



Original: **English**

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

Date: **15 June 2010**

PRE-TRIAL CHAMBER I

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

SITUATION IN DARFUR, SUDAN

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

Public Document

**Application under Rule 103 to Participate in the Proceedings before the Pre-Trial
Chamber concerning the Prosecutor's Application to Add Genocide Charges**

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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Other

A. The Applicants and Background to present Application

1. The Applicants in the present Application under Rule 103 are the Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG).
2. As the Pre-Trial Chamber will be aware, your Applicants are two representative Sudanese civil organisations who have filed a previous application under Rule 103 before the Pre-Trial Chamber together with a substantial body of supporting materials¹. On that occasion the Applicants were not granted leave to participate in the proceedings².
3. The present Application differs from the first application in that it arises from the Applicants having, since the refusal of leave, been recognised to the extent of being granted leave to participate as *amici curiae* in the proceedings before the Appeals Chamber. These proceedings concerned the Prosecutor's appeal against the decision of Pre-Trial Chamber I of 4 March 2009 refusing the inclusion of genocide charges in the present case³.
4. By way of background, the Appeals Chamber noted in its decision granting leave to the Applicants that SWTUF was the union of all trades unions in Sudan with affiliates from 25 state unions and 22 professional federations, and that SIDG was an NGO of concerned Sudanese citizens⁴. It held that "*the Applicants proposed putting forward*

¹ Application on behalf of Citizens' Organisations of The Sudan in relation to the Prosecutor's Application for Arrest Warrants of 14 July 2008 and 20 November 2008, 11 January 2009, and Supplement to the Application and Annexes to the Application on behalf of Citizens' Organisations of The Sudan in relation to the Prosecutor's Application for Arrest Warrants of 14 July 2008 and 20 November 2008, 3 February 2009.

² Decision on Application under Rule 103, ICC-02/05-185, 4 February 2009.

³ Pre-Trial Chamber's "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-3, 4 March 2009.

⁴ Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply, ICC-02/05-01/09-43, 18 September 2009 and Reasons for "Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply", ICC-02/05-01/09OA, 9 November 2009, para 2.

As they had originally set out before the Pre-Trial Chamber in the Application of 11 January 2009, in their application to the Appeals Chamber for leave under Rule 103 of 20 July 2009, the Applicants explained that:

- SWTUF's affiliates include the State Trade Unions for the whole of Darfur and that its membership covers the vast majority of the organised working people of Sudan comprising about two million citizens from the government, private and informal sectors.
- The aims and initiatives of SIDG are supported by many Sudanese NGOs and by the association that co-ordinates Sudanese NGOs.

another view to that of the Prosecutor who was the only participant to have made submissions before the Appeals Chamber on the merits of the appeal. In light of the issue on appeal, the Appeals Chamber considered it desirable for the proper determination of this appeal to grant the Applicants leave to submit observations”⁵. The Applicants were thus granted leave to submit observations on the legal issue of the correct standard of proof to be applied.

5. In accordance with this decision, on 25 September 2009 the Applicants submitted their “Observations on behalf of Amici Curiae in respect of Prosecution’s Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir” (“Applicants’ Appeal Observations”)⁶. On 3 February 2010 the Appeals Chamber rendered its judgment, directing the Pre-Trial Chamber to decide anew whether a warrant of arrest in respect of the crime of genocide should be issued in the present case on the basis of the correct standard of proof which it elaborated in its decision⁷.

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- The Applicants collected signatures from nearly 2 million Sudanese citizens through various petitions in support of their campaign against the ICC Prosecutor’s applications for arrest warrants against Sudanese citizens. By the Pre-Trial Chamber’s decision of 18 May 2009 these petitions have been accepted for the record as part of the filings of the Applicants.
 - The Applicants represent citizens of Sudan including tribal leaders of the very tribes (the Fur, Masalit and Zaghawa) said to have been the subject of genocide. Certain of these leaders and those they represent were allegedly the subject of attacks and displacement and there are grounds for them to apply to be represented as victims in proceedings before the ICC in accordance with Article 68(3). **[As explained further below in Part D, the Applicants have since assisted victim applicants file applications to participate as victims in the present case.]**
 - The Applicants do not represent the Government of Sudan in these proceedings.
 - The Applicants accept that grave crimes have been committed in Darfur by all parties to the conflict as noted in the findings of the UN International Commission of Inquiry on Darfur and the Commission of Inquiry into Allegations of Human Rights Violations by Armed Groups in Darfur, established by the Government of Sudan.
 - It is accepted that those responsible, including the President, should be held to account if there is evidence of their involvement in crimes.

