest the President Bashir without a warrant in terms of section 40(1)(k) of the Criminal Procedure Act, 51 of 1977 and detain him, pending a formal request for his surrender from the International Criminal Court;

alternatively

4. Compelling the Respondents forthwith to take all reasonable steps to provisionally arrest President Bashir in terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002;

5. Compelling the Respondents to prevent President Bashir from leaving the country without taking reasonable steps to facilitate his arrest in terms of domestic and international laws.

6. Compelling the Respondents who oppose the application to pay costs jointly and severally, such costs to include the costs of two counsel;

7. Further and/or alternative relief.

TAKE NOTICE FURTHER that the affidavit of **KAAJAL RAMJATHAN-KEOGH** will be used in support of this application.

TAKE NOTICE FURTHER that the Applicant has appointed the undersigned email address (maxine.gunzenhauser@webberwentzel.com) of its attorneys as the address at which it will receive notice and service of all process in this matter.

TAKE NOTICE FURTHER that if you intend opposing this application you are required to notify the Applicant's designated attorney as soon as possible via email at maxine.gunzenhauser@webberwentzel.com and further that you may file answering affidavits, if any, by no later than 10:00am on 14 June 2015 at maxine.gunzenhauser@webberwentzel.com.

KINDLY ENROLL THE MATTER FOR HEARING ON 14th June 2015.

DATED AT JOHANNESBURG THIS 14th DAY OF JUNE 2015.

M Hathorn

WEBBER WENTZEL

Applicant's Attorneys

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Illovo Boulevard

Johannesburg 2196

Maxine Gunzenhauser

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Ref: M Hathorn / 3001742

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Ref: Moray Hathorn

TO: THE REGISTRAR

High Court
PRETORIA

**AND TO: THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

First Respondent

ministry@justice.gov.za
c/o The State Attorney
PRETORIA

**AND TO: THE DIRECTOR-GENERAL OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

Second Respondent

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c/o The State Attorney
PRETORIA

AND TO: THE MINISTER OF POLICE

Third Respondent

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MonahengAmelia@saps.gov.za
c/o The State Attorney
PRETORIA

AND TO: THE NATIONAL COMMISSIONER OF POLICE

Fourth Respondent

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c/o The State Attorney
PRETORIA

AND TO: **THE MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION**

Fifth Respondent
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c/o The State Attorney
PRETORIA

AND TO: **THE DIRECTOR-GENERAL OF INTERNATIONAL RELATIONS AND
COOPERATION**

Sixth Respondent
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PRETORIA

AND TO: **THE MINISTER OF HOME AFFAIRS**

Seventh Respondent
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c/o The State Attorney
PRETORIA

AND TO: **THE DIRECTOR-GENERAL OF HOME AFFAIRS**

Eighth Respondent
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c/o The State Attorney
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AND TO: **THE NATIONAL COMMISSIONER**

OF THE SOUTH AFRICAN POLICE SERVICE

Ninth Respondent

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0001

PRETORIA

**AND TO: THE NATIONAL DIRECTOR
OF PUBLIC PROSECUTIONS**

Tenth Respondent

pfmabanga@npa.gov.za

VGM Building

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Silverton

0184

PRETORIA

**AND TO: THE HEAD OF THE DIRECTORATE OF
PRIORITY CRIMES INVESTIGATION**

Eleventh Respondent

corruptionreports@saps.gov.za

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Pretoria

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**AND TO: THE DIRECTOR OF THE PRIORITY CRIMES
LITIGATION UNIT**

Twelfth Respondent

communication@npa.gov.za

VGM Building

123 Westlake Avenue

Weavind Park

Silverton

0184

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First Respondent

**THE DIRECTOR-GENERAL OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

Second Respondent

**THE MINISTER OF SAFETY
AND SECURITY**

Third Respondent

**THE DIRECTOR-GENERAL
OF SAFETY AND SECURITY**

Fourth Respondent

**THE MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION**

Fifth Respondent

**THE DIRECTOR-GENERAL OF INTERNATIONAL
RELATIONS AND COOPERATION**

Sixth Respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Seventh Respondent

THE NATIONAL DIRECTOR OF PUBLIC

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PROSECTIONS

Eighth Respondent

**THE HEAD OF THE DIRECTORATE
FOR PRIORITY CRIMES INVESTIGATION**

Ninth Respondent

**THE DIRECTOR OF THE PRIORITY CRIMES
LITIGATION UNIT**

Tenth Respondent

THE MINISTER OF HOME AFFAIRS

Eleventh Respondent

THE DIRECTOR GENERAL OF HOME AFFAIRS

Twelfth Respondent

FOUNDING AFFIDAVIT

I, the undersigned

KAAJAL RAMJATHAN-KEOGH

do hereby make oath and say that:

INTRODUCTION

1. The Applicant in this matter is the Southern Africa Litigation Centre ("SALC"), a non-governmental organisation based in Johannesburg.

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2. I am the Executive Director of the Applicant, and am duly authorised to act on behalf of the Applicant in this matter. I attach to this annexure a resolution empowering me to act thus, marked Annexure KRK1.
3. The contents of this affidavit are within my personal knowledge and belief and are true, unless the context indicates otherwise.
4. The Applicant provides support, both technical and financial, to human rights and public interest initiatives undertaken by domestic lawyers within the Southern Africa region.
5. SALC's model is to work in conjunction with domestic attorneys in each jurisdiction who are interested in litigating important cases involving human rights or the rule of law. SALC supports these attorneys in a variety of ways, including, as appropriate, providing legal research and drafting of heads of argument, training and mentoring, and monetary support. While SALC aims primarily to provide support on a specific case-by-case basis, its objectives also include the provision of training and the facilitation of legal networks within the region.
6. SALC's International Criminal Justice Programme monitors international criminal justice and its development in the Southern Africa region, and on the continent more generally. Its objective is to encourage African states, and particularly those in Southern Africa, to comply with their international and domestic obligations in relation to international criminal justice.

