

## INTERNATIONAL CRIMINAL COURT

Original: English

No: ICC-02/05-01/09

Date: 27 January 2017

## PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge  
 Judge Marc Perrin de Brichambau  
 Judge Chang-ho Chung

SITUATION IN DARFUR, SUDAN

*THE PROSECUTOR V OMAR HASSAN AHMAD AL BASHIR*

## Public Document

Request for leave to submit *Amicus Curiae* Observations by the Southern Africa  
 Litigation Centre (SALC)

Source: Kaajal Ramjathan-Keogh

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

The Office of the Prosecutor:  
 Fatou Bensouda, Prosecutor

Counsel for the Defendants



<b>James Stewart, Deputy Prosecutor</b>	
<b>Legal Representatives of Victim</b>	<b>Legal Representatives of Applicants</b>
<b>Unrepresented Victims</b>	<b>Unrepresented Applicants for Participation/Reparation</b>
<b>The Office of the Public Counsel for Victims</b>	<b>The Office of Public Counsel for the Defence</b>
<b>State Representatives Competent Authorities of the Republic of South Africa</b>	<b>Others United Nations Secretariat of the Assembly of States Parties</b>
<b>REGISTRY Registrar Herman von Hebel</b>	<b>Deputy Registrar</b>
<b>Victims and Witnesses Unit</b>	<b>Detention Section</b>
<b>Victims Participation and Reparations Section</b>	<b>Others</b>

*R*  
*KK*

## I Introduction

1. The Southern Africa Litigation Centre ("SALC") seeks leave, in terms of Rule 103 of the Rules of Procedure and Evidence ("the Rules"), to submit written and oral observations, in fact and in law, as *amicus curiae* regarding the Republic of South Africa's legal obligations in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir*.
2. State cooperation in the pursuit of accountability for international crimes is vital. In service of this, SALC wishes to draw the Chamber's attention to the factual and legal context in which the government of the Republic of South Africa's conduct occurred. SALC submits that it is desirable for the proper determination of the case that these submissions be received.
3. SALC seeks to demonstrate to the Chamber that South Africa had clear domestic – as well as international – legal obligations to arrest and surrender President Bashir to the International Criminal Court ("ICC"). Factually, South Africa flouted its obligations, by actively facilitating President Bashir's escape or, at minimum, by failing to comply with its duty to arrest and surrender President Bashir to the Court.
4. SALC requests leave to submit observations on four grounds:
  - 4.1. first, SALC will provide the Chamber with submissions on the relevant South African legal framework, contending that domestically, the South African government was obliged to arrest and surrender President Bashir;
  - 4.2. second, SALC is particularly well-placed to advise the Chamber on the facts regarding what transpired in the days leading up to, and on the day of, President Bashir's escape from South Africa;
  - 4.3. third and relatedly, SALC can identify various documents that record what occurred during President Bashir's visit and escape, which the Court may wish to consider in determining this matter; and
  - 4.4. fourth, SALC will demonstrate the importance of the Chamber's making a formal finding of non-compliance. To date, the South African government



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

5. SALC offers to file together with this application a full copy of the Record of Decision placed before the South African Supreme Court of Appeal.

## **II Procedural History**

6. The procedural history concerning the indictment of President Bashir has been set out most recently in this Chamber's Decision of 8 December 2016.<sup>1</sup>
7. In brief, Pre-Trial Chamber I issued two arrest warrants against President Bashir on 4 March 2009 and 12 July 2010 respectively. South Africa is a State Party to the Rome Statute, and accordingly was notified of the requests for arrest and surrender of President Bashir. South Africa nevertheless failed to arrest President Bashir when he attended a summit of the African Union ("the AU Summit") on South African territory during 13-15 June 2015. South Africa's domestic courts have found that such failure was unlawful.<sup>2</sup>
8. The Chamber, on 4 September 2015, opened proceedings pursuant to article 87(7) of the Statute and has convened a public hearing into the matter for 7 April 2017.

