

# **A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir**

Alex de Waal  
Social Science Research Council

## **Overview**

1. The Public Application for an arrest warrant by the Chief Prosecutor of the International Criminal Court against Sudanese President Omar al Bashir is on ten counts: three of genocide, five of crimes against humanity and two of war crimes. This memorandum outlines a critique of the charges, focusing particularly on the genocide charges and the mode of liability indicated in the Application.
2. The genocide charges, which make up the bulk of the case publicly presented by the Prosecutor but are not necessarily the most substantive parts of the application, arise from new investigations by the Office of the Prosecutor (OTP), additional to those mounted for the 2007 case against Ahmad Harun and Ali Kushayb. The charges are broad-ranging, covering the entire period of the conflict since early 2003 until the present and the whole of Darfur, though specifically referring to the Fur, Masalit and Zaghawa tribes. The OTP alleges not only genocidal intent but also a central genocidal plan. It would be extremely difficult to convict President Bashir of genocide on this basis.
3. The charges of crimes against humanity and war crimes are mostly specific to the period between July 2003 and April 2004 and consist of a reiteration of the charges already laid against Harun and Kushayb, with the addition of some additional recent incidents, plus President Bashir as another perpetrator through the mode of ‘perpetration by means.’
4. Rather than arguing for modes of liability such as superior responsibility, conspiracy or joint criminal enterprise, the Prosecutor has chosen to pursue an ambitious and innovative mode of liability: indirect perpetration. It is unclear what the Prosecutor will need to prove for this to stick. In the Application, the OTP argues for Bashir’s total control over every relevant institution of the state, something neither demonstrated in the evidence presented nor supported by past patterns of action.
5. The Public Application is not in the interests of justice, peace and democracy for Sudan. Pursuing an arrest warrant against a head of state is tantamount to demanding regime change, which is in contradiction to the international strategy of negotiating with the Sudan Government to achieve peace and democracy. The approach is therefore a gamble with unknowable consequences and very large risks. It is already contributing to a negative reaction against the ICC by African governments and civil society.

6. Constituted as an independent court, the ICC is ill-suited to serve as an instrument for political leverage. An Article 16 deferral is an inadequate instrument for both Sudan's political needs and for safeguarding the principle of justice. Nonetheless, a deferral is in the interests of peace and security in Sudan and its neighbours and should be enacted.

7. The flaws in the Prosecutor's case are such that it is necessary to ask whether he ever expects it to come to court, or whether he prefers a contest in the court of international public opinion. The flaws are such that the Pre-Trial Chamber should send it back to the Office of the Prosecutor for comprehensive reconsideration.

## **The Genocide Charges**

8. In deciding to charge President Omar al Bashir for the crime of genocide, the Prosecutor of the ICC took a remarkably bold step. Genocide is difficult to prove. The 1948 Genocide Convention and the case law of prosecutions for genocide (derived from the ICTR and ICTY) provide a relatively modest basis on which to build a robust prosecutorial strategy. While it may not be difficult to show that Pres. Bashir has a case to answer (the threshold that must be met for the Pre-Trial Chamber to issue an arrest warrant), successfully convicting Pres. Bashir will be much a tougher test. Success in the latter would depend upon the Prosecutor managing to demonstrate three things:

- a. The target groups qualify for protected status as 'racial', 'ethnic' or 'national' under the Genocide Convention;
- b. The acts committed against these groups (*actus reus*) were of sufficient nature to warrant the categorization of 'genocide' under the Genocide Convention and sufficient gravity to meet the admissibility criterion of the Rome Statute; and
- c. The charged individual (President Bashir) possessed the required genocidal intent (*mens rea*) to destroy these groups, as such, in whole or in part.

### *Determining the Identities of the Groups*

9. Determining that the three groups—Fur, Masalit and Zaghawa—constitute 'ethnic' groups according to the definition of the Genocide Convention is the least difficult of the Prosecutor's tasks. There is little doubt that these groups—equally well characterized as 'ethnic groups' or (in Sudanese parlance) 'tribes'—are protected groups.

10. But some rudimentary ethnographic errors mar the text and raise the question of the OTP's competence in this regard. In Paragraph 5, Dar Fur, Dar Masalit and Dar Zaghawa are given as though they were comparable categories. In fact Dar Fur is not an ethnically defined domain, it is the territory of the former multi-ethnic sultanate and as such encompasses the two other Dars. In footnote 3, the Ma'aliya would be surprised to find themselves bracketed with the 'Mahamid, Northern Reizegat [sic], Jalul etc.' The Ma'aliya are a distinct Arab tribe located in a wholly different area (south-east Darfur) where they have had serious political differences with their neighbouring (southern)

Rizeigat over the last forty years, and have been only marginally involved in the current conflict. One suspects it is a mistake and the OTP meant to refer to the ‘Mahariya’, which is a clan of the Northern Rizeigat. In addition, the Jalul are a section of the Mahamid who are themselves a section of the Northern Rizeigat, and listing them as though they identified comparable entities indicates a basic ethnographic misunderstanding.