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7. In South Africa, SALC has utilised the Implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002 ("the Implementation Act") to ensure that South African law enforcement officials abide by their obligations under both domestic and international law to ensure accountability for the perpetration of international crimes. In 2014, the Constitutional Court ruled that the Implementation Act empowered and obliged the South African Police Service to investigate alleged crimes against humanity committed in Zimbabwe in 2005.

8. SALC has monitored events surrounding the indictment of President Omar Hassan Ahmad Al Bashir of Sudan ("President Bashir") by the International Criminal Court in The Hague. The International Criminal Justice Programme is concerned with ensuring that states which are signatories to the Rome Statute of the International Criminal Court ("the Rome Statute"), which includes South Africa, abide by their obligations under that Statute. In the case of President Bashir, that entails encouraging countries to arrest him should he be present in their territories.

9. In 2009, when President Bashir was invited to attend the inauguration of President Jacob Zuma, SALC briefed counsel and prepared papers for an urgent application similar to this present one. At that time, the application was unnecessary as President Bashir cancelled his travel to South Africa.

10. This application is brought as a matter of urgency to compel the relevant officials of the South African government to comply with their domestic

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(constitutional) and international legal obligations, specifically by arresting and/or detaining President Bashir pursuant to the arrest warrant issued by the International Criminal Court ("the ICC") on 4 March 2009.

11. SALC has been alerted to the fact that President Bashir has arrived in South Africa from a number of sources including the Sudan Tribune¹:

11.1 Coverage from the Sudan Tribune stated that a senior diplomatic source told the Sudan Tribune that committees reviewed the merits of President Bashir's trip to South Africa and cleared it. They reported further that the Sudanese Embassy in South Africa has been informed that Bashir will be in attendance at the AU Summit and that flight clearances had already been obtained marked Annexure **KRK2**

11.2 We have received further confirmation from the Sudan Tribune that President Bashir boarded a plane headed for South Africa at 11h30 on 13th June 2015 Khartoum local time. He arrived in South Africa sometime between 16h30 and 17h00 on the same day. This annexure is marked **KRK3**

11.3 He is further listed on the AU Summit Programme to speak and this is an indication that he has an intention to be in attendance. This is marked Annexure **KRK 4**.

¹ <http://www.sudantribune.com/spip.php?article55303>

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11.4 We have seen twitter feed from journalists Erika Gibson and Carien du Plessis that Mr Bashir's Presidential plane is due to arrive at Waterkloof Airforce base at 17h00. We have seen subsequent tweets from Erika Gibson which showed the Sudanese Presidential Plane "Sudan 01" landing at Waterkloof Airforce base in Pretoria. Due to the fact that this is a military base no press photographs have yet emerged confirming Mr Bashir's arrival. Annexure is marked KRK 6.

11.5 SABC News has however reported that President Bashir has been welcomed by South African officials and Sudanese diplomats on his arrival in the country. Annexure is marked KRK 7.

11.6 We also attach an email from a journalist who confirms that the Sudan Embassy have confirmed an interview with President Bashir and requested the questions in advance. This is attached marked KRK 8.

12. President Bashir is accused of committing genocide, war crimes and crimes against humanity in Darfur, Sudan. These crimes are prohibited under international customary law and under the Rome Statute, and, as a result of the Incorporation Act, under South African law.

13. The Respondents in this matter are the Minister of Justice and Constitutional Development, the Director-General of Justice and Constitutional Development, the Minister of Safety and Security, the Director-General of Safety and Security, the Minister of International Relations and Cooperation, the Director-General of International Relations

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and Cooperation, the National Commissioner of the South African Police Service, the National Director of Public Prosecutions, the Head of the Directorate for Priority Crime Investigation, and the Director of the Priority Crimes Litigation United. All are cited as the government officials responsible for the arrest and/or detention of persons whom, under South African and international law, are suspected of crimes and liable to be arrested.

14. This affidavit will first set out the facts, then the law, and then the relief that is sought by the Applicant. The issues of urgency and standing are then dealt with, followed finally by the conclusion.

FACTS

15. On 4 March 2009, the Pre-Trial Chamber of the ICC issued a warrant for the arrest of President Bashir, for war crimes and crimes against humanity ("the first warrant"). A copy of the first warrant is annexed hereto marked **KRK9**.

16. On 12 July 2010, the Pre-Trial Chamber of the ICC issued a second warrant for President Bashir for genocide ("the second warrant"). A copy of the second warrant is annexed hereto marked **KRK10**.

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17. President Bashir is suspected of being criminally responsible for attacks against a section of the civilian population of Darfur, Sudan, including murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians, and pillaging their property.

18. The warrants are first warrants of arrest issued for the arrest of a sitting Head of State by the ICC.

19. The ICC held that President Bashir's official capacity as a sitting Head of State does not exclude his criminal responsibility, nor does it grant him immunity against prosecution before the ICC.

20. The abovementioned crimes were allegedly committed during a five year counter-insurgency campaign by the Government of Sudan against the Sudanese Liberation Movement/Army (SLMA), the Justice and Equality Movement (JEM) and other armed groups opposing the government of Sudan in Darfur. It is alleged that this campaign started soon after the April 2003 attack on El Fasher airport as a result of a common plan agreed upon at the highest level of the government of Sudan by President Bashir and other high-ranking Sudanese political and military leaders. It lasted at least until 14 July 2008, on which date the Prosecutor of the ICC made a formal application to the ICC for the first warrant of arrest for President Bashir.

