

ANNEX E

PUBLIC

Founding Affidavit of Applicant - The Southern
Africa Litigation Centre before the High Court of
South Africa (North Gauteng High Court, Pretoria)

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

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 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 Unit. 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

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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