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No.: **ICC-02/05-01/09**
Date: **20 July 2009**

THE APPEALS CHAMBER

Before: **Judge Sang-Hyun Song**
Judge Erkki Kourula
Judge Ekaterina Trendafilova
Judge Daniel David Ntanda Nsereko
Judge Joyce Aluoch

SITUATION IN DARFUR, SUDAN

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

Public Document

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"

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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A. Introduction

1. The Applicants (as described in Part B below) file this Application under Rule 103 for leave to be (i) participants in the present appeal proceedings or (ii) *amici curiae* for the reasons explained in Part C below.

2. The Applicants request the Appeals Chamber to take into consideration their written submissions and materials, as set out in this Application, in support of the Majority of the Pre-Trial Chamber's decision of 4 March 2009 refusing the Prosecution's application for an arrest warrant for President Al Bashir on charges of genocide. The Applicants also request to be heard at an oral hearing by the Appeals Chamber.

3. In the Applicants' respectful submission, the Applicants' written and oral submissions could assist the Appeals Chamber in its deliberations. Without such submissions the Appeals Chamber would only have the benefit of the Prosecution's arguments and materials in making an extremely important decision that, once made, may have major political and practical consequences and that requires an analysis of facts and law all in circumstances where the Pre-Trial Chamber's decision found cause to be cautious on several occasions about the fairness or accuracy of the Prosecutors representations.

4. If leave is granted, as set out below in Part D, the Applicants invite the Appeals Chamber to uphold the findings of the Majority that the materials relied upon by the Prosecution do not establish reasonable grounds to believe in the existence of genocidal intent as required by Article 58 (summarised by the Majority at paras. 202-208). These findings, it will be argued, follow from a proper analysis by the Majority of the facts and the law, misunderstood or incorrectly represented by the Prosecutor and nothwithstanding that the Applicants herein do *not* challenge many parts of the Prosecutor's legal analysis. Your Applicants herein would observe by way of summary that:

    - The Prosecution is right to assert that it is not necessary to establish at the stage of an arrest warrant that genocidal intent is proven beyond reasonable doubt as the only conclusion to be drawn on the evidence presented. The Prosecution itself made this point clear in its application for the arrest warrant

of 14 July 2008, and the Majority accepted the Prosecution's submission on the applicable standard of proof at the arrest warrant stage (paras. 364-366 of the Prosecution's application, as noted by the Majority in its decision at paras. 153-159 and para. 203).

- It was the Prosecutor who later, at paragraph 400 of the application of 14 July 2008 asserted that: "The Prosecution respectfully submits that AL BASHIR's intent to destroy substantial parts of the Fur, Zaghawa and Masalit groups, as such, is the 'only reasonable inference available on the evidence'". This particular formulation (however modulated by explanations given elsewhere by the Prosecutor) equivalent to arguing that the trial stage test of proof beyond reasonable doubt had already been met, may have underlain the Pre-Trial Chamber's apparent approach to the issue, on the basis that it was following the Prosecutor's analysis and argument.

- The Majority clearly found that the Prosecution had not presented materials upon which it could establish that there were reasonable grounds to believe that genocide had been committed. Having examined all of the evidence, the Majority held that it "cannot but conclude *that the existence of reasonable grounds to believe* that the GoS acted with a dolus specialis/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups is not the only reasonable conclusion that can be drawn therefrom" (para. 205, emphasis added).

- The Majority did not find that in order to establish the existence of reasonable grounds the Prosecutor must show that the only reasonable conclusion is the existence of genocidal intent established beyond reasonable doubt at this early stage. The Majority found that it is sufficient to show that the only reasonable conclusion is that there are reasonable grounds, a point emphasised by the Majority in its decision to grant leave to appeal of 24 June 2009 (at pp. 6-7). The Majority is simply stating that a Chamber must be certain that there are reasonable grounds before issuing a warrant. If it is not sure that reasonable grounds exist, the warrant cannot be issued. It is an obvious process of decision making that was consistently applied throughout the decision: for instance, at para. 78 "the Chamber concludes that there are reasonable grounds

to believe that … war crimes … were committed". In other words, the only reasonable conclusion is that there are reasonable grounds to believe in the commission of war crimes (see for further examples, paras. 83, 100, and 223 where words such as "concludes", "finds", and "considers" that there are reasonable grounds to believe serve the same purpose as "the only reasonable conclusion is that there are reasonable grounds to believe").