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21. The first warrant of arrest for President Bashir lists 7 counts, on the basis of his individual criminal responsibility under Article 25(3)(a) of the Rome Statute, including:

21.1. five counts of crimes against humanity under Article 7 of the Rome Statute, including murder, extermination, forcible transfer, torture and rape; and

21.2. two counts of war crimes under Article 8 of the Rome Statute, including intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities, and pillaging.

22. The second warrant for President Bashir lists three counts on the basis of individual criminal responsibility as an indirect perpetrator under Article 25(3)(a) of the Rome Statute:

22.1. three counts of genocide against the Fur, Masalit, and Zaghawa ethnic groups including genocide by killing within the meaning of Article 6(a) of the Rome Statute; genocide by causing serious bodily or mental harm within the meaning of Article 6(b) of the Rome Statute; and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction within the meaning of Article 6(c) of the Rome Statute.

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23. A request for cooperation for the arrest and surrender of President Bashir was transmitted to all State Parties to the Rome Statute, including South Africa.

24. In May 2009, President Bashir was invited by the South Africa government to attend the inauguration of President Zuma. South African officials confirmed that they would abide by their international and domestic obligations to arrest President Bashir should he arrive in the country, and the leader cancelled his attendance at the inauguration.

SOUTH AFRICAN LAW

25. South Africa signed the Rome Statute on 17 July 2000 and ratified it on 27 November 2000. The Rome Statute is accordingly binding upon South Africa on the international plane.

26. Article 86 of the Rome Statute provides:

“States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court”.

27. Article 89(1) provides in relevant part:

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“States parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender”.

28. The applicable “national law” in South Africa is the Criminal Procedure Act 51 of 1977 (“the CPA”). Section 40(1)(k) of the CPA provides:

“A peace officer may without warrant arrest any person—

....

(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic”.

29. The “law relating to extradition or fugitive offenders” is, in the instant case, the Implementation Act.

30. Section 4 of the Implementation Act creates the crimes of genocide, crimes against humanity and war crimes (“international crimes”) as crimes under South Africa law.

31. The Implementation Act also requires the South African authorities to cooperate with the ICC. One of the ways it seeks to ensure this is by setting out, in sections 8 to 13, processes for the arrest and provisional arrest of persons suspected of international crimes.

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32. Section 9 of the Implementation Act deals with provisional arrest. The purpose of provisional arrest is to detain a person suspected of committing international crimes, thus preventing the person from fleeing the country while the ICC prepares a formal and complete request for his or her surrender.

33. According to section 9(1) of the Implementation Act, when the Director-General of Justice and Constitutional Development receives a request from the ICC for the provisional arrest of a person, the Director-General "must immediately forward the request to the National Director [of Public Prosecutions] to apply for a warrant of arrest for that person".

34. According to section 9(2) of the Implementation Act, the National Director of Public Prosecutions, or a designated delegate, must then apply to a magistrate stating under oath that:

- 34.1. An urgent request has been made for the arrest of a person suspected of committing international crimes;**
- 34.2. A warrant of arrest against the person exists;**
- 34.3. A formal request for the surrender of the person to the ICC will be made later;**
- 34.4. The person concerned is in or on his or her way to South Africa;**
- 34.5. The purpose of the arrest is to bring the person concerned before the ICC.**

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35. The magistrate may then issue the requested warrant of arrest, thereby “domesticating” the ICC warrant of arrest.

36. The formal procedures of causing the surrendering of the person concerned to the ICC then ensues. At this stage of this case, that process is not at issue.

37. The Rome Statute and the Implementation Act thus impose obligations on the Respondents under international and domestic law. When they fail to carry out those obligations, they violate, *inter alia*, the rule of law enshrined in section 1(c) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

...

38. Section 237 of the Constitution provides that:

“All constitutional obligations must be performed diligently and without delay”.

39. In terms of section 172(1)(a) of the Constitution, if a court finds that conduct, or the lack thereof, is inconsistent with the Constitution, it has no discretion but must declare the conduct unconstitutional and invalid to the extent of the inconsistency.

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40. A court may then, in terms of section 172(1)(b) of the Constitution, make any order that is just and equitable – such as a *mandamus* – to correct the unconstitutional conduct, or lack thereof.

THE RELIEF SOUGHT

41. The Applicant seeks to compel the Respondents to comply with their obligations under international and domestic law.

42. The Respondents' obligations are triggered by the following facts:

42.1. A warrant of arrest has been issued by the ICC for President Bashir for war crimes and crimes against humanity.

42.2. South Africa, as a State Party to the Rome Statute has an obligation to assist the ICC in bringing President Bashir to stand trial.

42.3. The Respondents are also bound by the Implementation Act to cooperate with and assist the ICC, *inter alia*, by taking the mandatory (preliminary) steps to have President Bashir provisionally arrested.

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43. The Respondents have failed in their legal duties by:

- 43.1. Inviting President Bashir to enter South Africa to attend the African Union Summit in Sandton, Gauteng; and**
- 43.2. Failing to indicate that international and domestic law obliges them to arrest and/or detain President Bashir; and**
- 43.3. Failing to prepare to arrest and/or detain President Bashir when he arrives in the country.**

44. In the circumstances the Applicant seeks the following relief:

- 44.1. A declaration that the Respondents have failed to fulfil their duties under local and international law by failing to take steps diligently and without delay to prepare to arrest and/or detain President Bashir in pursuance of the warrant for his arrest issued by the ICC;**
- 44.2. An order compelling the Respondents to take all reasonable and urgent steps to prepare to arrest President Bashir without a warrant in terms of section 40(1)(k) of the CPA, pending a formal request for his surrender to the ICC.**

In the alternative:

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44.3. An order compelling the Respondents to take all reasonable and urgent steps to prepare to provisionally arrest President Bashir in terms of the Implementation Act.

45. Such an order should not be necessary, but the Respondents have thus far failed to take any steps to ensure the arrest of President Bashir, despite being aware of the warrant for his arrest and despite being aware that he will soon be present in the country.

