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No.: **ICC-02/05**
Date: **3 February 2009**

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN DARFUR, THE SUDAN

Public Document with Confidential Annex 5 (Supplement)

**Supplement to the Application and Annexes to the 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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Unrepresented Victims

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**Victims Participation and Reparations
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Other

Introduction

1. As undertaken in the Application of 11 January 2009 (hereinafter “the Application”), the Applicants hereby file Annex 3 (letters of support from NGOs) and information concerning Annex 4 (the petitions), as set out below.
2. In addition, the Applicants provide a limited number of additional materials to supplement certain existing Annexes, as listed below, which have subsequently been identified or only become available after the filing of the Application.
3. Following recent consultations with tribal leaders of the Fur, Masalit and Zaghawa tribes, which took place after the filing of the Application, the Applicants extend an invitation to the Pre-Trial Chamber to meet those tribal leaders (see paras. 14-18 below).
4. As with the Application and Annexes, the Applicants respectfully request the Pre-Trial Chamber to accept these supplemental submissions and materials pursuant to Rule 103 for the very reasons outlined in the Application, including that,
 1. they could assist the Chamber in the proper determination of the issues before it being directly relevant to whether, in all the circumstances including the circumstances of the Prosecutor’s conduct, arrest warrants should be issued at all by the ICC, and given that the provisions of Rule 103 expressly provide that the Chamber could receive submissions “[a]t any stage of the proceedings” without any restriction in respect of applications for arrest warrants;
 2. no reasonable basis exists for granting the Prosecutor’s applications given the statements from tribal leaders named as victims in the Prosecutor’s applications and the other supporting materials in the Application; and,
 3. materials provided by the Application (and by this Supplement) concerning the accuracy of the Prosecutor’s allegations might otherwise not be available to the Chamber.

Annex 3 (Letters of support from NGOs)

5. These are attached for inclusion as Annex 3 to the Application.¹

Annex 4 (Petitions)

6. As undertaken in the Application, the petitions would be filed with the Pre-Trial Chamber shortly. Over 1.8 million Sudanese citizens have to date supported the petition campaign, including persons from groups named as the victims of the alleged genocide and other crimes by the Prosecutor. The petition campaign is continuing.
7. As the signature sheets of the petitions are voluminous, the Applicants are arranging for the signed petitions to be brought from Sudan to the ICC and filed through the Registry on Monday 9 February 2009. Arrangements have been made with the Registry to this effect. By way of explanation, the Chamber will receive the following:
 1. A petition conducted by various NGOs calling for the rejection of the ICC Prosecutor's application against President Bashir, in boxes marked with the number "1" consisting of about 400,000 signatures.
 2. The records of campaigns organised by three major mobile telephone networks in Sudan constituting over 1.2 million texts against the ICC Prosecutor's application that were sent in to these companies, in boxes marked with the number "2". The SIDG verified these records by calling a random sample of the mobile numbers to confirm that the persons concerned had participated in this campaign.
 3. A further petition launched by SIDG in November 2008 to collect additional signatures, in boxes marked with the number "3". This petition asks that warrants are not issued as they would undermine a peaceful solution to the conflict in Darfur and cause instability in the country as a whole - the terms of the petition are attached hereto as Annex 4 to the Application. To date about 200 000 signatures have been collected and the campaign to collect signatures for this petition continues.

Annex 5 (Statements of tribal leaders)

8. As a supplement to Annex 5 to the Application, the Applicants file a signed statement from additional tribal leaders of the Fur, Masalit and Zaghawa tribes and other tribes

¹ E-mail addresses of individuals who have sent and received certain of these letters have been redacted (by blanking out) for reasons of privacy and can be provided to the Pre-Trial Chamber and the Prosecution on a confidential basis if required.

from south Darfur. This statement was signed by the tribal leaders during August 2008 under the auspices of the Applicants, although it is not dated on the document. As with the statements already before the Chamber, these leaders highlight the serious repercussions of any ICC intervention into the problems of Darfur and urge that the leaders and people of Darfur are allowed to find lasting solutions in cooperation with the international community.²

9. In addition, improved translations of the statements of tribal leaders already submitted in Annex 5, as well as of the statement filed as a supplement, are being prepared and will be submitted as soon as they are available.

