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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN DARFUR, THE SUDAN

Public Document

**Application on behalf of Citizens' Organisations of The Sudan in relation to the
Prosecutor's Applications for Arrest Warrants of 14 July 2008 and 20 November
2008**

Source: Applicants, represented by Sir Geoffrey Nice QC and Rodney Dixon

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

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Section**

Other

A. The Applicants and who they represent

1. The Applicants are the Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG).
2. The SWTUF is the union of all trade unions of Sudan with affiliates from 25 state unions and 22 professional federations. Its affiliates include the State Trade Unions for the whole of Darfur. The SWTUF's membership covers the vast majority of the organised working people of Sudan comprising about two million citizens from the government, private and informal sectors, as are identified on the list of affiliated unions.¹ The views set out in this Application by the SWTUF are based on those expressed widely by its membership, and the leadership of the SWTUF is confident as the elected officials of the union that the opinions put forward are representative.
3. The SIDG is a non-governmental committee of Sudanese citizens established out of concern for the negative effects that ICC arrest warrants could have at this time for the peace process in Sudan and for the ordinary people of this country.² The aims and initiatives of the committee are supported by many Sudanese NGOs and by the association that co-ordinates Sudanese NGOs.³
4. The SIDG has initiated a petition requesting the Pre-Trial Chamber not to issue arrest warrants for President Omar Hassan Al Bashir and/or any rebel commanders in light of the detrimental consequences which could ensue in Darfur and Sudan and the region more widely. To date over one million signatures of Sudanese citizens have been gathered, and the campaign continues.⁴

¹ Annex 1: List of affiliated unions of the SWTUF and confirmation of its membership figures by its President, Prof. Ibrahim Ghandour.

² Annex 2: Founding Statement of the SIDG. The SIDG was formed by a group of concerned Sudanese citizens in the wake of the filing of the Prosecutor's application for an arrest warrant for President Omar Hassan Al Bashir and the concerns that were being raised both about the consequences of this application for stability in Sudan and about the Prosecutor's motives and the nature of the charges being sought. The arrest warrants that had already been issued for Ahmad Harun and Ali Kushayb had raised major tensions in Sudan, and in forming the SIDG it was the view of the founding members that the Prosecutor's application in respect of the serving President of Sudan would seriously aggravate the situation, creating an impending danger which urgently needed to be highlighted and addressed.

³ Annex 3: Letters of support from these NGOs which will be supplied to the Pre-Trial Chamber very shortly.

⁴ Annex 4: Copies of the petitions signed to date will be forwarded from Sudan to the Pre-Trial Chamber very shortly.

5. In raising the concerns expressed in this Application, the Applicants are supported by the tribal leaders of the Fur, Masalit and Zaghawa tribes of Darfur, groupings which are alleged to be *victims* in the Prosecutor's application for an arrest warrant in respect of President Bashir.⁵
6. In addition, various national organisations in Sudan (not affiliated to the SWTUF and not included on the list in Annex 1) have also lent support to the initiatives of the Applicants, including the National Federation of Sudanese Youth, the Sudanese Farmers General Union, the Sudanese Women General Union, the General Sudanese Students' Union, the General Sudanese Pastoralist Union, and the Sudanese Journalists Union.⁶ As explained in their letters of support, these groupings and organisations represent millions of Sudanese citizens.

B. The Applicants' request

7. The Applicants ask that this filing be considered by the Pre-Trial Chamber dealing with any and all applications for arrest warrants by the ICC Prosecutor that relate to the conflict in Darfur.⁷ It has been made public that the Prosecutor has applied for arrest warrants for President Omar Hassan Al Bashir and for unnamed commanders of rebel groups in Darfur on 14 July 2008 and 20 November 2008 respectively.⁸
8. The Applicants request that no arrest warrants are issued by the Pre-Trial Chamber at this time on grounds that (1) issuing such warrants would have grave implications for the peace building process in Sudan and that deference must be given to considerations of national interest and security; (2) that the interests of justice will not be served particularly in light of the Prosecutor's conduct in bringing these applications; (3) that such warrants could entrench the negative perceptions of the ICC and thus contribute to a deterioration of the situation in Sudan; and, (4) that alternative

⁵ Annex 5: Statements of the tribal leaders of Darfur who each request that the conflict in Darfur be resolved internally by local conflict resolution mechanisms. There may be good grounds to apply for these persons and those they represent to qualify as victims pursuant to the provisions of the ICC Statute and Rules. Such applications may be appropriate at a later stage in these proceedings if the proceedings continue. This application is made without prejudice to their rights to appear as victims at that later stage.

⁶ Annex 6: Letters of support from each of these organisations not included in the list at Annex 1.

⁷ The provisions under which the Application is brought and legal arguments are set out below in Part E.

⁸ As explained in footnote 2, two warrants were issued prior to the application in respect of the President.

means of transitional justice and resolution are being and will be pursued without the need for any consideration of involvement of the ICC at this stage.

Implications for peace building and considerations of national interest

9. In making this request, the Applicants urge the Pre-Trial Chamber to accept that issuing an arrest warrant for the President of Sudan and any individual on any side of the Darfur conflict at this stage will bring great danger to the region as a whole and for Darfur and Sudan in particular. Due consideration must be given to the fact that the relative peace that presently exists in Darfur - under the Darfur Peace Agreement (DPA) of May 2006 - as well as under the peace agreement that ended the civil war between the north and south of Sudan, the Comprehensive Peace Agreement (CPA) - would be under threat of disintegrating.