- At each stage of the proceedings, although different standards of proof apply, a Chamber must be certain that the evidence meets the requisite standard. Following the issuance of a warrant, at the stage of confirming charges (in accordance with Article 61), a Chamber must be certain that there are "substantial grounds to believe", and at trial, a Chamber must be certain of guilt "beyond reasonable doubt" to find an accused guilty.

- Put another way, at the stage of an arrest warrant, a Chamber must have materials before it upon which it *could* reasonably *exclude* alternatives to genocidal intent. Where a Chamber (as the Chamber found in the present case) does not have such materials advanced by the Prosecution, it can rightly and safely conclude that it is not certain that there is a reasonable basis for the charges sought.

- The reasoning of the Dissenting opinion that the inference of genocidal intent must not be unreasonable amounts to the same test – if there are other alternatives which do not permit a Chamber to conclude that there are reasonable grounds, the Prosecution application for genocide charges must be dismissed. The divergence between the Majority and the Dissent is really one of differing assessments and conclusions about the evidence itself – a matter which is not the subject of the present appeal.

- Leave to appeal has not been granted in respect of the Majority's actual findings on the evidence – the only issue on appeal is, "Whether the correct standard of proof in the context of Article 58 requires that the only reasonable conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" (p. 5 of the decision to grant leave).

- The Majority's appreciation of the distinction between proof to the level of "reasonable grounds" and "proof beyond reasonable doubt" is borne out by the manner in which it meticulously analysed each category of evidence relied upon by the Prosecution, separately and collectively. The Majority found that the evidence as a whole did not establish reasonable grounds – moreover, it held that materials relied upon by the Prosecution reflected a situation *significantly different* from the situation described in the Prosecution's application (summarised at paras. 202-208).

- The Prosecution is wrong to assert in its Appeal Brief that the Majority did find (even if implicitly) that the inference of genocidal intent *is* reasonable on the evidence presented (para. 3 of the Prosecution Brief – the footnote reference given by the Prosecutor for this submission is para. 205 of the Majority's decision (cited above) – this paragraph does not state or imply what the Prosecution claims – rather, the Majority finds that the Prosecutor has not demonstrated that the only reasonable conclusion from the facts is that there are reasonable grounds to believe in the existence of genocidal intent; and the Prosecution has failed to read the paragraph in the context of the Majority's essential findings on the lack of reasonable evidence and the Prosecution's misrepresentations about evidence, which immediately precede para. 205).

- As the correct standard of proof is the only issue on appeal, the Applicants submit that the only question that Appeals Chamber must answer is whether the Majority properly applied the provisions of Article 58, and in rejecting the Prosecution's application for genocide charges, did so on the basis that no reasonable grounds to believe had been established on the evidence. Were the Appeals Chamber to conclude that the Majority found on its analysis of the evidence that there was no reasonable grounds to find that genocide had been committed, the Majority's decision should be upheld. There would be no basis to go behind the factual findings of the Majority.

5. To the extent that it may be necessary, the Applicants bring this Application within the time period permitted in Regulation 65(5) for participants to respond to the

Prosecution's document in support of its appeal within 10 days of the notification of this document, and in accordance with the provisions on the calculation of time limits prescribed in Regulation 33.[1]

B. <u>The Applicants and the relevant background to the present Application</u>

6. The Applicants are the Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG).

7. As the Appeals Chamber may be aware, the Applicants sought to participate under Rule 103 in the proceedings before the Pre-Trial Chamber in respect of the Prosecution's application for an arrest warrant for President Al Bashir, by their Application dated 11 January 2009, together with the annexes of materials thereto, which were added to with a supplemental filing with annexes on 3 February 2009.

8. As set out in this original Application and its Supplement,

- 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.

- SIDG is a non-governmental committee of Sudanese citizens established out of concern for the negative effects that ICC arrest warrants could have for the peace process in Sudan and for the ordinary people of this country. The aims and initiatives of the committee are supported by many Sudanese NGOs and by the association that co-ordinates Sudanese NGOs.