Annex 7 (Memorandum of Alex De Waal)

10. Since filing the Application Alex De Waal has published his critique of the Prosecutor's Application against President Bashir on the Social Science Research Council (SSRC, New York) website. As pointed out in the Application, De Waal is an independent expert researcher, not retained by the Applicants, and not regarded as a supporter of the Sudanese Government. The first version of his critique that was provided to the Applicants in advance of publication was filed with the Application. For completeness the final critique - which is a little fuller - is attached hereto to be a supplement to Annex 7. The Chamber's attention is, in particular, drawn to paras. 93-96 in which De Waal highlights the need for close scrutiny of the facts (guarding against a "trial of sorts" in "the court of international public opinion") given the potentially grave consequences for Sudan as well as the future of the ICC.
11. De Waal also mentions that the mortality figures in the camps in Darfur, as reliably provided by UN reports, number in the region of 100-200 per month for the last two years (para. 41d of his website critique). These reports directly contradict the unsourced statement of the Prosecutor before the Security Council on 3 December 2008 that some 5,000 persons die in the camps each month as "genocide continues" (referred to in para. 26 of De Waal's website critique; the Prosecutor's statement to the Security Council filed in Annex 18 to the Application).

² This statement is filed confidentially at this stage due to concerns that certain tribal leaders have expressed for their safety in light of the continued presence of rebel and other armed groupings in Darfur.

12. In addition, three short articles and a collection of internet postings are filed herewith as a supplement to Annex 7. They are relevant to the grounds of the Prosecutor's applications, and the evidence submitted in support thereof, and to the Application of the Applicants. These articles and postings are the following:

1. Prof. Mahmood Mamdani, the Herbert Lehman Professor of Government, Columbia University, New York (who is Ugandan) has written an article entitled "The Politics of Naming: Genocide, Civil War, Insurgency". It raises questions about the true motives behind the characterisation by public campaigns of the conflict in Sudan as "Arabs" trying to eliminate "Africans" - "a genocide perpetrated by Arabs" (p. 6). It is significant that this is an allegation adopted by the Prosecutor in his application against President Bashir (for example, see para. 5 of annex A to the Prosecutor's application of 14 July 2008), which in the submission of the Applicants calls for the most searching scrutiny.
2. The second article published by Reuters deals with the very serious concerns expressed by the main opposition parties in the north of Sudan about the Prosecutor's applications. These views reflect the widest breadth of support in Sudan for the submissions made in the Application of the Applicants.
3. The third article published by Associated Press concerns the meeting of the African Union held only a few days ago in Addis Ababa in which the AU decided to urge the ICC to suspend the current proceedings. This call reiterates the support beyond Sudan and particularly in Africa for the submissions put forward by the Applicants.
4. Ahmed Hassan (whose position is not known by the Applicants) has an internet posting which is not sympathetic to the present Application and which raises pertinent questions about whether state failure should compromise justice. The response of Alex De Waal to this posting follows, as well as that of Khalid Omer (also not known to the Applicants). These postings also comment on the present Application. The Applicants include this collection of postings as being illustrative of the differing views that clearly exist on the merit of the Application in the spirit of openness (the posting of Michael

Davies included and referred to below takes another view of the subject). In acknowledging the existence of these contrary views the Applicants would, nevertheless, urge the Pre-Trial Chamber to find that there is overwhelming support for the Applicants' position in Sudan and very significant support for it among informed and thoughtful commentators outside Sudan as revealed in the Annexes to the Application and this Supplement. As to De Waal, the Applicants rely on his writings on the substance of whether arrest warrants should be issued (as explained above at paras. 10-11 and in the Application) and not for his comments on the procedural aspects of the Application in which he is not a specialist. In light of one of his criticisms, the Applicants observe that they *have* requested leave from the Chamber for their submissions to be heard and have included both the reasons therefor and the submissions in the Application and this supplemental filing. Further, as the Chamber will be aware, certain persons/groupings have already been granted the procedural status of victims in accordance with the provisions of the Statute and Rules in the present Situation in Darfur, The Sudan.³ The Applicants would certainly not object to any of these victims or other victims being permitted by the Chamber to make submissions in response to the Applicants' Application in light of the seriousness of the issues at stake, and of course the Prosecutor can and should be called upon to respond to the Applicants' submissions. It must also be noted that the Applicants do not represent or act on behalf of the Government or any Government official. It is inevitable that certain of the Applicants' views, as expressed in the Application, might support what is known of the Government's position on such matters. As for Omer's comments, he misses the point that the Applicants expressly offered no view on the underlying facts not least because they accept that there is much material alleging the commission of crimes and that any and every person shown to have committed crimes should be investigated in the domestic setting. The Applicants' view on why issuing arrest warrants would bring great danger to Darfur and Sudan as a whole starts from an acknowledgement of the body of material showing that crimes have been committed (see para. 26 of the Application).

³ See, ICC-02/05-111, Decision on the Application for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/7 to a/0033/07 and a/0035/07 to a/0038/07, 6 December 2007.