11. An interesting secondary point is whether the OTP claims that President Bashir intended to destroy the groups as *tribal* entities or as a *racial* group. The Prosecutor has emphasized that the racial distinction between ‘Arabs’ and ‘Africans’ in Darfur is an artificial construction. He refers to the three tribes by their ethnic names not as ‘Africans,’ and makes no mention of other ‘African’ tribes in Darfur whose members have also been victims during the years of conflict (Berti, Birgid, Daju, Meidob, Tunjur etc.) Yet a significant element of evidence that the OTP adduces in support of its genocide argument refers to the racial categorization of the victims, both by President Bashir (who, it alleges, constructed the racial divide) and by those who directly perpetrated the crimes. Prominent among the alleged perpetrators are Ahmed Harun (of Borgu, i.e. ‘African’ origin) and Ali Kushayb (also of Borgu lineage, though he calls himself ‘Arab’). These would be minor points if the OTP had constructed a coherent account of the motivations and intentions of the perpetrators. But it is on such fine points of specifying intent that any successful prosecution for genocide will rest.

#### *Inferring Intent*

12. The second and third requirements are closely linked and this section will concentrate on these challenges, beginning with the need for proof of genocidal intent.

13. The most important point to note is that, in the absence of a guilty plea by the accused or evidence in which the accused states his genocidal intent in unambiguous and irrefutable terms, proof of intent can only be obtained indirectly. Intent must be *inferred* from the pattern of the crimes, the circumstances in which they occurred, the knowledge of them by the accused, and his control over the individuals and forces committing the crimes. Central to this is the identification of genocide as a crime committed by a collectivity or organization, not solely by an individual.<sup>1</sup> It was such a method of inference that allowed the ICTR to attribute genocidal intent to the former Rwandese official, Jean-Paul Akayesu, and thereby obtain a conviction for genocide.

14. This approach is crucial for any prosecutorial strategy in two respects.

- a. First, it places a requirement on the prosecution to show that genocidal intent is the *only* reasonable inference that can be made from the

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<sup>1</sup> Some scholars argue that genocide should be seen as a state crime, or the crime of a state-like organization. Recently the Forces Democratique de Liberation du Rwanda, a militia in eastern Democratic Republic of Congo, has been labeled a ‘genocidal organization’—a labeling that would appear to indicate the stretching of collective intent beyond states. Few would argue that an individual, acting solely in an individual capacity, could commit an act of genocide.

circumstances. If there are reasonable inferences other than genocidal intent, the case is not proven.

- b. Second, this inference can only be made by the application of an *implied socio-political theory of genocide*. Individual intent must be situated within a broader organizational or collective 'intent,' which in turn requires socio-political analysis. This is why most prosecutions for genocide pursue modes of liability such as joint criminal enterprise, which allows for collective intent to be inferred from the pattern of crimes committed by the collectivity. The Public Application and the Prosecutor's reports to the UN Security Council contain such a theory, derived from the paradigmatic cases of the Nazi Holocaust and Rwanda in 1994. But transferring this paradigm to Darfur is implausible. If this implied theory can successfully be challenged, then it follows that there are reasonable alternative attributions for President Bashir's intent, and the Prosecution case will remain unproven.

### *The Prosecutor's Socio-Political Theory of Genocide*

15. In deciding to charge President Bashir with genocide, the Prosecutor not only presented evidence in support of criminal charges but also constructed a socio-political theory of genocide in Darfur. He not only identifies the institutions of state allegedly responsible for the acts but also imputes a collective intent, derived from the individual intent of the man whom, he says, controls the state. The narrative developed by the Prosecutor imputes an eliminationist agenda to Bashir. This narrative was the central part of his press conference on 14 July. This allegation places President Bashir as the political and criminological heir of the Nazis and the Hutu Power ideologues in Rwanda.

16. In the Public Application, the Prosecutor makes a special point of *not* adopting an alternative socio-political theory, which is that genocidal acts are the regular corollary of the counterinsurgency strategy adopted by the Sudan Government, practiced repeatedly over the last 25 years. This is close to the position adopted by the International Commission of Inquiry into Darfur (ICID) headed by Antonio Cassese, which concluded that there was no evidence for a genocidal plan (implying that no collective genocidal intent existed) but that individual acts of genocide might have been committed. The ICID report of January 2005 did not specify who might have committed such acts but did not rule out senior commanders.

17. Pursuing such an argument would have lifted the requirement of demonstrating genocidal motive or plan and left the Prosecutor with the simpler task of proving that Bashir intended only community-targeted violence in pursuit of military and political objectives, i.e. that the genocidal acts and intent were limited geographically and temporally to the location and timing of military operations and were ancillary to the latter. The drawback of this argument is that making such a clear separation between motive and intent and arguing that genocide was committed without a plan as a byproduct of counterinsurgency, would have set a controversial precedent. It would have watered down or removed the requirement of proving *specific* genocidal intent and would have

been tantamount to arguing that genocide is little different to aggravated murder or forcible dispossession. The judges might not accept this argument.