## **III SALC and Motivation for Leave to Submit Observations**

9. SALC is a non-governmental organisation that promotes human rights and the rule of law in Southern Africa. SALC's international criminal justice programme aims to ensure that Southern African states are aware of, and act in compliance with, their legal obligations including, crucially, those under international criminal law.
10. SALC recognises the role that domestic fora play in providing content to national obligations to respect, protect and promote human rights. Since its establishment in

---

<sup>1</sup> ICC-02/05-01/09.

<sup>2</sup> See *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (3) SA 317 (SCA). The South African government authorities initially sought to appeal its findings to the Constitutional Court, but later withdrew the appeal and accepted the Supreme Courts findings in this regard.

2005, SALC has supported and intervened in a number of high profile human rights related cases in South Africa, Namibia, Botswana, Lesotho, Swaziland, Zimbabwe, Zambia and Malawi. SALC is thus a regional expert, particularly on the complementary framework of international and domestic law, including under the ICC.

11. SALC's objectives are set out in its Deed of Trust, attached as Annexure **KRK1**. They include:
  - 11.1. To offer rapid response support relating to human rights, constitutional and public interest cases;
  - 11.2. To support and act as a catalyst to lawyers on prospective cases for the timeous preparation and resolution of human rights cases;
  - 11.3. To promote awareness of human rights litigation frontiers and capacity building and to stimulate advocacy for law reform, human rights and constitutionalism.
12. SALC's proposed intervention as *amicus curiae* was authorised by its Board of Trustees (evidenced by a letter from the chairperson of the Board – see Annexure **KRK2**).
13. Increasingly, *amici curiae* briefs have been made before international criminal tribunals.<sup>3</sup> Rule 103 (1) of the Rules allows the Chamber to grant leave to an *amicus curiae* to make submissions "if it considers it desirable for the proper determination of the case".
14. Whether an application under Rule 103 is admitted turns on whether the Chamber will be assisted in its "proper determination" of the case.<sup>4</sup> Drawing on jurisprudence from other international criminal tribunals, this will be the case if a prospective

---

<sup>3</sup> S Williams and H Woolaver 'The Role of the *Amicus curiae* before International Criminal Tribunals' (2006) 6 *International Criminal Law Review* 151-189.

<sup>4</sup> *Prosecutor v Lubanga*, ICC-01/04-01/06 (OA11), Decision on Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, 18 February 2008, para. 7.



*amicus curiae* can aid the Chamber in reaching the right decision.<sup>5</sup>

15. SALC respectfully submits that it is well-placed to make observations that will assist the Chamber in properly determining this case. SALC has general expertise in the area of international criminal justice, and how under the ICC's complementarity scheme international obligations translate into the domestic law frameworks.
16. Further, SALC is uniquely positioned by the role that it played before the South African courts in attempting to compel the Government of South Africa to arrest President Bashir. Accordingly, SALC intends to offer observations to assist the chamber by providing independent facts, originating from proceedings at the High, Supreme and Constitutional Courts of South Africa, as well as the correspondence and interaction between SALC and its representatives and officials and representatives of the Government of South Africa over the course of the Bashir matter.
17. While acting to enforce the Government of South Africa's obligations in domestic courts, SALC did so not out of a partisan interest in the matter. Instead, SALC acted in the public interest to safeguard human rights in the region by bringing South Africa's international and concurrent domestic legal obligations to the courts' attention.
18. It is also SALC's view that its submissions will be of assistance to the ICC as to possible measures the Chamber could impose to deter future noncompliance by States Parties. Furthermore, these observations relate to what remedies the Chamber can impose or recommend to the Security Council and the Assembly of State Parties where article 87 (7) of the Statute is invoked by this Court. These observations are novel and may impact on the future cases before the Court.

#### **IV South Africa's Domestic Legal Obligations**

19. South Africa has enacted the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("Implementation Act") to give domestic effect to the Statute. The Implementation Act strips heads of state of any immunity from arrest or

---

<sup>5</sup> See for example Trial Chamber 1, *The Prosecutor v. Jean-Paul Akayesu*, "Order Granting Leave for Amicus Curiae to Appear", Case No. ICTR-96-4-T, 12 February 1998.



prosecution for international crimes,<sup>6</sup> and overrides any other domestic legislation that provides otherwise.