See, “Application under Rule 103 in Respect of Prosecution Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” (“Appeal Application”), ICC-02/05-01/09-27, 20 July 2009, paras. 8-11.

⁵ Reasons for “Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply”, ICC-02/05-01/09OA, 9 November 2009, para. 9 (emphasis added).

⁶ ICC-02/05-01/09-35.

⁷ Judgment on the appeal of the Prosecutor against the Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-OA, 3 February 2010.

B. The present Application

6. In light of this decision, the Applicants request in the present Application that they be granted leave under Rule 103 to submit further observations as *amici curiae* in the proceedings before the Pre-Trial Chamber that now arise from the Appeals Chamber's decision.
7. In particular, the Applicants request leave to:
 - (i) file written observations on the legal requirements of the crime of genocide;
 - (ii) file written observations on the application of these legal requirements in light of the correct standard of proof to the materials submitted by the Prosecution (as identified in the Prosecutor's Application for a Warrant of Arrest of 14 July 2008 and in the Pre-Trial Chamber's decision of 4 March 2009) and any other materials - new or from earlier filings - relied on by the Prosecutor;
 - (iii) add materials to the court file not submitted by the Prosecutor which are relevant to the determination to be made by the Pre-Trial Chamber about whether reasonable grounds exist to issue a warrant for genocide (as the Pre-Trial Chamber will be aware, and as identified below, some of these materials have already been placed on the record by the Applicants, and could be supplemented by further materials); and,
 - (iv) make oral submissions on these matters to the extent that it may be appropriate if so requested by the Pre-Trial Chamber in the course of the proceedings.
8. It is the Applicants' respectful submission that such observations and materials could assist the Pre-Trial Chamber in its deliberations. As was the case before the Appeals Chamber, without these observations the Pre-Trial Chamber would only have the benefit of the Prosecutor's arguments in making a very important decision which requires an analysis before the Pre-Trial Chamber of both the applicable law and its application to the factual allegations, all in circumstances where the Pre-Trial Chamber has previously found repeated cause to be cautious about the accuracy of the

Prosecutor's representations⁸. The Applicants' grounds for the Application under Rule 103 are set out in further detail in **Part C** below.

9. In summary, the Applicants accept that leave to submit observations before the Appeals Chamber was limited to the legal issue of the correct standard of proof to be applied. These observations did not address the factual allegations. In the present Application your Applicants request that they permitted to submit observations on both the legal elements of genocide and their application to the available evidence, including factual materials provided by your Applicants that are directly relevant to the genocide issue but which have *not* been sought out or placed before the Chamber by the Prosecutor.
10. It is submitted that such observations would serve to provide the Chamber with a more comprehensive and balanced account of the factual background together with legal arguments on all sides. The Applicants urge the Pre-Trial Chamber to accept that this could enhance the Chamber's understanding of the pertinent questions and serve the interests of fairness and justice.
11. With the Prosecutor unable to conduct investigations within Sudan - whatever the ethical, moral, 'political', 'Political', or 'realpolitik' rights and wrongs of this situation, none of which should ever permit the issue of a warrant of arrest otherwise unmerited - the reality of these shortcomings may be another reason for the Chamber to seek alternative sources of information to verify the evidence relied upon by the Prosecutor.
12. As noted above, the Applicants have in previous applications filed a significant amount of material including the expert opinion of various international commentators of great repute (most of them *not* friendly to the President of Sudan). They have dealt with the proposed genocide charges, accepting that crimes were committed but disputing that they ever *could* have amounted to genocide⁹.

⁸ See Pre-Trial Chamber's Decision of 4 March 2009, paras. 180-189, and 204, which are highlighted in the Applicants' Appeal Application and the Applicants' Appeal Observations.