10. As for the CPA, it is widely accepted that the President and his party were instrumental in brokering the extensive peace agreement between the north and south of Sudan which was signed on 9 January 2005, ending more than two decades of war. A leading independent expert has said of the CPA, it “remains the most thoughtful, considered and far-reaching document in Sudanese history. Its ideas for sharing wealth and power address the core problems of mismanaged diversity and unequal development, and offer a model for other countries in the Horn of Africa”.⁹ It is a matter of reliable opinion and widely accepted that the President of Sudan and his office are vital to the effective implementation of these peace arrangements - regardless of the view taken of the Government’s record to date - at a very significant time with national elections scheduled for this year and a referendum on the independence of Southern Sudan for 2011, and that the Prosecutor’s application has introduced a volatility and a higher chance of a return to war.¹⁰

11. Indeed, there is a body of reliable material - albeit often from differing perspectives - that shows in various ways how and why reaction to the issuing of arrest warrants and

⁹ Edward Thomas, “Against the Gathering Storm, Securing Sudan’s Comprehensive Peace Agreement”, A Chatham House Report (“Report of Edward Thomas”), 9 January 2009, p. 34, appended at Annex 10. Chatham House, the name by which the Royal Institute of International Affairs (London) is widely known, was founded in 1920 and is the world-leading source of independent analysis, informed debate and influential ideas on how to build a prosperous and secure world for all. It is widely regarded as a forum for independent discussion and research that sets the agenda and shapes policy in international affairs, attracting the highest profile speakers and researchers.

¹⁰ See Report of Edward Thomas, p. 33 (Annex 10).

indictments by the ICC carries the serious risk of unraveling the peace building processes in Sudan and creating a humanitarian crisis potentially far worse than before.¹¹ The Applicants request that this material and all of the documentation filed with this Application be taken into account by the Pre-Trial Chamber in considering the Prosecutor's applications for arrest warrants. It is the submission of the Applicants that these considerations, although of a mixed legal and political character, are directly relevant to whether there is a reasonable basis to issue an arrest warrant in light of all the of evidence before the Chamber and the real interests - preeminently the security interests - of Sudan.¹²

12. The material includes the assessments of experts with very extensive knowledge and experience of Sudan but who do not come from Sudan and who are free from partisan loyalties of any kind, as well as leading local experts:

- Alex de Waal, Harvard University (Dept. of Government) and Social Science Research Council, an independent researcher and consultant who is not regarded as a supporter of the Government of Sudan, but who is nevertheless of the view that "The interests of peace, democracy and justice in Sudan, and the interests of the ICC, are not best pursued by the approach of demanding an arrest warrant against President Bashir".¹³ De Waal points out that western governments have decided to engage the Sudanese government in a negotiated transition to peace and democracy; that achieving these objectives requires good-faith negotiation, but that the Prosecutor's application is completely opposed to this strategy as it demands regime change; and, that it is possible that it will destabilise transitions to peace and democracy with adverse results: "It is in fact an immense gamble with the future of Sudan". He also distinguishes the case of President Bashir from those of other national leaders who have been indicted by international courts, like Charles Taylor and Slobodan Milosevic, on the basis that these prosecutions occurred *after* a

¹¹ This material is contained in four reports of leading western and local experts on Sudan (Annexes 7-10) as well as the assessments of African countries as expressed in the Report of the Committee of Intelligence and Security Services of Africa (CISSA), 24-30 November 2008 (Annex 11). In addition, Annex 12 contains the statement of the General Commissioner for the Commission of Disarmament for North Sudan (which covers Darfur) established under the Comprehensive Peace Agreement (CPA), 28 December 2008.

¹² The legal arguments relied upon for the admissibility of this Application are elaborated in full in Part E below.

¹³ Annex 7: Memorandum to be published by Alex de Waal entitled "The Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir: A Critique" ("De Waal memo"), paras. 50-77, quoted at para. 77.

transition to democracy in the context of a new national arrangement, and thus have little bearing on the Sudanese case.

- Peter Bechtold is a seasoned expert in Sudanese affairs who has spent much time in Sudan working and consulting with leaders from all sides and the international community. He chairs the Near East and North African Area Studies of the Foreign Service Institute at the Department of State, Washington DC. Peter Bechtold has provided a report to the Applicants on the background to the conflict in Darfur and the implications of the Prosecutor's actions.¹⁴ In addition to the violence that could erupt from a warrant being perceived as a national insult, he highlights that opposition leaders are disappointed with the prospect of a warrant as it could consolidate support for the President leading to a landslide victory in the elections scheduled for this year, a point echoed by the other experts who fear that a warrant could undermine the democratic process, which itself could lead to tensions and renewed violence.¹⁵
- Bona Malwal, Senior Associate, Middle East Studies, St Antony's College, Oxford, and prominent politician and journalist from Southern Sudan, whose lecture delivered at St Antony's College on 19 November 2008 is appended.¹⁶ Mr. Malwal indicates that for the Southern Sudanese as a people there is no guarantee without President Bashir - he agreed the CPA and signed it into law and is thus the constitutional guarantor that the CPA will continue to be respected and implemented. Bona Malwal also emphasises the dangers and impracticalities of the Prosecutor seeking to remove a serving head of State in that the ICC cannot assist Sudan with replacing its President. The political upheaval for Sudan could be "much greater than the current war in Darfur".
- Edward Thomas, an independent expert on Sudanese history and politics who has worked for the UN in Sudan, and whose report on the CPA was launched at Chatham House, Royal Institute of International Affairs (London), on 9 January 2009.¹⁷ In it he notes that attention has been diverted away from the implementation of the CPA by the application for President Bashir's arrest. He

¹⁴ Annex 8: Report of Peter Bechtold prepared for the Applicants, 8 January 2009.