- 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

[1] The Applicants were not formally notified of the Prosecution's document by the Registry given that they were not participants at the time. The Applicants were informed of the filing of this document on 8 July 2009 shortly after it was first posted on the ICC website.

accepted for the record as part of the filings of the Applicants (despite the Registry's objection to their filing).

- Neither organisation is representing the Government of Sudan in these proceedings.

- 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 (see para. 5 of original Application and Annex 5 thereto for the statements from tribal leaders).

- Certain of these leaders and those they represent were allegedly the subject of attacks and displacement. There are grounds for them to apply to be represented as victims in proceedings before the ICC in accordance with Article 68(3). (For the purposes of the present Application, the Applicants represent these groupings without prejudice to any application they may make in future to be represented as victims.)

- 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[2] and the Commission of Inquiry into Allegations of Human Rights Violations by Armed Groups in Darfur, established by the Government of Sudan.[3]

- It is accepted that those responsible, including the President, should be held to account if there is evidence of their involvement in crimes.

- The Applicants' reasons for their original Application related to: the impact that arrest warrants against the President and/or rebel leaders could have on various peace agreements and national security and stability in Sudan; whether the Prosecutor's actions were in the interests of justice especially given the very "political" approach he has taken to seeking an arrest warrant for

[2] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005.
[3] 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).

President Al Bashir, particularly for genocide (despite widespread opposition from, *inter alia*, commentators not supportive of the Sudanese Government); and, the initiatives taken in Sudan to ensure justice for the crimes committed in Darfur by processes constituting and/or leading to African solutions for African problems. But central to the Application was that there was insufficient evidence for genocide (see paras. 39-45 of the orginal Application 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 paras. 10-12 of the Supplement).

- Indeed, the Applicants many annexes include learned, academic or similar works of various international commentators of great repute (most of them not friendly to the President) who accept that crimes were committed but deny that they *could* have amounted to genocide.

- The Applicants 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 orginal Application and para. 13 of the Supplement).

9. The Pre-Trial Chamber refused this Application by its decision of 4 February 2009 on the basis that the Chamber determined it had no power under the Statute to review the Prosecutor's *implied* assessment that the issuance of an arrest warrant would not be detrimental to the interests of justice.

10. The Chamber's decision refusing leave under Rule 103 held that "only if the interests of justice are a factor to be taken into consideration at this stage would the matters to which the Application refers be related to an issue currently before the Chamber" (para. 10). The Chamber reasoned that as this was not an issue before the Chamber *on which it had the power to decide*, the Applicants' submissions could not be accepted.

11. The Applicants sought leave to appeal this decision on 11 February 2009 on the basis, *inter alia*, that the court possessed both express and inherent powers to review the Prosecutor's decision to apply for an arrest warrant:

- Even though Article 53(3)(b) and Article 58(1) and (7) make no express provision for the Pre-Trial Chamber to review the Prosecutor's decision to proceed with an application for an arrest warrant, this is not an end to the matter. The power can be read into the Statute. The exercise of the Prosecutor's discretion cannot be wholly beyond review by the court.

- In any event, Rule 103 does contain express provisions that empower the Pre-Trial Chamber to intervene if required. The adoption of Rule 103 by the States Parties explicitly envisages that the Chamber may in its discretion invite submissions from parties "at *any* stage of the proceedings" in relation to "*any* issue that the Chamber deems appropriate" (emphasis added).

- Furthermore, the submissions accord with the inherent and necessary powers the court must possess to fulfil its judicial function by virtue of its existence as a judicial organ.[4]

- The Applicants submitted (at paras. 32-34) that all of these matters should have been placed before the Appeals Chamber to resolve whether the Pre-Trial Chamber can review the Prosecutor's assessment of the interests of justice when the Prosecutor decides to proceed with an application for an arrest warrant, noting that the outcome would have clarified "an issue which goes to the heart of the division of functions and responsibilities between the Prosecution and the Chamber" (as the issue was characterised at para. 11 of the Pre-Trial Chamber's decision).