⁹ See Application of 11 January 2009, paras. 39-45 and the expert opinions referenced in the footnotes and annexed to the application, including the papers of Alex de Waal and Prof. William Schabas; and, Supplement of 3 February 2009, paras. 10-12 and the annexes thereto.

These filings include reports and papers of Alex de Waal, Edward Thomas, Prof. William Schabas, Prof. Mahmood Mamdani, Bona Malwal, and Prof. Peter Bechtold (see Annexes 7-10 and 19 of the Application of 11 January 2009, and Annex 7 of the Supplement of 3 February 2009). Some of these experts have since the

13. This material is already on the record. Even though the Pre-Trial Chamber refused the Application of 11 January 2009 by its decision of 4 February 2009, in the submission of the Applicants the Chamber could in these present proceedings properly refer to the materials filed on the record with this previous Application. The Chamber's refusal of the Applicants' request under Rule 103 in the original proceedings was not rendered on the grounds that the Applicants could not be a "party" to the proceedings. The Applicants based the original application in general on the implications that the arrest warrant could have on national peace and security within Sudan and whether it was in the interests of justice to issue the warrant in these circumstances. The Chamber refused leave on the single basis that as such matters were not "related to an issue currently before the Chamber" (para. 10) upon which it had the power to decide, the Applicants' submissions could not be accepted. The present Application is based on significantly different grounds.

14. Moreover and of considerable importance, if the Applicants were granted leave in the present Application, they could submit further and updated materials on the genocide issue. In particular, the Applicants have commissioned the preparation of an expert report from a leading international expert in the field, Prof. William Schabas. The report will be completed and ready for submission by 10 July 2010.

issuance of the arrest warrant published further reports, papers and interviews critical of the Prosecutor's efforts to secure genocide charges and of his misrepresentation of the evidence and the realities on the ground. Certain of these materials were filed with Appeal Application of 20 July 2009, including (i) Alex de Waal, "Case Closed: A Prosecutor Without Borders", *World Affairs Journal*, Spring 2009, in which, *inter alia*, he raises serious concerns over the mortality figures for Darfur relied upon by the Prosecutor, describing his arithmetic as "simply fantastical"; (ii) Prof. William Schabas, an interview published by the *Oxford Transitional Justice Research Project*, 26 March 2009, in which he notes that there is a growing authority for the view that the events in Darfur do not constitute the crime of genocide and that the definition of genocide in the Genocide Convention and Rome Statute should now be interpreted in a relatively strict and narrow manner; (iii) Mahmood Mamdani, an interview in May 2006 and an article "Beware Human Rights Fundamentalism!", *Mail & Guardian*, 20 March 2009; and, (iv) Peter Bechtold, "Darfur, the ICC and American Politics", *Middle East Policy*, Vol. XVI, No. 2, Summer 2009.

C. Grounds for the Application under Rule 103

15. As argued before the Appeals Chamber, the Applicants apply under Rule 103 to request leave to be participants as *amici curiae*. This Rule provides:

“Rule 103

***Amicus curiae* and other forms of submission**

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.”

[Underlining added]

16. As the Appeals Chamber held, Rule 103 leaves to the discretion of the Chamber to grant leave to an organisation to submit observations if it “**may** assist the ... Chamber in the proper determination of the case” (emphasis added)¹⁰.

17. The Applicants rely on the same arguments made before the Appeals Chamber for leave to participate as *amici curiae* before the Pre-Trial Chamber as these arguments are equally or more applicable to the substantive proceedings that follow and arise from the appeal¹¹. The arguments submitted to the Appeals Chamber are repeated below in underlined text in sub-section (a), with additional submissions relevant to the present proceedings added under each point.

18. Furthermore, the Applicants now rely on the fact that persons granted the right to participate as victims, who state that they *support* the Prosecutor’s application to add genocide charges, have applied to be heard in the proceedings before the Pre-Trial

¹⁰ *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 Procedure and Evidence”, ICC-01/04-01/06-1289, 22 April 2008, para. 8. Also see, *Prosecutor v Bemba*, “Decision on Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence”, 9 April 2009.

¹¹ Appeal Application, paras. 13-31.

Chamber. These applications are discussed below in sub-section (b). To achieve a balance in the determination of the genocide issue - a balance that may not have been provided in materials supplied by the Prosecutor - the Applicants submit that the Applicants' observations should be accepted alongside the observations of these other participants. Observations of others seeking victim status may, in due course, also assist the Chamber in its various decisions - see **Part D** below.