¹⁵ See De Waal memo, para. 67 (Annex 7) and Report of Edward Thomas, p. 33 (Annex 10).

¹⁶ Annex 9: "The Implication of the ICC Prosecutor's Action on Peace in Sudan" ("Speech of Bona Malwal"), 19 November 2008.

¹⁷ Annex 10: Edward Thomas, "Against the Gathering Storm, Securing Sudan's Comprehensive Peace Agreement", A Chatham House Report ("Report of Edward Thomas"), 9 January 2009.

observes that the international community's role has been contradictory: instead of political negotiation in respect of Darfur in the wake of the CPA, the international community has ended up proposing a prosecution (even though the US reportedly promised the Government of Sudan that it could be rehabilitated by signing the CPA), which has "dramatically changed the political scene in Sudan". Dr Thomas warns that the Prosecutor's actions (in combination with other factors) may give rise to one or more crises in Sudan in the next few months "that have the potential to create widespread human suffering", and pleads for a return to the notion of comprehensive peace negotiations in which negotiations over Darfur should be dealt with together with the CPA. He underlines that the international community needs to recognise the serious risks that civilians will face in Sudan if the CPA and the project for peace fail.

13. Taken together, these materials provide compelling support for the proposition that arrest warrants would risk undermining national security and the peace building capacity of Sudan. These are imperative considerations that in the submission of the Applicants substantially outweigh the Prosecutor's application to seek the arrest of the President of Sudan.

Interests of justice

14. Further, the Applicants urge the Pre-Trial Chamber to find that it is, in any event, not in the interests of justice for the arrest warrants to be issued especially in light of the conduct of ICC Prosecutor and the charges he has selected.¹⁸
15. In this regard, the Chamber may be aware of public criticisms of the conduct of the Prosecutor in relation to his present application against President Bashir. The Applicants will be relying to an extent hereafter on those criticisms for what they show of lack of due process, of absence of disinterested analysis of available evidence and perhaps of oblique motives of the Prosecutor in his making public announcement of his application for a genocide charge. It may be important to have in mind from the outset that the Prosecutor - it is believed - has never been to Sudan or to Darfur. The expert, or one of the experts, on whom the Prosecutor is thought to have relied has

¹⁸ The Applicants arguments in this regard are outlined below in Part D.

never been to Sudan and is subject to wide criticism by his peers of his work. The substantial shortcomings in supporting evidence for the genocide and other charges have been pointed out by leading experts in the field, who have argued that the Prosecutor's application is misconceived and should not be supported.¹⁹

16. Although not the focus of the same attention, the Prosecutor's application of 20 November 2008 for arrest warrants or summonses for publicly unnamed rebel leaders suffers from similar shortcomings and political influence.
17. The timing of the rebel leaders application inevitably raises the question as to whether it was done as a 'balance' for the application in respect of President Bashir. Further, without in any way detracting from the seriousness of the crimes alleged in respect of international peacekeeping personnel and property, the application plainly fails to address any of the allegations made against the various rebel groups for mass atrocities allegedly committed against local Sudanese civilians in Darfur over many years. And this in the context of widely held views that the rebels only stand to benefit from the application in respect of the President and have no incentive to negotiate for lasting peace as long as the Prosecutor pursues President Bashir.²⁰ These are considerations extraneous to the Chamber's function, but do highlight the need for the very closest scrutiny of the evidence selected by the Prosecutor in support of this application.

Perceptions of the ICC

18. The Pre-Trial Chamber may also be aware in general terms of some of the concerns expressed by African States about the ICC. To date 30 African countries out of a total of 53 have ratified the Rome Treaty. There is no immediate prospect of more African countries ratifying so far as is known, and there is the suggestion of some withdrawing. There is a perception within Africa that the ICC has concentrated its attention on African countries and looked away from the conflicts of the great powers or from conflicts where the great powers have particular interests.²¹ This sense is associated with strongly held views that African problems need African solutions

¹⁹ See paras. 43-45 below, including a paper by Prof. William Schabas, a leading expert on genocide, contained in Annex 19, who described the charge as "spectacular and extravagant" in this paper entitled "What is Genocide? What are the Gaps in the Convention? How to Prevent Genocide?", pp. 1-2.

²⁰ For example see Report of Edward Thomas, p. 32 ("... the [Bashir] Application have emboldened rebels not to return to the negotiating table. The ICC allowed them to hope that the international community would change the Sudanese regime for them") (Annex 10); De Waal memo, para. 65 (Annex 7); Speech of Bona Malwal, para. 7 (Annex 9); and, Report of Peter Bechtold, pp. 7-8 (Annex 8).