46. This order would not be of lengthy duration, but would serve simply to provide the ICC with the opportunity to make a formal request for the surrender of President Bashir. If the ICC fails to make such a request within the prescribed time limits, President Bashir would be released.

URGENCY

47. This matter is urgent by its nature, and cannot be rectified by a court at a later date.

48. President Bashir would be in South Africa for a very limited time. We have been informed that he is likely to be in the country for only 2 days. Not only that, but it is likely that he will seek to depart South Africa as soon as he becomes aware of this application.

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49. Once he has left South Africa, he will be beyond the reach of the South African criminal justice system, and South Africa will have failed in its international duties to the ICC.

50. Furthermore, depending on the order granted by this Court, the Respondents will, as a practical reality, need a number of hours or perhaps even days to carry out the arrest. This too subtracts from the time available to the Applicant and to this Court.

51. This application could not be brought at any earlier stage. It was unclear until very recently that President Bashir would in fact be attending the African Union Summit. The Applicant took what steps were possible – including briefing counsel to prepare preliminary papers – prior to the arrival of President Bashir, but some steps could not be anticipated.

52. It is therefore essential that this matter be heard and decided upon in a most urgent fashion: not in a matter of days, but in a matter of hours.

STANDING

53. As stated above, the Applicant is a non-governmental organisation whose goals include the promotion of human rights and, in particular, supporting litigation in key areas involving human rights, international law, and constitutionalism.

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54. This case concerns the arrest of a man accused of the most serious of crimes: war crimes and crimes against humanity. His arrest is accordingly a matter of great public importance, and clearly falls within the goals of the Applicant.

55. It is hence submitted that the Applicant has a direct and substantial interest in this matter, and accordingly has standing to bring this application.

56. It is also important to all South Africans that their government be compelled to abide by the law, both international and domestic. The rule of law is a founding value of South Africa and is enshrined in the Constitution.

57. When officials of the South African government fail to fulfil their legal obligations, particularly in such a serious and public matter as the instant case, it affects all South Africans equally, as it demonstrates an unjustifiable disregard for the law and an unjustifiable tolerance of war crimes and crimes against humanity.

58. The Applicant therefore also brings this case in the public interest.

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CONCLUSION

59. This application should not have been necessary: all it seeks is to compel the Respondents to perform their constitutional duties, of which the Respondents are well aware. In the circumstances the Applicant seeks costs, including costs of two counsel, against those Respondents that choose to oppose this application, on a joint and several basis.

60. The Applicant submits that the following has been demonstrated:

- 60.1. President Bashir has travelled to South Africa;**
- 60.2. President Bashir is sought by the ICC in connection with alleged war crimes and crimes against humanity;**
- 60.3. A warrant for President Bashir's arrest has been issued by the ICC to all State Parties to the Rome Statute, which includes South Africa;**
- 60.4. The Respondents, being the responsible government officials in South Africa, have failed to prepare to act on the warrant, in violation of their legal obligations;**
- 60.5. President Bashir's visit to South Africa will be a short one, and accordingly this matter is urgent.**

61. In light of these facts, it is submitted that the Applicant is entitled to the relief sought in the Notice of Motion to which this affidavit is annexed.

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62. The Applicant accordingly prays for an order in terms of the Notice of Motion.


KAAJAL RAMJATHAN-KEOGH

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at Pretoria on this the ____th day of June 2015, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.


COMMISSIONER OF OATHS

Full names DAVID EUGENE CATE
..... Lawyer for Human Rights
Business Heersingracht Building, 87 De Korte Str, 4th Floor
address Braamfontein, Johannesburg 2001 Tel: 011 339 1960
Capacity Legal Counselor Area Country Wide
Appointed: 19 February 2008
Reference no: 9/1/8/2 COUNTRY WIDE
Appointed in terms of Section 5(1) of the Justices
of the Peace and Commissioners of Oath Act, 1963

KRK1

SOUTHERN AFRICA LITIGATION CENTRE

RESOLUTION OF THE BOARD OF TRUSTEES OF THE SOUTHERN AFRICA LITIGATION CENTRE

TRUST NAME: SOUTHERN AFRICAN HUMAN RIGHTS LITIGATION CENTRE TRUST
Operating as THE SOUTHERN AFRICA LITIGATION CENTRE (SALC)

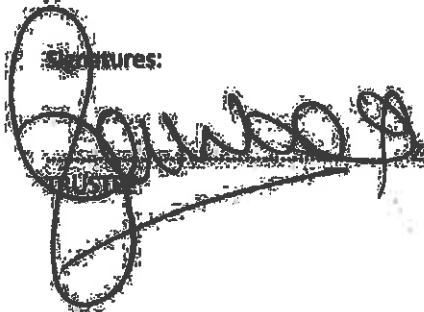
TRUST NO: IT 3935/05

Date of Resolution: 12th June 2015

It was resolved as follows:

The Board of Trustees have agreed that SALC is permitted to litigate in its own name in bringing an urgent application before the appropriate court to compel the South African authorities to arrest and detain Sudanese President Omar Al Bashir on account of the arrest warrant issued by the International Criminal Court for genocide, war crimes and crimes against humanity committed in Darfur, Sudan.

Signatures:



ZOHRA DAWOOD

Signed by the above Trustee on behalf of the SALC Board of Trustees:

Zohra Dawood
Rahim Khan
Philip Tamindjis
Keith Baker
Beatrice Mtetwa

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196,
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www.southernafricalitigationcentre.org

an initiative of the International Bar Association and the Open Society Initiative of Southern Africa

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HOME | NEWS | FRIDAY 12 JUNE 2015

Bashir's possible attendance of AU summit in South Africa draws skepticism

June 11, 2015 (WASHINGTON/KHARTOUM) – The Sudanese leader's purported plan to fly in to South Africa for the African Union (AU) summit this weekend was met with deep skepticism from diplomats and officials in Johannesburg.