12. The Pre-Trial Chamber refused to grant leave to appeal by its decision of 19 February 2009 on the basis that it now held that the Applicants could not be considered "'a

[4] *Nuclear Tests* case, ICJ Reports 1974, pp. 259-260, para. 23; al so see *Northern Cameroons* case, ICJ Reports 1963, p. 29; and see *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 14. Also see, *Prosecutor v Erdemovic*, Judgement, Appeals Chamber, 7 October 1997, para. 16; and, *Prosecutor v Delalic et al*, Decision on Motion to Preserve and Provide Evidence, Separate Opinion of Judge Hunt, Appeals Chamber, 22 April 1999, para. 3.

party' to the proceedings relating to the investigation into the Darfur situation" for the purposes of Article 82(1) and Rule 155. It must be noted that the Chamber's refusal of the Applicants' request under Rule 103 to be participants had not been rendered on the grounds that the Applicants could not be a "party" to the proceedings. It may be unfortunate if any inconsistency in reasoning between the two decisions is now beyond review of the Appeals Chamber, especially if the formulation of the second decision served to exclude the Application subject to the first decision from consideration by the Appeals Chamber.

C. Reasons for leave to be granted in these appeal proceedings

13. The Applicants rely on Rule 103 to request leave to be participants in the appeal or *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.

14. As the Appeals Chamber has held, Rule 103 leaves to the discretion of the Appeals Chamber to grant leave to an organisation to submit observations if it "may assist the Appeals Chamber in the proper determination of the case".[5]

15. There is no party in the present appeal to argue in support of the Majority. Just as Rule 103 allowed the Applicants herein properly to make arguments to the Pre-Trial Chamber so does Rule 103 permit the Appeals Chamber to receive observations from

[5] *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.

participants or *amici curiae* at any stage of the proceedings if it deems that such submissions could assist the Chamber in its deliberations. There are no provisions in the Statute or Rules which expressly prohibit the participation of parties or *amici curiae* at this stage of the proceedings.

16. 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.

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 (attached hereto as Annex 2), claiming *inter alia* that victims "die the same day" if they leave the camps, or "die the day after" if they remain (para. 38).

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.

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.

20. 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.

21. 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.

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.[6] This is material the court could have called for in any event either from the Prosecutor or through Rule 103.

23. The potential value of the whole body of material to the Appeals Chamber on an issue like this that could have possibly far-reaching political, legal and other consequences may be appreciated by considering particular "samples" of the material. In particular, the Appeals Chamber's attention is drawn to the reports and papers of Alex de Waal, Edward Thomas, Prof. William Schabas, Prof. Mahmood Mamdani, Bona Malwal, and Prof. Peter Bechtold annexed to the original Application and its Supplement (Annexes 7-10 and 19 of the original Application and Annex 7 of the Supplement).

[6] The Prosecutor is required by Article 54(1) "In order to establish the truth, [to] 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 very substantial body of "exonerating" materials filed by the Applicants. He has studiously failed to fulfil his duty under the Statute.

24. Some of these experts have since the 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:

- 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 to support his application, describing his arithmetic as "simply fantastical".

- 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.

- Mahmood Mamdani, an interview in May 2006 and an article "Beware Human Rights Fundamentalism!", *Mail & Guardian*, 20 March 2009, in which he emphasises that although the politicisation of the ICC by the Prosecutor is no reason to sidestep the question of accountability, it has damaged the ICC, already made worse by erroneous assumptions in the Prosecution's allegations of genocide, including mortality rates in Darfur.

- Peter Bechtold, "Darfur, the ICC and American Politics", *Middle East Policy*, Vol. XVI, No. 2, Summer 2009, which examines the causes and nature of the conflict, highlighting misconceptions and inaccuracies which have been ignored by the Prosecutor in his "virtual crusade against Bashir ... using highly incendiary language seemingly at odds with the responsibilities of a senior official on an international court".

25. These materials are attached to this Application as an update of current expert opinion in Annex 1.

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.

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.

28. 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.

29. In this regard, the Appeals Chamber is invited to take account of the initiatives of the African Union (AU) to identify the root causes of the conflict in Darfur and to ensure both accountability and a lasting peace, particularly through the efforts of the AU Panel on Darfur (AUPD), headed by the former South African President Thabo Mbeki. Public hearings have recently commenced in Darfur under the auspices of the AUPD to receive representations from Darfurian leaders, administrators, youth and women's groupings, as well as from representatives of rebel groupings, and to determine a route to an effective peace process. These steps take place in the context of wide ranging opposition to the Prosecutor's charges against President Al Bashir from within the AU and from other countries and organisations, at a time where there has been no specific Security Council action either to implement the warrant of arrest (despite the most recent address of the Prosecutor to the Security Council on 5 June 2009, attached hereto at Annex 2) or to invoke Article 16 of the Rome Statute.[7]

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"

[7] See for example, the report on the meeting of African States of 8 June 2009 and Security Council Resolution 1870 (2009). These documents are included in Annex 3 hereto which contains a selection of materials on the initiatives afoot in Darfur.