²¹ See De Waal memo, para. 68 (Annex 7).

wherever possible.²² Although this is, clearly, a political issue, it has significance for this Application in two ways.

19. First, these concerns may well give rise to reaction against this, yet *another* ICC prosecution brought against an African, this time a serving head of state, that will prove dangerous for peace in Sudan and the Region. Any such reaction might be particularly strong if there was a perception that the Prosecutor's allegation of genocide was made for oblique - even publicity reasons - all suggestive of a lower standard of justice being appropriate to African nations and leaders than elsewhere.
20. Second, as alluded to above, issuing arrest warrants in respect of a serving head of state against this background might act as a disincentive to the cooperation of any interest groups within Sudan in any such international or part international negotiations as may otherwise be pursued.
21. Further, as set out more fully below, the Prosecutor's extraordinary political posturing over this particular application of his makes it appropriate to have in mind all aspects of the political background.
22. In the same vein, the Pre-Trial Chamber may be aware in general terms of arguments to the effect that reality in Darfur is very different from how it is portrayed in the Western Press²³, that the underlying issue could be Sudan's mineral wealth and oil, and which great power should get access to it, and that insincere political objectives lie behind the general characterisation of the crisis as a genocide.²⁴
23. This Application does not depend on any of these possibilities being true and makes only limited references to the material on which they are based. Nevertheless, there may be sufficient material on these topics - even if only touched on in this Application - to underline the need for special caution in the court's approach to the application of the Prosecutor, a caution that would be best reflected in complete respect for the

²² This aspect of the Application is outlined in full in Part C immediately below.

²³ See para. 45 below. Also see Report of Peter Bechtold, pp. 2-7 (Annex 8).

²⁴ It is also worth noting that the American Secretary of State at the time, Colin Powell, at first assessed that the Darfur crisis did not meet the tests of the definition of genocide, and yet two months later in September 2004 declared that the events in Darfur did constitute genocide. The sudden change was widely seen as an attempt to divert attention away from the events in Iraq in the run up to the 2004 US election and to relieve domestic political pressure: see David Hoile, *Darfur: the Road to Peace*, 2008, pp. 141-171, and the sources cited therein, which is appended hereto at Annex 13.

presumption of innocence and a refusal to take any factual assumption for granted. Further, the fact of referral by the UN should not be taken as any evidence of the true state of affairs and should be treated with the same caution.

Support for this request

24. In making this request for the reasons advanced, the Applicants speak with the authority that comes from representing a significant portion of the population of Sudan who would be directly affected by the consequences of arrest warrants and indictments, as explained in Part A above. The opinions expressed here should be regarded as being representative of a very large part of the population of Sudan generally, including of the population of Darfur.

25. The Government of Sudan has not engaged at all with the ICC in respect of the Prosecutor's applications with the result that there has been no drawing together of the many arguments - legal and otherwise - that run counter to the highly public campaigns orchestrated by those able to attract publicity - like Ms. Jolie, Mr. Pitt and Mr. Clooney - and on whom the Prosecutor has been willing to rely for practical support but whose campaigns fail to deal with scholarly work of the kind relied on in this Application and produced in its Annexes. These high publicity campaigns have also served the political agendas of those, like the USA, who have dared to label the crisis as genocide in late 2004 (but not as such since 2005) and who are no doubt nevertheless content to allow the same term to be the magnetic standard of the public campaigns.²⁵

C. The Applicant's position on the conflict in Darfur and accountability

26. The Applicants do not express any view on the facts of the Darfur conflict or on the possible culpability one way or another of any individual for crimes alleged to have happened there, including in respect of President Bashir. No investigations have been conducted by the Applicants to serve as a basis to make any conclusive findings.

²⁵ See Report of Peter Bechtold, p. 10 in which the genocide label is said to have been used by public campaigners due to "crisis fatigue" among NGOs and in order to get attention (Annex 8).

Nevertheless, the Applicants note that the International Commission of Inquiry on Darfur has found on the basis of its investigations that serious violations of human rights were committed by the belligerent parties²⁶, as has the Commission of Inquiry into Allegations of Human Rights Violations by Armed Groups in Darfur, established by the Government of Sudan.²⁷ These inquiries are a starting point from which further investigation and judicial action must be taken and this Application takes full account of - and does not seek to diminish in any way - the strong conclusions expressed in such inquiries.

27. The Applicants acknowledge that a 'transitional justice' measure or combination of measures - criminal trials, truth commission, reparation program, vetting - in conjunction with resolution through traditional (tribal) methods *must* be put in place to deal comprehensively with events that have happened in Darfur. To this end, the Sudan Peoples (Initiative) Forum, launched in November 2008, consisting of a broad cross-section of government, opposition, tribal and other representatives has shown that there is a determination to find lasting solutions to the Darfur crisis and to facilitate accountability.²⁸

28. The Pre-Trial Chamber is asked to take into consideration that as a matter of common sense and reliable opinion if the arrest warrants were issued it would likely have a harmful effect on this initiative and future political and judicial initiatives.²⁹

29. The Applicants accept that within any such transitional justice and traditional resolution measure/s there must be the power to investigate and sanction *any* individual shown to bear responsibility for any alleged crimes committed in the Darfur conflict, including in respect of President Bashir in accordance with the constitutional procedures set out in Articles 60 and 61 of the Sudan Constitution. These provisions, which were adopted in 2005 to incorporate the CPA, allow for the serving head of

²⁶ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005.