Earlier today, government sources in Khartoum told *Sudan Tribune* that a committee consisting of multiple government agencies reviewed the merits of the trips and the logistics and cleared Bashir's attendance in South Africa.

The sources also revealed that the Sudanese embassy in South Africa has been formally notified about Bashir's planned appearance.

This ran contrary to reports by several local and international media houses this week which stated that 1st VP Bakri Hassan Saleh will represent Sudan at the convention instead of his boss who is wanted by the International Criminal Court (ICC) for alleged war crimes and genocide committed in Darfur.

Sudanese officials currently participating in AU preparatory meetings confirmed to African News Agency (ANA) Bashir's participation in heads of state summit.

But South African officials, speaking to ANA on condition of anonymity, foreign diplomats and some human rights bodies have said they don't believe he will come as whatever happens to him, his presence would be a major embarrassment to the South African government.

Other diplomats told ANA that they suspect that Sudanese officials may deliberately be leaking disinformation that he intends to come to South Africa just to cause confusion.

There was no public statements from Khartoum or Johannesburg on the level of representation Sudan will have at the summit. South African officials have not stated what action if any would occur should Bashir set foot in the country.

The Johannesburg-based Southern African Litigation Centre (SALC) said it is preparing to seek an arrest warrant from a local judge for Bashir.

"We are receiving information from various sources that Bashir is due to arrive in SA on Saturday. We are trying to confirm information and will prepare an urgent application to have him arrested," SALC Executive Director Kaajal Ramjathan-Keogh told ANA.

Keogh noted that the Constitutional Court had ruled that South Africa must uphold its international law obligations under the Rome Statute which governs the ICC.

She also pointed out that South Africa had domesticated the Rome Statute's provisions into South African law, the Implementation of the Rome Statute of the International Criminal Court 27 of 2002 (the ICC Act).

"In the preamble of the ICC Act, South Africa boldly commits itself to bringing persons who are suspected of committing genocide, war crimes and crimes against humanity, to justice pursuant to its commitment as a signatory to the Rome Statute of the ICC and in terms of its domestic law obligations," she said.

Human Rights Watch (HRW) associate international justice director Elise Keppler warned in a Twitter post that by traveling to South Africa "Bashir risks arrest on arrival".

South Africa has warned several times in the past that it will arrest Bashir should he visit in compliance with the ICC arrest warrant.

This was despite AU resolutions instructing its members not to cooperate with the ICC in apprehending Bashir.

In August 2009 the South African Department of Foreign Affairs issued a detailed statement outlining its position on the AU resolution regarding Bashir from a legal and political perspective.

"An international arrest warrant for President El Bashir has been received and endorsed by a magistrate. This means that if President El Bashir arrives on South African territory, he will be liable for arrest" the statement said.

Bashir has not visited South Africa since the issuance of the arrest warrant but in May 2009 he asserted in an interview with the BBC 'Hardtalk' program that he could visit if he wanted to.

The Sudanese leader has managed to travel to several African ICC members since 2009 but in some of these instances this seem to have backfired.

A trip by Bashir in 2011 to Kenya, another ICC member, without being arrested prompted a civil society group to file a case in court which ended up with the issuance of a provisional arrest warrant for him by a Kenyan judge.

Malawi, which received Bashir once, chose not to host an AU summit afterwards because it could not guarantee Bashir's risk-free attendance after US pressure.

In 2013, Bashir, traveled to Nigeria for a conference but left abruptly after less than 24 hours without addressing the main event on behalf of Sudan or attending a formal dinner or taking part in the group photo.

In a filing made with ICC judges at the time, the Nigerian government suggested that prior to Bashir's sudden exit it was in the process of initiating arrest procedures against him.

"The sudden departure of President Al-Bashir prior to the official end of the AU summit occurred at a time that officials of relevant bodies and agencies of the Federal Government of Nigeria were considering the necessary steps to be taken in respect of his visit in line with Nigeria's international obligations".

(ST)



FILE - Sudanese president Omar Hassan al-Bashir flanked by Kenyan president Uhuru Kenyatta and South African leader Jacob Zuma

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KRK 3



Wasil Ali
@wasilalaha



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#Bashir plane is headed to #SouthAfrica for #AU summit. Left 11:30 am local time .

#ICC



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3:22 PM - 13 Jun 2015

Sudan Tribune journalist
report

2
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Erika Gibson @GibsonErika 

Al Bashir Sudan01 just landed at Waterkloof Air Force Base. Pic: Morné Booij-Liewes.



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5:20 PM - 13 Jun 2015

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KRK 6



UN chief condemns 'appalling' child sex abuse
The UN chief has condemned 'appalling' child sexual abuse in rural African Republic.

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Sudan's Bashir on way to SA despite arrest threat

2015-06-13 17:18

Khartoum - Sudanese President Omar al-Bashir, wanted by the International Criminal Court over war crimes charges, left Khartoum on Saturday to travel to South Africa for an African Union summit, state news agency SUNA said.

Since Bashir was indicted by the ICC in 2009 over alleged war crimes and crimes against humanity during the Darfur conflict, his overseas travel has been severely restricted.

"Bashir left for Johannesburg at the head of the Sudanese delegation taking part in the African Union summit," SUNA reported.

His top adviser Bakri Hassan Salih and several ministers were at the airport for his departure, SUNA added, without saying exactly when on Saturday he left.

There had been conflicting reports in local media over whether Bashir would travel.

Since his indictment Bashir has mostly travelled to countries that have not joined the ICC.

The court relies on signatories to its founding treaty to arrest indictees.

Darfur erupted into conflict in 2003 when ethnic insurgents mounted a campaign against Bashir's government, complaining their region was politically and economically marginalised.