5. Michael Davies (who the Applicants know from the internet has worked for Greenpeace and other organisations in Sudan) has an additional internet posting which is included in this Annex. It appears neutral about the Application but is not sympathetic to President Bashir. It addresses some of the questions raised by Ahmed Hassan, Alex De Waal, and Khalid Omer.

Annex 8 (Report of Peter Bechtold)

13. The report of Peter Bechtold (who, as stated in the Application, is an expert retained by the Applicants) notes that views expressed by Eric Reeves on the Darfur conflict are known to be unreliable and partisan (see para. 44 of the Application). As further support for this proposition, the Applicants file herewith as a supplement to Annex 8, the Report of the US General Accountability Office (November 2006) which concluded that the high-end estimates for death rates in Darfur such as those produced by Eric Reeves were the least credible (see in particular pp. 15, 26, and 27).⁴ Furthermore, the Applicants attach extracts from the book of David Hoile (not retained by the Applicants and who is known as a pro-Government academic based at the European-Sudanese Public Affairs Council, London) which record various sources suggesting that Eric Reeves' credibility on Darfur is questionable.

Request from tribal leaders of Darfur

14. Further discussions have taken place, since the filing of the Application on 11 January 2009, with tribal leaders of the Fur, Masalit and Zaghawa tribes who support this Application. They request that the Pre-Trial Chamber come to Darfur and meet them before any decision is taken on issuing arrest warrants. The Applicants respectfully remind the Pre-Trial Chamber that these tribal leaders are completely opposed to the grant of arrest warrants in respect of President Bashir *despite* their being leaders of the very tribes which are identified as victims in the Prosecutor's application.

⁴ The findings of this report are also referred to by Alex De Waal in his critique, filed herewith as a supplement to Annex 7, at para. 26.

15. The Applicants make this request for such a visit to hear the oral submissions of the tribal leaders on the grounds that

1. statements have been submitted by these leaders in Annex 5 to the Application maintaining that intervention by the ICC would significantly worsen the situation in Darfur, would deny to Sudan the advantages of resolving present problems by tried and tested Sudanese/African solutions and would constitute a dangerously grave insult to the Sudanese people (as noted above, improved English translations of these statements are being prepared for submission to the court);
2. there appears from the work of many respected and informed commentators on Sudan affairs to be a very substantial gap between what has been and is being reported about the conditions in Darfur and the reality on the ground, a gap that justifies in part the positions taken by the tribal leaders and that needs to be understood by hearing from the tribal leaders directly; and,
3. the opposition of the tribal leaders, some of whom are indeed victims of alleged crimes, can best be understood through the Chamber hearing directly from these persons. The Chamber may be interested to know and consider the fact that at least two of these tribal leaders had themselves been forcibly displaced for some time, one to a camp in Chad the other to a camp in Sudan.

16. This request is made under Rule 103(1) on the basis that the Chamber could invite or grant leave to persons (in this case the tribal leaders) to submit in writing *or orally* any observation on any issue that the Chamber deems appropriate. As noted in the Application and above, the provisions of this Rule expressly provide that such submissions could be received “[a]t any stage of the proceedings” and do not place any restrictions on the operation of the Rule in respect of applications for arrest warrants.

17. Clearly, the necessary security arrangements to meet the Pre-Trial Chamber’s requirements would have to be put in place were the Chamber minded to respond to this request. The Applicants are currently seeking to obtain appropriate undertakings from the Government of Sudan. Pending the outcome, the Applicants submit that the

Pre-Trial Chamber could respond to the request by inviting the tribal leaders to come to The Hague to make their submissions in person to the Chamber in public or closed session as the Chamber may decide. Alternatively their submissions could be received by video-link from Darfur. In the Applicants' submission the representations of the tribal leaders would be far better evaluated in the very context of the region whose recent conflicts and present security are under consideration by the court and generally. (Submissions heard in Darfur could again be made privately or in public entirely as the Pre-Trial Chamber should decide.) Hence, the efforts of the Applicants to obtain undertakings from the Government.

18. The Applicants would respectfully urge the Chamber to conclude that hearing the submissions of the tribal leaders in Darfur would be preferable providing that the appropriate security arrangements can be put in place. The Applicants will make a short further supplemental filing as soon as the result of the efforts to obtain undertakings is known. In the event that no undertakings are forthcoming the Applicants request that the two alternative means of receiving the submissions of the tribal leaders are considered by the Chamber.



For Sir Geoffrey Nice QC

Rodney Dixon

Counsel on behalf of the Applicants

Dated this 3rd day of February 2009

London, United Kingdom