²⁷ Final Report of the Commission of Inquiry into the Allegations of Human Rights Violations by Armed Groups in Darfur, Western Sudan (established by Decree 2004/97). A criminal court has also been established for the trial of crimes committed in Darfur by order of the Chief Justice of The Sudan of 16 November 2005.

²⁸ Annex 14: English translation of the Final Report of The Sudan Peoples Forum, November 2008. The Chamber's attention is drawn only to the specific pages listed on the front page of this lengthy report for the purposes of this Application. See also comments on the Forum in Edward Thomas's report at pp. 32-33 (Annex 10).

²⁹ See De Waal memo, paras. 65-67 (Annex 7).

state and public officials to be investigated and prosecuted for alleged offences by the courts of Sudan.³⁰

30. The Applicants, however, ask the Pre-Trial Chamber to accept that any such measure must be internal to Sudan, albeit with the assistance of African countries and the international community, if justice is to be done without grave consequences of the kind they believe will follow from intervention in the affairs of Sudan at this stage by the ICC. The desirability of ‘in-Africa’ solutions, especially in light of the worsening perception of the ICC in Africa (whether accepted as being well-founded or not) has been encouraged by experts in African affairs and local leaders as the most sensible route at this time.³¹

31. Intervention by the ICC in the affairs of Sudan would be viewed by the vast majority of Sudanese as an imposition of a non-African solution to an African problem that remains susceptible to resolution by Sudan in co-operation with other nations of Africa and the international community. In particular, intervention by the ICC by attempting to prosecute the President of Sudan will be seen by most Sudanese as offensive in a way that will not be acceptable, regardless of any actual culpability of the President in crimes that may be alleged against him. The dignity of the office of a serving President, irrespective of who holds that office, must be preserved in the eyes of the citizens of Sudan.³² The continuation of President Bashir’s term of office is a matter properly to be decided by the people of Sudan, who will have the opportunity to vote for their President in the elections scheduled for this year. The Prosecutor’s

³⁰ These provisions state that although the President shall be immune from any legal proceedings during his tenure of office, “in case of high treason, gross violation of this Constitution or gross misconduct in relation to State affairs, the President or the First Vice President may be charged before the Constitutional Court upon a resolution passed by three quarters of all members of the National Legislature” (Article 60(2)). Article 60 provides that any person aggrieved by an act of the President or the Presidency may contest such act before the Constitutional Court if the alleged act involves a violation of the Constitution, the Bill of Rights, or the CPA, and before a competent court if the allegation is based on other legal grounds.

³¹ See, for example, Speech of Bona Malwal at para. 8 (Annex 9) and report of Peter Bechtold, p. 9 (Annex 8). Also see (1) Memorandum to EU Ambassadors on the ICC and Sudan of 17 July 2008 by Al Sadiq Al Mahdi, the last elected Prime Minister of Sudan who President Bashir replaced and who is currently a very prominent opposition leader of the Umma National Party (UNP) - in the memo he warns that the indictment of the President “will tear the Sudan up and set up a Somali scenario for Sudan” and thus he proposes non-ICC means for dealing with the crimes that have been committed in Darfur; and (2) Daffa Allah Al Haj Yousif, former Chief Justice of Sudan, “Traditional Justice and Reconciliation after Violent Conflicts: Learning from Sudan and African Experiences, The Justice of Restoring Rights, Curing Injuries and Erasing Feuds” (both in Annex 15).

³² Annex 16: Paper by the Sudan Bar Council of 19 July 2008, particularly at p. 5. Also see Speech of Bona Malwal, para. 4 (Annex 9); De Waal memo, para. 62 (Annex 7); and, Report of Peter Bechtold, p. 8 (Annex 8). The Office of the Presidency assumes a central role under the Comprehensive Peace Agreement (CPA), further underlining the prominence of the position for implementing the peace deal: see Chapter II of the CPA, parts 2.3-2.5, which provisions are included in this annex.

application is viewed as an inappropriate attempt to achieve regime change to the exclusion of the Sudanese electorate.³³

32. Moreover, the proposed intervention by the ICC in respect of President Bashir (and most recently in respect of rebel leaders) is seen from within Sudan as unacceptable given that the UN's Security Council that referred the Darfur conflict to the ICC included three permanent members who have not ratified the Rome Statute (USA, China, Russia), especially since Sudan similarly has not ratified the Statute.³⁴ The lawfulness of the referral itself should be the subject of scrutiny.³⁵ No doubt any one of the three permanent members that have not ratified the ICC Statute would exercise their power of veto were an application made to refer their own nationals or their own leaders to the ICC but chose not to do so in respect of Sudan. What does this reality say of double standards in international affairs?

33. Further, since the referral, one of the permanent members of the Security Council, China, who had not vetoed the referral, has publicly stated that issuing an arrest warrant against the President of Sudan would have a "disastrous" impact on the Darfur conflict and has called for the case to be postponed.³⁶

D. The conduct of the ICC Prosecutor in respect of The Sudan referral

34. Inflamed emotions in Sudan generated by the Prosecutor's applications have been further heightened by the behaviour of the Prosecutor Luis Moreno-Ocampo. Rather than confining himself to his duties under Article 42 of the Statute and Rule 34, leaving to the politicians and diplomats of the UN the question of deferral of any investigation and prosecution (under Article 16) and to the Pre-Trial Chamber the question of whether the supporting material he has presented is sufficient for the

³³ Speech of Bona Malwal, para. 4 (Annex 9).