More than 300 000 people have fled their homes, the UN said. In Kenya, more than 2.5 million people have been displaced.

Khartoum estimates the death toll at 300 000.



Sudanese President Omar al-Bashir. (AFP)

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Sudan's President Omar al-Bashir has been welcomed by South African officials and Sudanese diplomats on his arrival in the country.

RETWEETS 6 FAVORITES 2

7:50 PM - 13 Jun 2015



6/9

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KRK 8

Kaajal Ramjathan-Keogh

Subject:

FW: FW: FW: Bashir

From: Peter Fabricius [mailto:peter.fabricius@inl.co.za]

Sent: 13 June 2015 08:51 PM

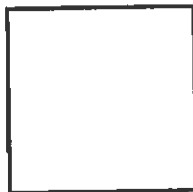
To: Kaajal Ramjathan-Keogh

Subject: Re: FW: FW: Bashir

Dear Kaajal,

The Sudanese embassy in Pretoria has offered me an interview with Sudan's President Omar el Bashir when he is in South Africa for the AU summit. I wonder if you wouldn't mind sending me some background to the ICC case against him to help me prepare my questions?

Kind Regards
Peter



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Independent Newspapers, South Africa
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mobile+27824537110
office +27116332579
fax +27118368274

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KRK 9

**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/09
Date: 4 March 2009

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN DAFUR, SUDAN

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

Public Document

Warrant of Arrest for Omar Hassan Ahmad Al Bashir

KRK PL

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Mr Essa Faal, Senior Trial Lawyer

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of 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

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Handwritten initials: KX DC

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively);

HAVING EXAMINED the “Prosecution’s Application under Article 58” (“the Prosecution Application”), filed by the Prosecution on 14 July 2008 in the record of the situation in Darfur, Sudan (“the Darfur situation”) requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad Al Bashir (hereinafter referred to as “Omar Al Bashir”) for genocide, crimes against humanity and war crimes;¹

HAVING EXAMINED the supporting material and other information submitted by the Prosecution;²

NOTING the “Decision on the Prosecution’s Request for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”³ in which the Chamber held that it was satisfied that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator,⁴ for war crimes and crimes against humanity and that his arrest appears to be necessary under article 58(1)(b) of the *Rome Statute* (“the Statute”);

NOTING articles 19 and 58 of the Statute;

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution Application and without prejudice to any subsequent determination that may be made under article 19 of the Statute, the case against Omar Al Bashir falls within the jurisdiction of the Court;

¹ ICC-02/05-151-US-Exp; ICC-02/05-151-US-Exp-Anx1-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anx1 & 2; and Public redacted version ICC-02/05-157 and ICC-02/05-157-AnxA.

² ICC-02/05-161 and ICC-02/05-161-Conf-AnxA-J; ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anx1-5; ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxA-E.

³ ICC-02/05-01/09-1.

⁴ See Partly Dissenting Opinion of Judge Anita Ušacka to the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, Part IV.

MR

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution Application, there is no ostensible cause or self-evident factor to impel the Chamber to exercise its discretion under article 19(1) of the Statute to determine at this stage the admissibility of the case against Omar Al Bashir;

CONSIDERING that there are reasonable grounds to believe that from March 2003 to at least 14 July 2008, a protracted armed conflict not of an international character within the meaning of article 8(2)(f) of the Statute existed in Darfur between the Government of Sudan ("the GoS") and several organised armed groups, in particular the Sudanese Liberation Movement/Army ("the SLM/A") and the Justice and Equality Movement ("the JEM");

CONSIDERING that there are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the GoS issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counter-insurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008;

CONSIDERING that there are reasonable grounds to believe: (i) that a core component of the GoS counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups³ – perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur; and (ii) that, as part of this core component of the counter-insurgency campaign, GoS

³ See Partly Dissenting Opinion of Judge Anita Ulsacka to the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Part III. B.

MLP

forces systematically committed acts of pillaging after the seizure of the towns and villages that were subject to their attacks;⁶

CONSIDERING, therefore, that there are reasonable grounds to believe that from soon after the April 2003 attack in El Fasher airport until 14 July 2008, war crimes within the meaning of articles 8(2)(e)(i) and 8(2)(e)(v) of the Statute were committed by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, as part of the above-mentioned GoS counter-insurgency campaign;

CONSIDERING, further, that there are reasonable grounds to believe that, insofar as it was a core component of the GoS counter-insurgency campaign, there was a GoS policy to unlawfully attack that part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur;

CONSIDERING that there are reasonable grounds to believe that the unlawful attack on the above-mentioned part of the civilian population of Darfur was (i) widespread, as it affected, at least, hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region; and (ii) systematic, as the acts of violence involved followed, to a considerable extent, a similar pattern;

CONSIDERING that there are reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the

⁶ Including in *inter alia* (i) the first attack on Kodoom on or about 15 August 2003; (ii) the second attack on Kodoom on or about 31 August 2003; (iii) the attack on Bindisi on or about 15 August 2003; (iv) the aerial attack on Muljar between August and September 2003; (v) the attack on Arawala on or about 10 December 2003; (vi) the attack on Shattaya town and its surrounding villages (including Kailek) in February 2004; (vii) the attack on Muhajerrya on or about 8 October 2007; (viii) the attacks on Saraf Jidad on 7, 12 and 24 January 2008; (ix) the attack on Salea on 8 February 2008; (x) the attack on Sirba on 8 February 2008; and (xi) the attack on Abu Suruj on 8 February 2008; (xii) the attack to Jebel Moon between 18 and 22 February 2008.