20. In a judgment handed down just over a year before President Bashir's visit, the South African Constitutional Court resoundingly affirmed the need for South Africa, as a State Party, to comply with its international obligation, under the Statute, to bring to justice the alleged perpetrators of international crimes.<sup>7</sup>
21. SALC submits that it is not open to the South African government to claim that its domestic legal obligations were ambiguous on this matter. Should its request for leave to make submissions be granted, SALC will provide the Chamber with full observations on the statutory provisions and relevant jurisprudence within South Africa that unambiguously compelled the government to arrest and surrender President Bashir.
22. In particular, the government parties had been alerted to their legal obligations with respect to President Bashir's arrest:
  - 22.1. On or about 30 July 2009, the South African government had sent an invitation to President Bashir to attend President Zuma's inauguration. SALC wrote to the government, highlighting that were President Bashir to attend, South Africa would be obliged to arrest and surrender him or would flout its legal obligations. As a result, the then-Director-General of the Department of International Relations and Cooperation issued a public statement recording that President Bashir would risk arrest, should he enter South Africa.<sup>8</sup> President Bashir consequently cancelled his trip.
  - 22.2. Regarding President Bashir's anticipated attendance at the AU Summit in 2015, SALC wrote to the relevant South African authorities (namely, the Minister of International Relations and Co-operation, the Minister and

<sup>6</sup> In section 4. The South African Supreme Court of Appeal confirmed as much in *Minister of Justice and Constitutional Development*, paras 93-103.

<sup>7</sup> *National Commissioner of the South African Police Service v Southern African Litigation Centre and Another* [2014] ZACC 30; 2015 (1) SA 315 (CC).

<sup>8</sup> See, in this regard, *Minister of Justice and Constitutional Development and Others* at para 104.

Director-General of Justice and Correctional Services, The Minister of Police, The Chief State Law Advisor, and The National Director of Public Prosecutions) as early as 21 May 2015, recording that, in terms of the Implementation Act:

*“. . . were President Bashir to be present on the territory of South Africa, and the International Criminal Court were to request his arrest and surrender, the Director-General of the Department of Justice and Constitutional Development ‘must immediately on receipt of that request, forward the request and accompanying documents to a magistrate, who must endorse the warrant of arrest for execution in any part of the Republic’.*

*Accordingly, the South African government is required to make it clear, as it has done before, that should President Bashir accept the AU Summit invitation, the South African government will be duty bound to arrest him.”* (footnotes omitted; emphasis in original text).

- 22.3. On 25 May 2015, SALC received a response from the Chief State Law Advisor, recording that:

*“Government is mindful of its international obligations which it takes seriously. However, should [he] be required to do so, [he] shall provide the ministers concerned with advice on the issue raised by [SALC].”*

- 22.4. SALC’s letter and the Chief State Law Advisor’s response are attached as **KRK3** and **KRK4** respectively.
- 22.5. On 13 June 2015, SALC learnt through press reports that President Bashir had nevertheless been included on the programme to speak at the AU Summit, and that he was due imminently to arrive in Johannesburg, South Africa.
- 22.6. SALC then wrote another letter on 13 June 2015, directed to 12 different government parties (“the government parties”), requesting them to inform SALC of the steps to be taken to effect the arrest of President Bashir, and recorded that SALC would launch urgent proceedings in the High Court to ensure that the authorities complied with their obligations under the Rome Statute, if that became necessary. That letter is attached as Annexure **KRK5**.

R  
KRC

No response was received.

23. SALC submits that each of these factors is relevant in considering whether South Africa acted in breach of its obligations under the Statute.

**V Detailed account of the facts surrounding President Bashir's departure**

24. SALC is intimately positioned to make observations regarding what transpired on the days leading up to, and on the day of, President Bashir's escape from South Africa. It submits this information will be of assistance to the Chamber in properly determining the case.