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. The Applicants respectfully refer the Appeals Chamber to their earlier submissions on the "interests of justice" that are inevitably engaged by the issue of granting arrest warrants against President Al Bashir to be found in their original Application of 11 January 2009, para.14 *et seq*, and in the Application for Leave to Appeal to the Pre-Trial Chamber of 11 February 2009, para.16 *et seq*.

31. For all of these reasons, the Applicants request that their submissions on the single ground of appeal are received by the Appeals Chamber under Rule 103, and that the relevant materials that they have already submitted, together with that filed with this Application, are included in the information to be reviewed by the Appeals Chamber in considering this appeal.

Whether there can be a factual determination by the Appeals Chamber?

32. As an alternative submission, if the Appeals Chamber does not decide the single issue on appeal in favour of the Majority, then it should return the case to the Pre-Trial Chamber to reconsider the Prosecution's application for genocide charges to be added in light of all of the evidence. The Appeals Chamber should in addition make an order or recommendation that the Pre-Trial Chamber seek out further evidence by involving the Applicants and by admitting the Applicants' materials because of the essentially unsound basis of the factual case relied on by the Prosecution as the Applicants materials show.

33. The Prosecution is wrong to assert that the Appeals Chamber can rely upon the factual findings of the Majority to substitute its own conclusion of a reasonable basis for genocide charges to be added (Prosecution Brief, paras. 55-61). The Majority's finding on the evidence before it is that there is no reasonable basis under Article 58 to charge genocide (see summary at paras. 202-206). These findings cannot be overturned by the Appeals Chamber without the benefit of examining and assessing all of the evidence, an exercise which the Appeals Chamber is not in a position to perform.

34. Even the Dissenting Opinion recognised that the Majority in their review of the evidence reached a conclusion opposite to that of the dissenting Judge regarding the existence of reasonable grounds on the available evidence (see para. 77). Judge Usacka then proceeded to examine the reasons given by the Majority for rejecting the genocide charges, providing her alternative findings *on the evidence*.

35. These are matters of interpretation and assessment of the evidence over which the Majority and the Minority disagreed. They are not the subject of this appeal.[8] The Appeals Chamber cannot adopt the factual findings and analysis of the Dissenting Opinion. Were the Appeals Chamber to decide that the Majority identified the incorrect standard on inferences, and that this had had any bearing on their actual findings, the matter should be referred back to the Pre-Trial Chamber to reconsider in light of the evidence.

36. As set out immediately below, the Applicants' primary submission is that the Majority found in accordance with Article 58 that there were no reasonable grounds to believe in the existence of genocidal intent on the evidence presented by the Prosecution. The correct standard of proof was identified and applied by the Majority. The Prosecutor's appeal should be dismissed as there is no basis at all to overturn the Majority's findings of fact.

D. <u>No reasonable grounds to believe that genocide was committed</u>

37. The Applicants do not dispute the Prosecution's submission that the Prosecutor is not required to prove his case beyond reasonable doubt at the stage of issuing an arrest warrant. The Prosecution does not need to establish that genocidal intent is the only conclusion that can be drawn on the evidence. However, this is to miss the thrust of the Majority's findings.

38. The Majority stated in plain terms that at the arrest warrant stage it is sufficient for the Prosecutor to demonstrate that the only conclusion to be drawn from the evidence is that there are *reasonable grounds* to believe in the existence of genocidal intent. The correct standard of proof for the stage of an arrest warrant was stated and followed –

[8] As recognised by the Prosecutor: "This appeal is solely on the legal issue" (fnt 48).

"reasonable grounds to believe", and as noted by the Majority, the Chamber must be certain that such grounds exist before it can issue the warrant.