19. Before turning to their adoption of arguments deployed before the Appeals Chamber, the Applicants urge the Pre-Trial Chamber to have regard to the general significance of the type of decision it is being invited to make. Laying charges against a serving Head of State for grave crimes - especially for genocide - will almost inevitably have consequences well beyond those for the short, medium or long term future of the particular Head of State. 'Geo-political' consequences that are unpredictable are one set of consequences. In addition, especially at this time, consequences for international law itself may follow where the parameters of a serving Head of State's immunity are not without controversy. These facts of general application may combine with the particular facts of this Application to encourage the Pre-Trial Chamber to conclude that it should be assisted to the maximum possible extent by material and argument lest it should inadvertently err in a decision having such unforeseeable consequences if error in the decision is ultimately established. To be precise, if a chamber added a warrant for genocide against a serving Head of State on exiguous material (none other having been supplied by a prosecutor) with grave consequences for the relevant region where at a subsequent trial the charge was not found proved, would not the process of laying the charge, however well intentioned, motivated and articulated, be open to criticism?

20. Expressed differently and more succinctly, in a situation where the presentation of the Prosecutor's arguments may have extreme consequences for Sudan and for other parts of Africa, the philosophically 'utilitarian' question of where the greater good would lie must be answered by a course of action that allows more, rather than less, material to guide the Pre-Trial Chamber.

(a) Reasons for application under Rule 103 before the Appeals Chamber, adopted with further comment for this Application

21. Appeal Application, paras. 15-16: There is no party in the present appeal to argue in support of the Majority. In the absence of argument from any other party, the Appeals Chamber could benefit from submissions contrary to the Prosecution's arguments which seek, in an adversarial setting, to highlight the flaws in the Prosecution's submissions. It could not be sensibly suggested that it would undermine or harm the proceedings for the alternative view to be put, to which the Prosecution would be entitled to respond.

The Pre-Trial Chamber is similarly without the benefit of argument and materials to the contrary. Although the Rules make no specific provision for such a procedure, in the context of an adversarial setting, and given that Rule 103 permits the Chamber whenever it deems it appropriate to accept observations, the Applicants request that the Pre-Trial Chamber follow the procedure adopted by the Appeals Chamber in the same proceedings and permit them to file their observations.

The Applicants submitted observations only on the legal issue of the correct standard of proof before the Appeals Chamber because that chamber effectively had a single *legal* issue to deal with. The Pre-Trial Chamber has mixed issues of fact and law to deal with and the Applicants would ask that the principle by which the Appeal Chamber allowed representations to be made on what concerned them could and should apply in the setting of the Pre-Trial Chamber's review of the evidence and Prosecutor's Application.

As noted above, the Chamber did not refuse the Applicants' first application under Rule 103 on the basis that the Applicants could *never* be a party to the proceedings. The Chamber held that the issues that the Applicants sought to be heard on were not issues before them in the proceedings. The present Application raises issues concerning the legal elements of genocide and their application to the available evidence, precisely the issues now before the Chamber.

The Applicants do not, of course, seek to litigate issues that are most appropriately left for trial. The Chamber is required to decide whether reasonable grounds exist for issuing a warrant for genocide. This is a critical determination in respect of which the

Chamber could be assisted by the Applicants filing submissions on the legal elements of this crime as well as by filing observations and materials that scrutinise and dissect the Prosecution's case.

22. **Appeal Application, para. 17:** The Applicants submit that Pre-Trial Chamber's indication that the Prosecutor overstated his case in key respects provides an additional reason for his submissions on appeal to be scrutinised by other parties (for example, the finding that the materials relied upon by the Prosecution to assert that the Government of Sudan hindered medical and humanitarian assistance in IDP camps in Darfur, in fact showed that the extent, systematicity and consequences of the alleged hindrances varied greatly over time and thus reflect a level of hindrance which significantly differs from that described by the Prosecution: paras. 181-189). The Prosecutor has persisted with these exaggerated allegations, without further substantiation and evidence, such as most recently in his address to the Security Council of 5 June 2009 ... claiming *inter alia* that victims "die the same day" if they leave the camps, or "die the day after" if they remain (para. 38).