**(a) The urgent application**

25. As President Bashir was confirmed to be in the country for the AU Summit, and because the government parties failed to give the necessary undertakings, SALC was forced to launch an urgent application to compel the government parties to arrest and surrender President Bashir to this Court.
26. This application was initially heard on Sunday morning, 14 June 2015. At that time, the government parties contended that they were not ready to argue the application and accordingly acceded to an order, granted by Fabricius J of the High Court, directing the government respondents to take all necessary steps to prevent President Bashir from leaving South Africa, pending the outcome of the application. That order was subsequently amended to provide as follows:

*"President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until a final order is made in this application, and that the respondents are directed to take all necessary steps to prevent him from doing so:*

*The eighth respondent, the Director General of Home Affairs, is ordered:*

*To effect service of this order on the official in charge of each and every point of entry into, and exit from, the Republic; and*

*Once he has done so, to provide the applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit. . ."*

27. That interim order is attached as **KRK6**.
28. By virtue of the interim order, the government parties assumed additional legal obligations in relation to President Bashir's potential arrest and surrender.
29. SALC's application was then set down for hearing at 11h30 on Monday 15 June 2015. The High Court directed the government parties to file any answering affidavits by 09h00 on 15 June 2015 and SALC to reply by 10h00. However, the government parties' answering affidavit was only furnished to SALC at 10h50 and to SALC's counsel at 11h15. The government parties failed to provide the High Court with any formal explanation for this delay. Given the urgency of the matter and the fear that President Al Bashir would exit the country before the urgent hearing commenced, SALC waived its right to file a replying affidavit.
30. The hearing commenced at 11h30 before a full bench of the Pretoria High Court. A video recording of the full hearing of the matter on 15 June 2015 is available.<sup>9</sup>
31. At the commencement of the hearing, counsel for the government parties confirmed that all but five ports of entry and exit had been served with the interim order and confirmation of such service had been received. At that point, there was no clarity as to which were the outstanding ports of entry and exit.
32. Due to the late filing of the government parties' answering affidavit, the judges presiding did not have an opportunity to peruse the affidavit and the High Court requested an adjournment to do so. The government parties' counsel submitted that it was his instructions that the matter could stand down to 14h00 as President Bashir was to attend the AU Summit which was due to end that evening and he would therefore not depart before the end of the Summit.
33. SALC requested an adjournment only until 13h00 as there were still a few ports of entry and exit that had not confirmed receipt of the interim order. Furthermore, there were news reports that the Sudanese airplane ("Sudan01") was seen landing at Waterkloof Air Base ("Waterkloof"). Accordingly, there was a risk of President Bashir

---

<sup>9</sup> [https://www.youtube.com/watch?v=QrnyIGVqB\\_o](https://www.youtube.com/watch?v=QrnyIGVqB_o)



leaving the country and escaping arrest. As such SALC's counsel requested that this matter continue to be heard expeditiously.

34. During this adjournment, counsel for SALC was made aware of media reports that President Bashir had left South Africa. On resumption of the hearing, counsel for the government parties stated that the government parties were surprised at the media reports and that, to the best of the government's knowledge, President Bashir was in the Republic of South Africa.
35. The government parties' counsel further informed the High Court that:
  - 35.1. he had requested the Director-General of Home Affairs to verify reports that President Bashir had departed from Waterkloof and was awaiting instructions;
  - 35.2. he had been instructed by another official (who has since been appointed the South African National Director of Public Prosecutions) that President Bashir's name was not on the list of passengers who had taken off from Waterkloof;
  - 35.3. service of the interim order had been effected on Waterkloof and that the ports of entry and exit that had not already confirmed receipt of the interim order were all remote ports; and
  - 35.4. unless he advised otherwise, the High Court could assume that President Bashir was still in the country. It was on this basis that the High Court continued to hear counsels' submissions on the merits of the matter.
36. After hearing argument and adjourning for a short while, the Judge President handed down an order later that afternoon, attached as Annexure **KRK7** ("the final order"). (On 24 June 2015, the High Court handed down its written reasons for the final order that it granted on 15 June 2015. The judgment is attached as annexure **KRK8**.) The final order of 15 June 2015 declared the government parties' failure to arrest President Bashir unlawful, and compelled government parties to do so.
37. Immediately after the final order was handed down, and despite his earlier assurances

Handwritten signature and initials in the bottom right corner of the page.

on behalf of the Government, the government parties' counsel informed the High Court that the government had verified information that President Bashir had indeed departed and was on his way to Sudan.<sup>10</sup>

38. The government parties' counsel made an undertaking that the Minister of State Security and the Minister in the Presidency would fully investigate the circumstances of this departure.
39. Following a request from SALC's counsel, the High Court ordered that, within seven days, the government parties file an explanatory affidavit explaining the circumstances around the departure of President Bashir, disclosing the time that President Bashir left and the port of exit from which he did so.