39. It is fundamental to understand, as stated above at p. 4, that the Majority is applying an obvious decision making process that it used consistently throughout its decision. In stating that to confirm charges the only reasonable conclusion must be that reasonable grounds exist, it is stating that it must be *satisfied* that reasonable grounds are established on the evidence (see the examples from the decision mentioned above: paras. 78, 83, 100, and 223 where words such as "concludes", "finds", and "considers" that there are reasonable grounds to believe serve the same purpose as "the only reasonable conclusion is that there are reasonable grounds to believe").

40. The Chamber must, therefore, have materials upon which it *could* exclude alternatives to genocidal intent so that it can be satisfied that there are reasonable grounds. It need not have materials which *would* lead it to conclude that all alternatives are excluded – this would amount to proof beyond reasonable doubt. As the Prosecution points out (supported by international and national case law), and as was of course understood by the Majority[9], it is for the Trial Chamber *at trial* to decide whether alternatives inconsistent with guilt have been excluded so that the trial Judges are sure beyond reasonable doubt.

41. At no point did the Majority rule out any category of evidence on the basis that it did not prove beyond reasonable doubt the commission of genocide. Indeed, the Majority only ever referred to the "reasonable grounds" standard throughout its analysis of the evidence in respect of all charges, re-iterating that "according to the consistent interpretation of article 58 of the Statute by this Chamber, a warrant of arrest or a summons to appear shall only be issued in relation to a specific crime if the competent Chamber is satisfied that there are reasonable grounds to believe that the relevant crime has been committed and the suspect is criminally liable for it under the Statute" (para. 157).

42. There is no basis to suggest that the Majority did not apply this standard in its assessment of the evidence, as is evident from the summary of its findings:

[9] It cannot seriously be suggested that the Judges of the Majority did not understand that it was unnecessary to prove the allegations beyond reasonable doubt to issue a warrant.

202. The Majority observes that the Prosecution acknowledges that it has no direct evidence of the GoS's genocidal intent and that it therefore relies on proof by inference.

203. In light of this circumstance, the Majority agrees with the Prosecution in that the article 58 evidentiary standard would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe that the GoS acted with a dolus specialis/specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups.

204. In this regard, the Majority recalls that the above-mentioned analysis of the Prosecution's allegations concerning the GoS's genocidal intent and its supporting materials has led the Majority to make the following findings:

i. even if the existence of an alleged GoS strategy to deny and conceal the crimes committed in Darfur was to be proven, there can be a variety of plausible reasons for its adoption, including the intention to conceal the commission of war crimes and crimes against humanity;

ii. the Prosecution's allegations concerning the alleged insufficient resources allocated by the GoS to ensure adequate conditions of life in IDP Camps in Darfur are vague in light of the fact that, in addition to the Prosecution's failure to provide any specific information as to what possible additional resources could have been provided by the GoS, there existed an ongoing armed conflict at the relevant time and the number of IDPS s, according to the United Nations, was as high as two million by mid 2004, and as high as 2.7 million today;

iii. the materials submitted by the Prosecution in support of the Prosecution Application reflect a situation within the IDP Camps which significantly differs from the situation described by the Prosecution in the Prosecution Application;

iv. the materials submitted by the Prosecution in support of the Prosecution Application reflect a level of GoS hindrance of medical and humanitarian assistance in IDP Camps in Darfur which significantly differs from that described by the Prosecution in the Prosecution Application;

v. despite the particular seriousness of those war crimes and crimes against humanity that appeared to have been committed by GoS forces in Darfur between 2003 and 2008, a number of materials provided by the Prosecution point to the existence of several factors indicating that the commission of such crimes can reasonably be explained by reasons other than the existence of a GoS's genocidal intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups;

vi. the handful of GoS official statements (including three allegedly made by Omar Al Bashir himself) and public documents relied upon by the Prosecution provide only indicia of a GoS's persecutory intent (as opposed to a genocidal intent) against the members of the Fur, Masalit and Zaghawa groups; and

> vii. as shown by the Prosecution's allegations in the case of The Prosecutor v. Ahmad Harun and Al Kushayb, the Prosecution has not found any indicia of genocidal intent on the part of Ahmad Harun, in spite of the fact that the harsher language contained in the above-mentioned GoS official statements and documents comes allegedly from him.
>
> 205. In the view of the Majority, when all materials provided by the Prosecution in support of the Prosecution Application are analysed together, and consequently, the above-mentioned findings are jointly assessed, the Majority cannot but conclude that the existence of reasonable grounds to believe that the GoS acted with a dolus specialis/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups is not the only reasonable conclusion that can be drawn therefrom.
>
> 206. As a result, the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application fail to provide reasonable grounds to believe that the GoS acted with dolus specialis/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups, and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to counts 1 to 3.