This argument is particularly pertinent to the proceedings presently before the Pre-Trial Chamber. If the Chamber only has the Prosecutor's view, there is the danger that allegations with far-reaching consequences remain untested (to the level required at the stage of issuing a warrant). The Chamber will, of course, in its role as the final adjudicator of the facts subject all the Prosecutor's allegations, and those of any other parties, to the closest scrutiny. In the adversarial system of the ICC, it is the Applicants' submission that the Chamber could be assisted in this task with observations putting the alternative viewpoint. Although not specifically provided for in the Rules, it would appear that Rule 103 was designed to provide the Chamber with a broad discretion to achieve the same result if it so desires.

In this regard, it is noteworthy that in his latest address to Security Council, the Prosecutor asserted that "The entire Darfur region is still a crime scene ... The attacks against civilians not participating in the conflict continue. Thousands of civilians were attacked immediately after the signing of a peace agreement and public commitments to peace earlier this year. Rapes continue. The process of extermination against millions displaced in the camps continues"¹².

¹² Press release, ICC-OTP-20100611-PR545, 11 June 2010.

These may be arguments which the Prosecutor seeks to rely upon before the Chamber. The Applicants could perform a vital function of bringing to the attention of the Chamber materials that are inconsistent with the Prosecutor's statements. These materials might be valuable in the Chamber's assessment of whether reasonable grounds are made out or not. It must be in the best interests of justice for such matters to be aired and considered now before any decision is taken on the issuance of a warrant. The negative consequences of materials coming to light at a later stage which were available at the time but not disclosed that could undermine the Chamber's decision could be avoided through the use of Rule 103 in the particular circumstances of this case¹³.

- 23. Appeal Application, para. 18:** Furthermore, the various reasons to be cautious about the Prosecutor (as highlighted in the original Application of 11 January 2009, not overlooking the matters referred to by Joshua Rozenberg in Annex 19, see para. 34) reinforce the need in such an important case to have lawyers argue the other point of view.

The Applicants have alerted the Pre-Trial Chamber to reasons to be cautious about the Prosecutor's approach as well as to be cautious about the expert on whom he may well have relied (paras. 34-45 of the Application of 11 January 2009, and para. 13 of the Supplement). The Chamber may regard these as reasons to justify receiving the Applicants' observations.

- 24. Appeal Application, para. 19:** The Appeals Chamber might, therefore, in any event, try to find experienced lawyers to act as *amici curiae* to argue the position in support of the other view. Given the Applicants' filings to date (that have dealt with the proposed genocide charges and gathered expert opinion for the record), and the representative character of the Applicants in Sudanese society, there is no reason *not* to turn to them as participants or *amici curiae* on the legal and factual issues that arise in this appeal.

¹³ By way of illustration, the BBC have reported that although 600 people died in fighting in Darfur in May 2010, the highest monthly toll since 2008, the joint UN-AU peacekeeping force stated that most died in fighting between Sudan's army and the rebels of JEM: see "Darfur death toll rises to two-year high in Sudan", BBC News, 7 June 2010. This may well be information (including the sources) which the Prosecutor is not placing before the Chamber in order to maintain his asserted position that the Government of Sudan continues to kill thousands of civilians in Darfur as part of a genocidal plan.

The Applicants have demonstrated their widely representative character within Sudan and established their credentials as parties capable of submitting constructive and helpful submissions before the Appeals Chamber. The Pre-Trial Chamber may assess that it could similarly benefit from the Applicants' contribution. The Applicants and their lawyers have access to Sudan, and in particular to Darfur, and thus to witnesses and victims in the relevant region. This provides them with access to evidence arguably greater than that available to the Prosecutor.

25. **Appeal Application, paras 20-21:** Moreover, the Applicants have placed on the record a large body of materials and expert opinion relevant to the present case and, in particular, the genocide charges sought by the Prosecutor. The materials submitted by the Applicants, including the very substantial learned, academic and other material from experts on the precise topics at issue, support the finding of the Majority that there is no reasonable basis for genocide charges. The Applicants urge the Appeals Chamber to take these materials into consideration to the extent necessary in this appeal. The original decision of the Pre-Trial Chamber to refuse the Applicants leave under Rule 103 on the basis that the "interests of justice" issue had not arisen, leaves it unclear whether the substantial quantity of material supplied and that is already part of the court record in the Situation in Darfur (ICC-02/05) could be considered by the Pre-Trial Chamber and the Appeals Chamber revisiting the matter.