**(b) The government parties' explanatory affidavit**

40. On 25 June 2015, the government parties filed an explanatory affidavit as directed by the High Court. The explanatory affidavit is attached as annexure **KRK9**. The explanatory affidavit was deposed to by Mr Apleni, the Director-General of Home Affairs. In summary, Mr Apleni stated the following: -

- 40.1. Government parties' counsel had been informed by "Government" that President Bashir had departed from the Republic of South Africa.
- 40.2. The interim order had been served on all 72 ports of entry and exit in the Republic and that by the time that the hearing on 15 June 2015, all but two of the ports of entry and exit had confirmed receipt.<sup>11</sup> Attached to the affidavit is annexure MA1 detailing the acknowledgments of receipt received from the various ports of entry.<sup>12</sup>
- 40.3. From annexure MA1, it is clear that the order was furnished to officials at

<sup>10</sup> The explanatory affidavit filed on behalf of the government respondents incorrectly records that the court was informed of President Bashir's departure prior to the handing down of the order.

<sup>11</sup> Explanatory affidavit, **KRK9**, para 6. There is a factual discrepancy as to how many ports of entry and exit were still outstanding – during the proceedings on 15 June 2015, the government respondents' counsel submitted that there 5 ports of entry outstanding.

<sup>12</sup> Id at annexure MA1, annexure A.

Handwritten signature and initials, possibly 'f' and 'KKA', located in the bottom right corner of the page.

Waterkloof who confirmed receipt.<sup>13</sup>

- 40.4. Sudan01 was located at Waterkloof for “security reasons and refuelling.”<sup>14</sup> SALC understands that the airplane was first located at OR Tambo airport (a commercial airport) but was moved to Waterkloof on the evening of 14 June 2015.
- 40.5. Waterkloof is under the command and control of the Department of Defence and is not a normal port of entry or exit.
- 40.6. At all times during the visit of the Sudanese delegation, there was a protocol officer from the South African Department of International Relations and Cooperation (“protocol officer”) who accompanied the Sudanese delegation and was attached to the delegation. The protocol officer was responsible for facilitating the official schedule and itinerary of President Bashir.<sup>15</sup>
- 40.7. At all times during the visit of the Sudanese delegation, the South African Police Services (“SAPS”) provided static and mobile protection to President Bashir.<sup>16</sup>
- 40.8. On 15 June 2015, the protocol officer received communication that the visiting Sudanese delegation wanted to travel from Sandton to Waterkloof. The protocol officer informed SAPS,<sup>17</sup> which then made the requisite security arrangements to accompany the delegation to Waterkloof.<sup>18</sup>
- 40.9. The Venue Operating Centre for Waterkloof was activated and the South African Air Force ensured the processing of the delegation and the clearing of the aircraft at Waterkloof.<sup>19</sup>
- 40.10. At Waterkloof, as the Sudanese flight was designated a VIP flight, the

---

<sup>13</sup> Id at para 12 and annexure MA1, annexure A.

<sup>14</sup> Id at para 12.

<sup>15</sup> Id at para 9.

<sup>16</sup> Id.

<sup>17</sup> Id at para 12.1.

<sup>18</sup> Id at para 12.1.