³⁴ Annex 17: Body of some material which shows opposition to Security Council referral.

³⁵ The legality of those provisions of a statute that purports to expose States that have not ratified the statute to its consensual treaty-based court has never been tested. The issue may be apt for resolution by the ICJ not least given that the ICJ's powers to review resolutions of the Security Council has itself not been finally determined by the ICJ. It would seem to be an appropriate case for a State or States to seek to generate sufficient support within the UN General Assembly for a referral to the ICJ for an advisory opinion on the matter.

³⁶ Report by Andrew Heavens, "China urges deferral of Bashir war crimes case", Reuters, 7 January 2009 (in Annex 17).

charges he has proposed, he has been active in the political environment and at conferences around the world seeking to create a groundswell of public opinion adverse to Sudanese government in general and to President Bashir in particular.³⁷ These actions are incompatible with the role of a Prosecutor acting fairly, impartially and recognising the presumption of innocence.³⁸ Indeed, there has been comment to the effect that the Prosecutor may have made the genocide charges public to divert attention away from the publicity surrounding the finding against him of a breach of due process.³⁹

35. An example of the Prosecutor's approach to the giving of publicity to his unresolved application to the Judges of the ICC for an arrest warrant for President Bashir can be seen in the speech he gave in New York to the Council of Foreign Relations Symposium on 17 October 2008 (included in Annex 18). First, he chose a high publicity forum promoted by the Jolie-Pitt Foundation to make this contribution.

36. Second, at no stage in his address, when dealing with the existing arrest warrants issued against Ahmed Harun and Ali Kushayb or with the application for an arrest warrant against President Bashir, did he pay even lip-service to the presumption of innocence.

37. Third, on the contrary, he asserted as facts things that had been alleged in his applications but never tested before a court of law such as (passages highlighted in Annex 18): "Today massive crimes are being committed in Dafur"; "They are targeted by the very officials who are responsible for protecting them"; "the attacks against civilians in their homes, the massive campaign of rapes, the forced displacement of almost 3 million people, were not the product of self-defence militias or the result of 'inter tribal fighting'. They were the actual goal of an operation planned and

³⁷ Annex 18: Collection of some public speeches and addresses by ICC Prosecutor in which he has declared that President Bashir is guilty of genocide and other offences, and called on the international community to support his application (relevant portions have been marked in the margins).

³⁸ There may, indeed, be good grounds under Article 42 and Rule 34 to seek to disqualify the Prosecutor from participation in the Sudan cases by application to the Appeals Chamber pursuant to Article 42(8)(a) and Rule 103. Article 42(5) provides that the Prosecutor shall not "engage in any activity which is likely to interfere with his or her prosecutorial functions or to effect confidence in his or her independence". Article 42(7) states that the Prosecutor shall not "participate in any matter in which their impartiality might reasonably be doubted on any ground". Rule 34 provides that a ground for disqualification is: "Expression of opinion, through the communications media, in writing or in public actions that, objectively, could adversely affect the required impartiality of the person concerned".

³⁹ See Joshua Rozenburg, "Why the world's most powerful prosecutor should resign: Part 2", UK Telegraph, 14 September 2008, and Joshua Rozenburg, "Why the world's most powerful prosecutor should resign: Part 3", UK Telegraph, 16 September 2008, both in Annex 19.

implemented by the Sudanese state apparatus, executed by the Army, the Air Force and Reservist forces integrating tribal militias called ‘janjaweed’.”; “Mr. Al Bashir created the illusion of Militia/Janjaweed autonomy and this helped him to continue to carry out the genocide in the face of international scrutiny”; “Al Bashir ordered the crimes. He ordered the attacks on the villages and he orders today the attacks on the camps for internally displaced persons, the rapes and the hindering of humanitarian assistance. Al Bashir has genocidal intent”.

38. Fourth, he invited his audience effectively to assume that his application in respect of President Bashir would be granted: “Should judges rule in favour of the request, they will issue an arrest warrant and transmit it to the Government for enforcement. Arrest is the responsibility of the territorial state. The Court is not asking for international forces to intervene. But there will be need for innovative, strong and consistent diplomatic and political action by all actors to ensure compliance with the Court’s decision”.

39. To make a speech with these characteristics is completely unnecessary for a Prosecutor who, as here, has a court of experienced judges to whom to apply *in camera* for an arrest warrant on the basis of evidence presented, and has a defined legal-political structure within which applications to the Court can be made by the Prosecutor and any orders for deferral of the prosecution by the UN Security Council can be brought by politicians/diplomats. The only reason for travelling round the world addressing bodies in the way exemplified here (and he has made many addresses on similar lines) can have been to put pressure on the judges to accede to his application or to attract publicity for himself. It is as if he wants to ‘dare’ the court to deny him a genocide or any charge. He has done this in the full knowledge that there are many highly respected academics knowledgeable of Darfur who say, as a minimum, that the genocide count is impossible to prove.⁴⁰

40. It is worth observing that in many or most domestic jurisdictions for a prosecutor to announce as conclusions facts that he wants to prove in the way done here would contravene various rights and be unacceptable for reasons of possible contempt of court or on grounds of privacy or defamation. It may also be worth asking whether he would have felt so brazen with remarks about the culpability of a serving head of state

⁴⁰ See paras. 43-45. Also see De Waal memo, paras. 6-36 and 37-49 (Annex 7).

had his application not been in respect of an African head of state but the leader of one of the great (Western) powers.