As outlined above, there already is a substantial body of material on the record that the Pre-Trial Chamber could take into consideration. In the Applicants' submission there is nothing in the Chamber's decision refusing the original Application of 11 January 2009 that would bar it from receiving this body of material with the present Application.

Further materials were filed with the Appeal Application of 20 July 2009 which could be considered by the Chamber, and the Applicants could provide the Chamber with the most up to date materials and evidence relevant to the genocide issue. In particular, as noted above, an expert report from Prof. William Schabas has been commissioned which will be ready for submission by 10 July.

26. **Appeal Application, para. 22:** In the submission of the Applicants, there is no cogent reason for excluding such material from the Appeals Chamber and every reason to incorporate it. This is material the court could have called for in any event either from the Prosecutor or through Rule 103.

The Applicants cited to the Prosecutor's obligation under Article 54(1)(a) which provides that the Prosecutor shall "In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally". Yet, the Prosecutor in the present case has never sought even to recognise, let alone introduce, the extensive body of "exonerating" materials filed by the Applicants; a further reason to employ Rule 103.

27. **Appeal Application, paras. 23-26:** As a minimum, and if necessary *de bene esse* in the first instance, the Appeals Chamber is invited to explore how the publicity led campaign of the Prosecutor to charge genocide at all costs is readily countered by experienced and serious academics of great repute, as reflected in the materials identified above.

These materials have been listed above and would be updated were the Chamber minded to grant leave to the Applicants.

28. **Appeal Application, para 27:** In light of this material, the Appeals Chamber is requested to have in mind how the counter arguments to the Prosecutor's position may now be being reflected around the world in and by approaches to the Sudan problem that seek to put political resolution very high on the agenda; something that further reinforces the absolute need to be rigorous in deciding about the sufficiency of the evidence for an arrest warrant for genocide given that the addition of genocide could have substantial – unforeseeable and probably unintended – effect on the politics and stability of the region.

In the Applicants' submission the profile and impact of the genocide issue demands an approach which does not countenance adding genocide charges at this stage in the hope that the validity of these charges will be tested at a later stage in the proceedings.

Even though the test is lower than at trial, it is no reason to postpone a thorough assessment of the Prosecutor's representations until a later date.

29. **Appeal Application, paras. 28-29:** Given the nature of the material and the real risks (already realised in part) of issuing arrest warrants against sitting heads of state (or other leaders), the court owes a duty to the international community to consider all relevant evidence before taking further risks that follow from the intervention of legal processes where peace processes and other delicate political endeavours are under way.

The same considerations apply before the Pre-Trial Chamber.

30. **Appeal Application, para. 30:** The Prosecutor has relied on an "interests of justice" argument in support of his appeal (Prosecution Brief, para. 63). In the Applicants' submission, the "interests of justice" necessarily dictate that the alternative to the Prosecutor's argument be heard by the Appeals Chamber, especially since it is reflective of the views of many key actors in the situation in Darfur who are committed to the peaceful resolution of the conflict.

Assuming the Prosecutor opposes this Application, the interests of justice weigh heavily in favour of hearing a view or views that oppose his application.

(b) Victim groups supportive of Prosecutor's application

31. There are two filings of significance: Application by Legal Representatives of Victims a/0011/06, a/0012/06, a/0013/06 and a/0015/06 to Participate and Submit Observations on the Proceedings on Remand in connection with the Application for a Warrant for the Arrest of Omar Hassan Ahmad Al-Bashir, 10 March 2010¹⁴, and the Victims' Application for Participation in the Proceedings arising out of the Appeal Judgment of 3 February 2010, 24 March 2010.

32. It is evident that these victim participants all support the Prosecutor's application for a genocide warrant. In the former application it is stated that "the harm suffered by these victims and the circumstances in which this harm was inflicted are consistent

¹⁴ ICC-02/05-01/09-75.

with the implementation of a campaign of genocide against the Fur, Masalit, and Zaghawa groups. In fact, the events described by these Recognised Victims and the harm they and their family members have suffered is [sic] entirely consistent with the elements of the crime of genocide” (para. 15).