KAC
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Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination;⁷

CONSIDERING that there are also reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, (i) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer;⁸ (ii) thousands of civilian women, belonging primarily to these groups, to acts of rape;⁹ and (iii) civilians, belonging primarily to the same groups, to acts of torture;¹⁰

CONSIDERING therefore that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport until 14 July 2008, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed crimes against humanity consisting of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(1)(a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region;

CONSIDERING that there are reasonable grounds to believe that Omar Al Bashir has been the *de jure* and *de facto* President of the State of Sudan and Commander-in-

⁷ Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Burun Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.

⁸ Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Burun Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008.

⁹ Including in *inter alia* (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.

¹⁰ Including in *inter alia*: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality in West Darfur in February 2008.

KK PL

Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the above-mentioned GoS counter-insurgency campaign;

CONSIDERING, further, that the Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan;

CONSIDERING that, for the above reasons, there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator,¹¹ under article 25(3)(a) of the Statute, for:

- i. intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime, within the meaning of article 8(2)(e)(i) of the Statute;
- ii. pillage as a war crime, within the meaning of article 8(2)(e)(v) of the Statute;
- iii. murder as a crime against humanity, within the meaning of article 7(1)(a) of the Statute;
- iv. extermination as a crime against humanity, within the meaning of article 7(1)(b) of the Statute;
- v. forcible transfer as a crime against humanity, within the meaning of article 7(1)(d) of the Statute;

¹¹ See Partly Dissenting Opinion of Judge Anita Uluoka to the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Part IV.

MAC DC

- vi. torture as a crime against humanity, within the meaning of article 7(1)(f) of the Statute; and
- vii. rape as a crime against humanity, within the meaning of article 7(1)(g) of the Statute;


CONSIDERING that, under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes;

FOR THESE REASONS,


HEREBY ISSUES:

A WARRANT OF ARREST for **OMAR AL BASHIR**, a male, who is a national of the State of Sudan, born on 1 January 1944 in Hoshe Bannaga, Shendi Governorate, in the Sudan, member of the Ja'ali tribe of Northern Sudan, President of the Republic of the Sudan since his appointment by the RCC-NS on 16 October 1993 and elected as such successively since 1 April 1996 and whose name is also spelt Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar al-Bashir, Omar al-Bashir, Omar el-Bashir, Omer Albasheer, Omar Elbashir and Omar Hassan Ahmad el-Béshir.


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




Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka



Judge Sylvia Steiner



Dated this Wednesday, 4 March 2009

At The Hague, The Netherlands

Handwritten initials

**Cour
Pénale
Internationale**



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**International
Criminal
Court**

Original: English

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

Date: 12 July 2010

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser

SITUATION IN DAFUR, SUDAN

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

Public Document

Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir

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

The Office of the Prosecutor
 Mr Luis Moreno Ocampo, Prosecutor
 Mr Essa Faal, Senior Trial Lawyer

Counsel for the Defence

Legal Representatives of Victims
 Mr Nicholas Kaufman
 Ms Wanda M. Akin
 Mr Raymond M. Brown

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
 Victims**
 Ms Paolina Massidda

**The Office of Public Counsel for the
 Defence**
 Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar
 Ms Silvana Arbia
 Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**
 Ms Fiona McKay

Other

KH DL

PRE-TRIAL CHAMBER I of the International Criminal Court (“Chamber” and “Court” respectively);

HAVING EXAMINED the “Prosecution’s Application under Article 58” (“Prosecution’s Application”), filed by the Prosecution on 14 July 2008 in the record of the situation in Darfur, Sudan (“Darfur situation”) requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad Al Bashir (hereinafter referred to as “Omar Al Bashir”) for genocide, crimes against humanity and war crimes;¹

HAVING EXAMINED the supporting material and other information submitted by the Prosecution;²

NOTING the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” (“First Decision”)³ issued on 4 March 2009, in which the Chamber decided:

(i) to ~~is~~ issue a warrant of arrest against Omar Al Bashir for his alleged responsibility under article 25(3)(a) of the Statute for the crimes against humanity and war crimes alleged by the Prosecution;⁴ and

(ii) not to include the counts of genocide listed in the Prosecution’s Application—genocide by killing (count 1); genocide by causing serious bodily or mental harm (count 2); and genocide by deliberately inflicting conditions of life calculated to bring about the group’s physical destruction (count 3)—among the crimes with respect to which the warrant of arrest was issued;⁵

¹ ICC-02/05-151-US-Exp; ICC-02/05-151-US-Exp-Anxs1-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxs1 & 2; and Public redacted version ICC-02/05-157 and ICC-02/05-157-AnxA.

² ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J; ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxs1-5; ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E.

³ ICC-02/05-01/09-3.

⁴ ICC-02/05-01/09-3, page 92.

⁵ Judge Anita Ušacka partly dissenting.

HX DL

NOTING the "Judgment on the Appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'" ("Appeals Decision") dated 3 February 2010,⁶ in which the Appeals Chamber reversed the First Decision to the extent that the Chamber "decided not to issue a warrant of arrest in respect of the crime of genocide in view of an erroneous standard of proof(...)"⁷ and decided not to consider the substance of the matter⁸ remanding it to the Pre-Trial Chamber "for a new decision, using the correct standard of proof";⁹

NOTING the "Second Decision on the Prosecution's Application for a Warrant of Arrest",¹⁰ ("Second Decision") in which the Chamber held that it was satisfied that there were reasonable grounds to believe that Omar Al Bashir was criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for the charges of genocide under article 6 (a), 6 (b) and 6 (c) of the Statute, which were found in that decision to have been committed by the GoS forces as part of the GoS counter-insurgency campaign, and that his arrest appeared to be necessary under article 58(1)(b) of the *Rome Statute* ("the Statute");

NOTING articles 19 and 58 of the Statute;

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution's Application and without prejudice to any subsequent determination that may be made under article 19 of the Statute, the case against Omar Al Bashir falls within the jurisdiction of the Court;¹¹

⁶ ICC-02/05-01/09-73.