<sup>19</sup> Id.

passengers on the flight did not personally present themselves before the immigration officer on duty.<sup>20</sup> The passports were collected by two Sudanese representatives who were accompanied by the protocol officer to present their passports to the immigration officer.<sup>21</sup>

- 40.11. At about 11h55 on 15 June 2015, following media reports that President Bashir was or had departed, Mr Apleni enquired from the immigration officials who were on duty to verify the information. He states that the immigration officials on duty informed him that *"the passport of President Bashir was not part of the passports that were handed to immigration for processing of the persons that were on board the flight."*<sup>22</sup> The affidavit does not identify the name of the official who gave this assurance.
- 40.12. The officials of the Department of Home Affairs were at all relevant times aware of the interim court order handed down on 14 June 2015.<sup>23</sup>
- 40.13. President Bashir's passport was not presented to the immigration officer by the two Sudanese representatives. This is confirmed by the Movement Control System of the Department of Home Affairs which records that although President Bashir entered the Republic of South Africa, there is no record of him leaving the Republic.<sup>24</sup>
- 40.14. The Sudanese aircraft departed Waterkloof at approximately 11h50.<sup>25</sup>
- 40.15. Attached to the explanatory affidavit are a number of confirmatory affidavits. The confirmatory affidavit of an official from the Department of International Relations and Cooperation ("DIRCO") is telling. The deponent confirms the content of the explanatory affidavit insofar as it relates to the processes and protocols normally followed by DIRCO official. However, the confirmatory affidavit further states that:

---

<sup>20</sup> Id at para 11.4.

<sup>21</sup> Id.

<sup>22</sup> Id at para 7.

<sup>23</sup> Id at para 12.3.

<sup>24</sup> Id at para 13.

<sup>25</sup> Id at para 8.

*"... DIRCO officials execute their functions in line with the applicable provisions of customary international law, the Diplomatic Immunities and Privileges Act, No 37 of 2001 ...any host Agreement concluded between South Africa and an international organisation for the hosting of an international conference in South Africa."*

**(c) The High Court's finding and further proceedings in the South African Courts**

41. The High Court did not accept the government's explanations. As the Full Court put it:

*"Perhaps the questions that can be asked about the apparent non-compliance with this court's explicit order of Sunday 14 June are: how was it possible that President Bashir would, with his whole entourage, travel from Sandton to Waterkloof Airbase, without any of the Respondents' knowledge?; how was it possible that the Sudanese plane would take off from the airbase without the Respondents knowing whether the President was on board or not?; how would that plane be able to land in Sudan by late afternoon if it had not departed at about noon that same day?"*

*The answers suggest themselves."*<sup>26</sup>

42. The government parties applied for leave to appeal the order and judgment of the High Court. On appeal, the Supreme Court of Appeal ("the SCA") had the opportunity to consider the state's explanatory affidavit. The SCA made trenchant criticisms of the government parties' conduct, stating that: -

*"The affidavit failed to explain how a head of state, using a military air base reserved for the use of dignitaries, could possibly have left the country unobserved. The Director-General said that President Al Bashir's passport was not among those shown to officials of his department, but as an explanation that is simply risible. Senior officials representing Government must have been aware of President Al Bashir's movements and his departure, the possibility of which had been mooted in the press. In those circumstances the assurances that he was still in the country given to the Court at the commencement and during the course of argument were false. There seem to be only two possibilities. Either the representatives of Government set out to mislead the Court and misled counsel in giving instructions, or the representatives and*

<sup>26</sup> At paras 36 to 37. See further Erika De Wet, "The implications of the visit of Al Bashir to South Africa for international and domestic law", (2015) 13 *Journal of International Criminal Justice*, 1049 at pp 1068 to 1071.

*counsel misled the Court. Whichever is the true explanation, a matter no doubt being investigated by the appropriate authorities, it was disgraceful conduct.*<sup>27</sup>  
(Emphasis added)

43. The SCA judgment is attached as **KRK10**.
44. Although the government parties initially launched an appeal of the SCA judgment in the Constitutional Court, they subsequently withdrew this application. In doing so, the government parties must be taken to accept that, as a matter of law and of fact, they had contravened their domestic legal obligations, as the SCA had held.