41. At this stage, the Applicants urge the Pre-Trial Chamber to hold that the ICC Prosecutor's proper functions are essentially the legal functions identified in the Rome Statute. The Prosecutor should be directed not to seek to intervene in expressly political processes, such as the UN's use of its power to defer any ICC investigation or prosecution for 12 months, still less in the arrest warrant/indictment decision-making of the Pre-Trial Chamber by public international campaigning on the grounds that he is an appointed lawyer - not having the authority of an elected politician answerable to voters or of a representative diplomat properly answerable through a democratic process.

42. Given that he has engaged in substantial international campaigning on all these issues (as detailed above), the Applicants ask the Pre-Trial Chamber to find that it is entirely appropriate that their Application be considered at this stage, contemplated as it is by Rule 103 of the ICC Rules even if not expressly provided for in the procedures for the issue of a warrant of arrest pursuant to Article 58 of the ICC Statute. Rule 103 expressly envisages that the Chamber could receive submissions from any organisation on *any* issue "if it considers it desirable for the proper determination of the case". The rule does not exclude submissions being accepted in proceedings concerned with the application for arrest warrants.

43. Moreover, the actions of the ICC Prosecutor should be considered beside the reality that assertions in his (public redacted) application to the court for the issue of an arrest warrant against President Bashir have been highlighted as being inaccurate and false.⁴¹ There has, in particular, been widespread scepticism about charging genocide.⁴² All of the above point to the need for heightened scrutiny of the Prosecutor's applications, as already suggested, and the importance of taking into account the Applicant's submissions.

44. The Prosecutor's applications should be very carefully examined to see if he has, in the event relied on sources that are known to be unreliable and partisan. For example,

⁴¹ See De Waal memo, paras. 7-36 and 42-49 (Annex 7).

⁴² Annex 19: Collection of critiques on the proposed genocide charges. See also De Waal memo, paras. 6-49 (Annex 7).

were the Prosecutor to have relied on the expert views of Eric Reeves then the Pre-Trial Chamber would be urged to review materials which show this purported expert to be unreliable.⁴³

45. The actions of the ICC Prosecutor should also be set beside a body of material that shows reporting of the Darfur conflict to be controversial with many different perspectives recognised as being worthy of consideration.⁴⁴

E. The application of Rule 103 and other provisions

46. The jurisprudence of the ICC has made it clear that the central matter to be determined on an application under Rule 103 “is whether the Chamber will be assisted in its ‘proper determination’ of the issues in the case”, explained further as whether “information and assistance of direct relevance on certain issues that otherwise will not be available to the Court” can be supplied?⁴⁵ The Appeals Chamber has held that Rule 103 gives the Chamber discretion to permit submissions to be made which “may assist the Appeals Chamber in the proper determination of the case”.⁴⁶

47. It is the Applicants’ submission that the terms of Rule 103 are broadly couched to permit the Chamber to receive submissions at *any* stage of the proceedings, including applications for arrest warrants, providing that such submissions could assist in the proper determination of the matter before the Chamber.

48. The Pre-Trial Chamber in the present Situation in Darfur, Sudan has already at an earlier stage of the proceedings permitted submissions to be received under Rule 103 to assist with the protection of victims and the preservation of evidence.⁴⁷

⁴³ For example, see Report of Peter Bechtold, pp. 10-11 (Annex 8).

⁴⁴ Annex 20: Arab Media Watch Study: The Media & Darfur, Guy Gabriel. Also see Report of Peter Bechtold, pp. 2-7 (Annex 8).

⁴⁵ ICC-01/04-01/06, *Prosecutor v Lubanga*, Decision Inviting Observations from Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, 18 February 2008, para. 7.

⁴⁶ ICC-01/04-01/06 OA11, *Prosecutor v Lubanga*, Decision on “Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Evidence and Procedure”, 22 April 2008, para. 8 (emphasis added).

⁴⁷ ICC-02/05, Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, 24 July 2006.

49. The Applicants submit that the information provided in this Application is of direct relevance to the issue before the Pre-Trial Chamber of whether there is a reasonable and proper basis to grant arrest warrants in light of all the information before the Chamber. It is also very likely that materials of the nature submitted with this Application are not otherwise presently available to the Chamber to take into account in its deliberations. The submissions advanced, including in relation to the Prosecutor's conduct, and the materials relied upon, have not been placed before the Pre-Trial Chamber by the Prosecutor or any other party.

50. Furthermore, as outlined above, the Applicants submit that the conduct of the Prosecutor in this particular case may impel the Chamber to hear from the Applicants and those they represent. To do so would also give added transparency to the proceedings and ensure that justice is 'seen to be done'.