⁷ ICC-02/05-01/09-73, page 3.

⁸ ICC-02/05-01/09-73, para. 42.

⁹ Ibid.

¹⁰ ICC-02/05-01/09-94.

¹¹ As found by the Chamber in the First Decision, see ICC-02/05-01/09-3, paras. 35-45, and reiterated in the Second Decision, para. 41.

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CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution's Application, there is no ostensible cause or self-evident factor to impel the Chamber to exercise its discretion under article 19(1) of the Statute to determine at this stage the admissibility of the case against Omar Al Bashir;¹²

CONSIDERING that there are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the Government of Sudan ("GoS") issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counter-insurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008;

CONSIDERING that there are reasonable grounds to believe: (i) that a core component of the GoS counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur; and (ii) that villages and towns targeted as part of the GoS's counter-insurgency campaign were selected on the basis of their ethnic composition and that towns and villages inhabited by other tribes, as well as rebel locations, were bypassed in order to attack towns and villages known to be inhabited by civilians belonging to the Fur, Masalit and Zaghawa ethnic groups;

CONSIDERING that there are reasonable grounds to believe that the attacks and acts of violence committed by GoS against a part of the Fur, Masalit and Zaghawa

¹² As found by the Chamber in the First Decision, see ICC-02/05-01/09-3, para. 51, and reiterated in the Second Decision, para. 41.

groups took place in the context of a manifest pattern of similar conduct directed against the targeted groups as they were large in scale, systematic and followed a similar pattern;

CONSIDERING that there are reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination;¹³

CONSIDERING that there are reasonable grounds to believe, as well, that as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, (i) thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of rape;¹⁴ (ii) civilians belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of torture;¹⁵ and (iii) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer;¹⁶

¹³ Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.

¹⁴ Including in *inter alia* (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.

¹⁵ Including in *inter alia*: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality in West Darfur in February 2008.

¹⁶ Including in *inter alia* (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu Suruj,

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CONSIDERING that that there are also reasonable grounds to believe that in furtherance of the genocidal policy, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces throughout the Darfur region (i) at times, contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked;¹⁷ (ii) subjected hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of forcible transfer;¹⁸ and (iii) encouraged members of other tribes, which were allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups;¹⁹

CONSIDERING therefore that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport at least until the date of the Prosecution's Application, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed the crimes of genocide by killing, genocide by causing serious bodily or mental harm and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6 (a), (b) and (c) respectively of the Statute, against part of the Fur, Masalit and Zaghawa ethnic groups;

Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008.

¹⁷ Physicians for Human Rights, Report, *Darfur Assault on Survival, A call for Security, Justice, and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0679 which mentions three incidents of destruction of water sources.

¹⁸ UN Security Council Press release, 22 April 2008 (Anx J38) DAR-OTP-0147-0859 at 0860; UN Security Council 5872 meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061; UNCOI Material, (Anx J72) DAR-OTP-0038-0060 at 0065; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604; United Nations Inter-agency Report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0067; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 35, 39, 44; United Nation Human Rights Council, Report on Human Rights Situations that require the Council's attention (A/HRC/6/19) (Anx 78) at D AR-OTP-013 8-0116 at 0145-0146; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0300, 0291-0296; Ninth periodic report of the United Nations High Commissioner for Human Rights. Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0374.

¹⁹ Witness statement (AnxJ47) DAR-OTP-0125-0665 at 0716, para.255.

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CONSIDERING that there are reasonable grounds to believe that Omar Al Bashir has been the *de jure* and *de facto* President of the Republic of the Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 until at least the date of the Prosecution's Application 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the above-mentioned GoS counter-insurgency campaign;

CONSIDERING, further, that the Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the Republic of the Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan;

CONSIDERING that, on the basis of the standard of proof as identified by the Appeals Chamber, there are reasonable grounds to believe that Omar Al Bashir acted with *dolus specialis*/specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups;

CONSIDERING that, for the above reasons, there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator, under article 25(3)(a) of the Statute, for:

- i. Genocide by killing, within the meaning of article 6(a) of the Statute;
- ii. Genocide by causing serious bodily or mental harm, within the meaning of article 6(b) of the Statute; and
- iii. Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, within the meaning of article 6(c) of the Statute;

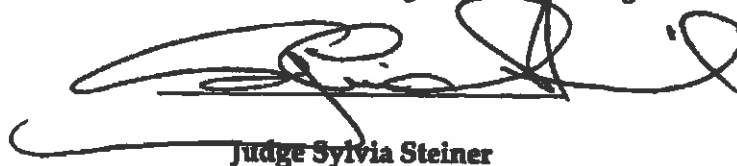
CONSIDERING that, under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes;

FOR THESE REASONS,

HEREBY ISSUES:

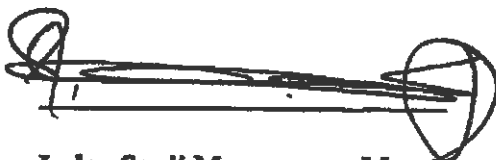
A WARRANT OF ARREST for **OMAR AL BASHIR**, a male, who is a national of the Republic of the Sudan, born on 1 January 1944 in Hoshe Bannaga, Shendi Governorate, in the Sudan, member of the Jaáli tribe of Northern Sudan, President of the Republic of the Sudan since his appointment by the RCC-NS on 16 October 1993 and elected as such successively since 1 April 1996 and whose name is also spelt Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar al-Bashir, Omar al-Beshir, Omar el-Bashir, Omer Albasheer, Omar Elbashir and Omar Hassan Ahmad el-Béshir.

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



Judge Sylvia Steiner

Presiding Judge



Judge Sanji Mmasenono Monageng



Judge Cuno Tarfusser

Dated this Monday 12 July 2010

At The Hague, The Netherlands

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