**(d) SALC's Observations Regarding the Conduct of the Government Parties**

45. This is not least because it appears that South African officials aided and abetted President Bashir's departure. This can be inferred from the following:
- 45.1. After the grant of the interim order, President Bashir's plane Sudan01 was moved from the OR Tambo Airport to Waterkloof on Sunday 14 June 2015. OR Tambo airport is a commercial airport, not under the direct control of any of the government parties. Waterkloof, on the other hand, is under the direct control of the government parties and the Minister of Defence.
- 45.2. An unnamed DIRCO official was attached to the Sudanese delegation and accompanied them during their visit. This official was informed when the Sudanese delegation requested to be transported from Sandton to Waterkloof and facilitated the security arrangements that had to be made for the delegation. The official also accompanied the Sudanese representatives when their passports were taken to the immigration officials prior to their departure.
- 45.3. SAPS VIP protection services, whose responsibility it is always to know the whereabouts of the dignitary they are protecting, provided the necessary security to ensure the safe transport of the Sudanese delegation from Sandton to Waterkloof. The distance between Sandton and Waterkloof is

---

<sup>27</sup> 2016 (3) SA 317 (SCA) at para 7.

50.1 kilometres.

- 45.4. The Venue Operating Centre for Waterkloof was activated and the South African Air Force (“SAAF”) ensured the processing of the delegation and the clearing of the aircraft at Waterkloof.<sup>28</sup>
- 45.5. The Ministers responsible for DIRCO and SAPS were parties in the proceedings in the High Court. Had these Ministers wanted to ensure compliance with the interim order, they could have taken the reasonable step of informing their officials, in whose care the Sudanese delegation were entrusted, that the High Court had granted an order prohibiting President Bashir from leaving the country.
- 45.6. The facts contained in the explanatory affidavit demonstrate that there were SAPS, DIRCO and SAAF officials who accompanied and assisted the Sudanese delegation – including President Bashir – in departing from Waterkloof.
- 45.7. The explanatory affidavit also fails to explain how the government parties came to the knowledge that President Bashir had indeed departed.
46. The government parties, having been afforded an opportunity to put forward a full account, failed to give any plausible explanations to account for all the other parties who were involved in the process. The sole reason that the explanatory affidavit puts forward for President Bashir’s escape is that his passport was not given to the immigration officials on duty. However, this explanation fails to account for the actions of the government officials who accompanied the Sudanese delegation during their stay in South Africa and who were required to know of the whereabouts of President Bashir at all times, and so knew or ought to have known that President Bashir and his delegation were leaving the country.

## VI Documentary Evidence

47. SALC thus has strong grounds to believe that a number of government agents,

---

<sup>28</sup> Id.



including some high-ranking officials, were aware of the whereabouts of President Bashir at the time of his departure and are implicated in President Bashir's escape. SALC assumes that South Africa, in its submissions, will provide the full names and details of these officials that were involved, thereby avoiding the need for the Chamber to compel it to do so.

48. SALC submits that it can be of further assistance to the Chamber by identifying and providing various documentary evidence that indicates how South Africa failed to comply with its international and domestic legal obligations. SALC also wishes to draw to the Chamber's attention documents which South Africa should produce or which could be called for by the Chamber:

48.1. The report of the Minister of State Security and the Minister in the Presidency in which they fully investigated the circumstances under which President Bashir left the Republic.<sup>29</sup>

48.2. The report pursuant to the internal investigation of the Department of Home Affairs, referred to in the explanatory affidavit.<sup>30</sup>

48.3. The general protocols used for the departure of delegations in terms of multilateral events such as the African Union Summit referred to in the explanatory affidavit.<sup>31</sup>

48.4. The names and details of the protocol officer assigned to the Sudanese delegation as well as the schedule and itinerary of the visiting Sudanese delegation for the AU Summit held between 7–15 June 2015.

48.5. The communication and documents relating to the relocation of the Sudan01 aircraft from OR Tambo to Waterkloof.

48.6. The communication from the Sudanese delegation to the DIRCO protocol

---

<sup>29</sup> The explanatory affidavit records, in para 4, that such investigations were to be undertaken. The government parties also made an undertaking to the High Court, though their senior counsel, that such an investigation would be undertaken.

<sup>30</sup> Id at para 8.