43. When (as in (i) above) the Majority found that there could be a variety of plausible reasons for an alleged attempt by the Government of Sudan to conceal crimes, the Majority is providing its reason for why it held that on the basis of this evidence that no reasonable grounds existed. Each of the Majority's findings must be read in the context of its stated position that only if reasonable grounds are established by the evidence could it confirm the genocide charges pursuant to Article 58.

44. Similarly with (ii) above, in stating that the Prosecution's allegations about the lack of provision of resources in the camps are vague and unsubstantiated by information, particularly in light of the evidence of the on-going nature of the conflict, the Chamber is explaining in clear terms its reasons for finding that reasonable grounds do not exist. The Majority is not "effectively imposing a requirement of proving an inference 'beyond reasonable doubt'" (as the Prosecution seeks to argue: para. 22). The Majority is plainly indicating that the Prosecution's evidence (and lack thereof) on this point does not establish reasonable grounds.

45. The Majority is also indicating that materials submitted by the Prosecutor in support of his application reflect a situation within the camps which significantly differs from the situation described by him in his application. Put bluntly, the Prosecutor's

allegations are overstated – another reason why the Majority was not convinced that reasonable grounds were made out.

46. As a further illustration, the statements and documents relied on by the Prosecution were found not to be sufficient to establish reasonable grounds for genocidal intent (see (vi) above). Merely because they support a finding of persecutory intent by the Chamber does not mean that there are automatically reasonable grounds to infer genocidal intent as well.

47. It must be stressed that the Majority rightly assessed all of the evidence collectively in determining whether reasonable grounds were established. The method whereby the Majority arrived at its conclusion cannot be faulted. Article 58 requires that the Chamber must be satisfied that reasonable grounds are established on all the evidence and in all the circumstances. It is not a mechanical process of merely determining whether an inference can be drawn, ignoring all evidence to the contrary. Even the Dissenting Judge recognised that if there is material that renders the inference unreasonable, the requirements of Article 58 are not satisfied.

48. The Majority correctly noted that allegations of widespread crimes which could constitute crimes against humanity cannot automatically always amount to genocide:

> "The Majority considers that the existence of reasonable grounds to believe that GoS forces carried out such serious war crimes and crimes against humanity in a widespread and systematic manner does not automatically lead to the conclusion that there exist reasonable grounds to believe that the GoS forces intended to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups" (para. 193).

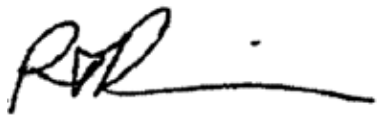
49. It is the evidence that must be determinative. Indeed, the Majority noted that there were "a number of materials provided by the Prosecution [which] point to the existence of several factors indicating that the commission of such crimes can reasonably be explained by reasons other than the existence of a GoS's genocidal intent" (see (v) above).

50. Furthermore, there is no bar on the Prosecution presenting new evidence at a later stage in the proceedings to seek to meet the required standard of proof, as pointed out by the Majority:

> 207. Nevertheless, the Majority considers that, if, as a result of the ongoing Prosecution's investigation into the crimes allegedly committed by Omar Al Bashir, additional evidence on the existence of a GoS's genocidal intent is gathered, the Majority's conclusion in the present decision would not prevent the Prosecution from requesting, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir so as to include the crime of genocide.
>
> 208. In addition, the Prosecution may always request, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir to include crimes against humanity and war crimes which are not part of the Prosecution Application, and for which the Prosecution considers that there are reasonable grounds to believe that Omar Al Bashir is criminally liable under the Statute.

E. <u>Conclusion</u>

51. The Applicants respectfully request the Appeals Chamber to accept their submission, and the supporting materials from this and their previous Application. The Applicants urge the Appeals Chamber to uphold the Decision of the Majority in rejecting the genocide charges. The Majority so held on the basis that there were no reasonable grounds to believe that genocide had been committed, a proper application of the provisions of Article 58.



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

Dated this 20th day of July 2009
London, United Kingdom