33. In the latter application it is claimed that alleged victims are able to provide incriminating evidence that “comprise evidence from which it may reasonably be inferred that ... high ranking officials were expressing the genocidal agenda conveyed to them by their hierarchical superior [President Al-Bashir]” (para. 18).

34. Moreover, the Prosecutor supported the submissions of the victim participants who were permitted to make observations before the Appeals Chamber in connection with the genocide issue: “the Prosecution supports the legal arguments presented ... which largely endorses the submissions advanced by the Prosecution in its appeal brief”¹⁵.

35. In order to guarantee that the Prosecution’s arguments are critically analysed and that all materials both favourable and unfavourable are brought to the attention of the Chamber, the Applicants submit that there are good reasons to accept its observations as well.

D. Victim applications from persons residing in Darfur

36. The Applicants have assisted victim applicants from villages in Darfur that are named in the Prosecutor’s charges to apply to participate in the present proceedings¹⁶. Many of these victims belong to the very tribes that the Prosecutor has asserted were the subject of genocidal attacks. The parties have until 18 June 2010 to reply to these applications.

37. Although these victims clearly suffered harm and loss as a result of attacks in Darfur which are charged by the Prosecutor, their evidence raises questions about the accuracy of certain allegations made by the Prosecutor. For instance, one of the victims was resident in a camp in Darfur that is one of the camps referred to by the

¹⁵ Prosecution Response to the Victims’ “Second Request for Participation and Observations on the Prosecution’s Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad Al-Bashir”, ICC-02/05-01/09OA, 11 January 2010, para. 24.

¹⁶ See Decision Setting a Time Limit for the Parties’ Replies to 8 Applications for Victims’ Participation in the Proceedings, 26 May 2010.

Majority in its Decision of 4 March 2009 over which the Majority raised concerns about the accuracy of the Prosecutor's representations in respect of the conditions in the camp¹⁷.

38. The victim applicants' participation will, of course, be decided under the separate applications which have been filed and in accordance with the applicable provisions. Their evidence does, nevertheless, highlight the shortcomings of an investigation conducted at an arm's length from the location where the alleged crimes occurred (whatever the reasons might be for this situation). This reality underscores the need to hear from victims who were present at the time in many of the locations selected in the charges brought by the Prosecutor, and who are from the "targeted" tribes. It is also a good reason to permit the Applicants to be heard as participants in the proceedings who do have direct access to Darfur.

E. Conclusion

39. The Prosecutor has requested by its filing of 24 February 2010 an *ex parte* hearing on the most efficient and appropriate way to proceed in order to file additional information before the Chamber in respect of the issue of genocide¹⁸. The Applicants do not request that they be represented at any *ex parte* hearings concerning such procedural matters. They ask to be afforded the opportunity to place the materials outlined above before the the Pre-Trial Chamber and to submit observations in respect of materials filed by the Prosecutor, whether new or from previous filings.

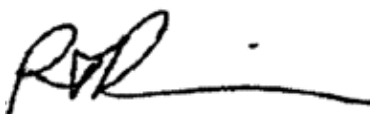
40. For all of the reasons set out above, the Applicants respectfully request the Pre-Trial Chamber to grant them leave to:

- (i) file written observations on the legal requirements of the crime of genocide;
- (ii) file written observations on the application of these legal requirements in light of the correct standard of proof to the materials submitted by the Prosecution;

¹⁷ See paras 180-189.

¹⁸ Prosecution's Request for an *ex parte* Hearing, ICC-02/05-01/09-74, 24 February 2010.

- (iii) add materials to the court file not submitted by the Prosecutor which are relevant to the determination to be made by the Pre-Trial Chamber about whether reasonable grounds exist to issue a warrant for genocide; and,
- (iv) make oral submissions on these matters to the extent that it may be appropriate if so requested by the Pre-Trial Chamber in the course of the proceedings.



For Sir Geoffrey Nice QC
Rodney Dixon
Counsel on behalf of the Applicants

Dated this 15th day of June 2010
London, United Kingdom