<sup>31</sup> Id at para 9.

officer indicating that there was a need to move the delegation from Sandton to Waterkloof, also referred to in the explanatory memorandum.<sup>32</sup>

- 48.7. The communication referred to in the explanatory memorandum from the DIRCO protocol officer to the SAPS Protection Services so that the requisite security arrangements for the transport of the Sudanese delegation from Sandton to Waterkloof.<sup>33</sup>
- 48.8. The communication requesting the Department of Home Affairs to make available immigration officers to process the passports of the visiting delegations.<sup>34</sup>
- 48.9. A legible copy of the print out of the Enhanced Movement Control System attached as annexure MA2 to the explanatory affidavit.
49. SALC also understands that the conduct of the government parties' counsel has been subjected to scrutiny by the General Council of the Bar and/or the Johannesburg Society of Advocates, pursuant to a recommendation by the Supreme Court of Appeal that his and the government parties' conduct be investigated. The records of that investigation may, SALC submits, shed light on what occurred, and may be of assistance to the Chamber.

## **VII Benefit of a Formal Finding of Non-Compliance**

50. Finally, SALC argues that it would be beneficial for the Chamber to make a formal finding of non-compliance against South Africa. To date, the South African government has failed to sufficiently investigate and to hold accountable those involved in the government parties' actions. Accordingly, a formal finding would serve as an important accountability mechanism and vindicate the rule of law. This is the case both domestically, as it would bolster subsequent measures within South Africa to hold officials to account, as well as internationally to ensure that South Africa and other States Parties meet their obligations under the Rome Statute.

---

<sup>32</sup> Id at para 12.1.

<sup>33</sup> Id at para 12.1.

<sup>34</sup> Id at para 10.

51. Thus far, attempts to hold relevant officials accountable in South Africa have been fruitless. Ordinarily, parties who flout court orders are liable to contempt of court proceedings.
52. Accordingly, paragraph 39 of the High Court judgment of 24 June 2015 invited the National Director of Public Prosecutions to consider whether criminal contempt of court proceedings should be instituted following the state's failure to implement the interim order.
53. Furthermore, in two letters, dated 9 July and 6 August 2015, SALC requested the office of the National Director of Public Prosecutions (NDPP) to investigate what occurred and to consider contempt of court proceedings against relevant officials who facilitated the flight of President Al Bashir. These letters are attached as **KRK11** and **KRK12**.
54. On 21 August 2015, the NDPP reverted to SALC, undertaking to respond to their letters once judgment in the application for leave to appeal was handed down. This letter is attached as **KRK13**.
55. Following the conclusion of the proceedings before the Supreme Court of Appeal, SALC again wrote to the NDPP on 8 and 12 December 2016 enquiring whether the NDPP's office intends to bring contempt charges. There has been no response to these letters, which are attached as **KRK14** and **KRK15**.
56. It should be noted that the current NDPP was cited as a respondent in SALC's original application. The current NDPP personally attended and participated during the High Court proceedings, and gave the undertaking referenced in paragraph 35.2 above.
57. Despite this, it appears that to date no investigations on the matter have been commenced and no tangible progress has been made by the State on the said request. It appears that there either the mechanisms or the political will to ensure accountability for the episode are lacking. In the absence of an international non-compliance order, the government parties' conduct may be without adverse consequences for them.

Handwritten signature and initials, possibly 'KPK'.

58. In the premises, it is respectfully submitted that the Chamber proceed to determine that South Africa failed in its obligations under articles 87 and 89 of the Statute by failing to arrest and surrender President Bashir when he was in South Africa.

### VIII Conclusion

59. For the foregoing reasons, SALC requests that the Chamber grant leave to submit *amicus curiae* observations on these matters pursuant to Rule 103, within a time limit determined by the Chamber, including the right for SALC to appear at the hearing on 7 April 2017 with a view to assisting the Chamber by way of oral submissions, including by answering any questions that arise in respect of the submissions or documentation offered by SALC or by the South African Government.

Respectfully submitted



**KAAJAL RAMJATHAN-KEOGH**

Executive director of the Southern Africa Litigation Centre

Dated this 27<sup>th</sup> day of January 2017  
At Johannesburg, South Africa



27 JANUARY 2017

**Prasothmen Vennagopal Naiker**  
**Commissioner of Oaths**  
**Practising Attorney R.S.A**  
**Suite 8, 2nd Floor**  
**2 Hood Avenue Rosebank**  
**Tel: 011 252 3000 Fax: 011 447 9559**