51. The Applicants are not seeking to challenge the *admissibility* of any of the present or proposed Sudan cases by this Application under Rule 103. The Applicants are mindful of the decision of the Appeals Chamber in the Situation in the Democratic Republic of The Congo.⁴⁸

52. The Applicants also rely on the provisions of Article 53(3). Pursuant to these provisions the Pre-Trial Chamber may review decisions of the Prosecutor *not* to proceed with an investigation, including on the grounds that a prosecution would not serve the interests of justice taking into account all the circumstances. The Applicants argue that the same considerations must apply should the Prosecutor be of the view that a prosecution *must* proceed: are the interests of justice served *taking into account all the circumstances of the case?*⁴⁹

53. In this regard, the Applicants note that it is well-established in many national criminal systems that the prosecuting authorities must consider whether it is in the *public*

⁴⁸ ICC-01/04, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, paras. 42-45. The Appeals Chamber held that the admissibility of a case cannot be made an integral part of the decision on an application for a warrant of arrest. It found that as no reference is made to the admissibility of a case in the wording of Article 58(1), admissibility cannot be a prerequisite for the issuance of a warrant of arrest. The requirements are that there are "reasonable grounds to believe the person has committed a crime within the jurisdiction of the Court" and the arrest must appear necessary for one of the reasons enumerated in Article 58(1)(b). The reasoning of the Appeals Chamber does not preclude consideration of the interests of justice when deciding whether to issue a warrant of arrest.

⁴⁹ As set out in the previous footnote, the Appeals Chamber has not excluded this proposition.

interest to proceed with a possible prosecution even if sufficient evidence may exist *prima facie* for such a prosecution, and that such decisions are reviewable by the national courts, including by review of the internal processes that led the prosecuting authorities to take these decisions.⁵⁰ The Applicants argue that the same degree of open inquiry into the exercise of an international Prosecutor's authority should be undertaken before an international court.

54. The Applicants submit that it is appropriate for such an inquiry to be conducted at the stage of requesting arrest warrants on the evidence presented by the Prosecutor. To require that the submissions advanced in this Application should *only* be allowed at some later point in the proceedings before the ICC would be to risk two categories of irreversible damage identified in this Application: (i) the destabilisation of the delicate peace building processes in Sudan and (ii) the potentially dire humanitarian consequences, including the cost of human life and destruction of civilian society.

F. Request for oral submissions

55. Rule 103 does envisage that oral submissions may be permitted by the Chamber in the event that they could assist the court in the proper determination of the matter at hand. It is the Applicants' position that the Pre-Trial Chamber would be assisted in its deliberations by oral submissions from the Applicants given that they would address both the concerns of the widest cross-section of Sudanese society about whether arrest warrants should be issued, and the conduct of the Prosecutor in making these applications and the allegations contained therein. Such a hearing could also enhance the transparency of the current proceedings and demonstrate an openness to hearing

⁵⁰ For example, the provisions of the Code for Crown Prosecutors of England and Wales (which are mirrored in many common law jurisdictions) provide that "The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction ... A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution" (at para. 5.7). And at para. 5.8: "Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better."

In the most recent leading case before the UK House of Lords on the subject, it was held that it was lawful for an investigation and prosecution to be discontinued on the basis that it would not be in the public interest as it could have resulted in the withdrawal of cooperation in countering terrorism giving rise to a real threat to British lives: *R (on the application of Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60. A copy of the judgment is appended at Annex 21.

“the other side” as a matter of fairness and justice, and could thus serve as a measure to seek to improve deteriorating perceptions of the ICC in Sudan and many other countries of the world.

56. The Applicants thus request an opportunity to be heard by way of an oral hearing on the matters raised in this Application before any final decisions are made and rendered by the Pre-Trial Chamber.

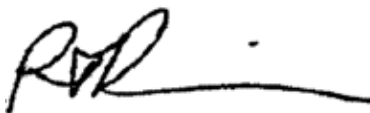
57. The Prosecutor has elected to make the applications for arrest warrants public and he has made numerous public statements about the applications. In accordance with the Statute and Rules, the Pre-Trial Chamber has requested the Prosecutor to provide further information to the Chamber about the applications, which the public in Sudan has followed very closely⁵¹. In accordance with Rule 103, the Prosecutor can and should, of course, be permitted to respond to the submissions of the Applicant. The Applicants request the Chamber thereafter to allow them a chance to put their case through oral submissions and seek to persuade the Chamber of its merit, creating the possibility for addressing questions that the Chamber may wish to raise.

G. Conclusion

58. The Applicants have been driven to make this Application out of a genuine concern for preserving the intricate web of peace agreements in Sudan without which the country may be set back immeasurably. They hold firmly to the view that there cannot be indifference to the highly detrimental consequences of arrest warrants in the particular circumstances that face their nation at this point in its development towards a peaceful democracy. The Applicants ask that their submissions are heard and seriously considered, based as they are on reliable external, informed and researched opinion together with reliable ‘local’ opinion reflecting and supported by the broadest spectrum of public opinion within Sudan.

⁵¹ Most recently, the Prosecutor was requested to provide additional information by 26 January 2009 in the case concerning the rebel leaders: ICC-02/05, Decision Requesting Additional Information and Supporting Materials, 9 December 2008.

59. For all of the reasons set out herein, the Pre-Trial Chamber is urged to decline the issuing of any arrest warrants at this time.



For Sir Geoffrey Nice QC

Rodney Dixon

Counsel on behalf of the Applicants

Dated this 11th day of January 2009

London, United Kingdom