18. The first indication of the Prosecutor's approach appears in Paragraph 7 of the Application:

AL BASHIR's motives were largely political. His pretext was a 'counterinsurgency.' His intent was genocide. The goal was not simply to defeat a rebellion but to destroy those ethnic groups whose members challenged his power.

19. This is precisely wrong. But first it needs to be unpacked. The first and third sentences refer to 'motives' and 'intent'. These are legal claims, though we can note the qualifier 'largely' which leads us back into the terrain of socio-political theorizing. The second and fourth sentences use the words 'pretext' and 'goal.' This refers to the Prosecutor's socio-political theory, which becomes explicit at various points during the Application, which is that President Bashir had a genocidal plan above and beyond the suppression of insurgency.

20. The Public Application contains other statements that make it clear that this is indeed the Prosecutor's belief. Paragraphs 349-355 describe the measures taken to suppress the political profile of the Fur following the SPLA incursion into Darfur led by an ethnic Fur, Daud Bolad, in 1991. These measures included the dismantling of the single state for Darfur and its replacement by three smaller states, thereby breaking up the Fur constituency. The Application does not mention that this was primarily the work of a Darfurian of non-Arab West African ancestry, now prominent in the political opposition to Bashir, named Ali al Haj Mohamed. Neither does the Application mention the fact that throughout the entire period, members of the Fur, Masalit and Zaghawa served in senior positions in government and the very substantial communities of these tribes in the national capital and central and eastern Sudan have continued to live as Sudanese citizens, subject to the same tribulations as other Sudanese but only rarely marked out for targeted measures (as occurred, transiently, after the 2003 rebellion and the 2008 attack by JEM on the national capital). The fact that very substantial numbers of Darfurians served in the Sudan Armed Forces up to and during the Darfur war is also significant, and also omitted.

21. Paragraph 49 asserts the existence of a genocidal plan or policy. But the following four paragraphs give no indication of any such *genocidal* plan or policy. What they demonstrate is precisely the kind of clumsy and violent counterinsurgency, targeted at civilian communities, that is characteristic of how wars are conducted in Sudan and the neighbouring countries. General Ismat al Zain is quoted as saying that during military operations 'numerous small villages would be overrun.' What the Application does not quote is the self-same General Ismat describing how his first step as officer commanding the Western Command was to arm paramilitaries from *all* tribes to try to counter the rebellion on a non-ethnic basis. After many Fur, Tunjur and Zaghawa paramilitaries

deserted to the SLA with their weapons, the strategy was changed to arming only those who had demonstrated loyalty, i.e. the Arabs.

22. In Paragraph 10, the Prosecutor raises the claim that the Sudan government forces continued to pursue the destruction of the Fur, Masalit and Zaghawa ethnic groups after their displacement to camps. This we can call the ‘two stage’ theory of genocide, an account which was first publicly aired by the Prosecutor in his December 2007 statement to the UN Security Council. The argument is that President Bashir first sought to destroy the Fur, Masalit and Zaghawa through massacre (and related crimes) and then, having driven them to internally displaced persons (IDP) camps, sought to destroy them through ‘causing serious bodily and mental harm – through rapes, tortures and forced displacement in traumatizing conditions – and deliberately inflicting on a substantial part of these groups conditions of life calculated to bring about their physical destruction, in particular by obstructing the delivery of humanitarian assistance.’

23. The target groups are, of course, assisted in the IDP camps in what has been for several years the largest humanitarian operation in the world. The fact of this assistance would seem to contradict any eliminationist agenda. This was pointed out in the ICID report authored by Antonio Cassese. In Paragraph 22, the Prosecutor rebuts this, saying that the groups are attacked in the camps, and that these attacks ‘are a clear indication of AL BASHIR’s genocidal intent.’ It is of course possible that congregating a population in camps could be part of a genocidal plan. But, as a rebuttal this falls well short of a refutation. There are many other explanations for the camps, consistent with established patterns in Sudan’s wars over the decades.

24. Should the case come to court, one would expect the defence to put the argument: why should a man with genocidal intent allow such a huge humanitarian operation to assist the targets of his destruction? Since 2005, data for mortality and nutrition indicate near-normal levels in the majority of the camps. (This is implicitly conceded in Paragraph 197 which refers to nutritional indicators rising above emergency thresholds for the first time since 2005 in May 2008.) Much of the credit for this can go to the 12,000 humanitarian workers (most of them Sudanese, including government officials) who work in Darfur, chiefly in the camps. Comparisons with the Warsaw Ghetto would not be appropriate.

25. The crime of genocide is defined by intent rather than scale and gravity. The Prosecutor has tried to emphasize (and indeed exaggerate) the scale and gravity of the case. We may assume this is partly for public relations purposes and partly because the Rome Statute includes a gravity criterion for admitting cases. It would be odd if a genocide charge could be justified according to the Genocide Convention yet not meet a gravity threshold, but that theoretical possibility arises in the case of Darfur over the last few years given the low intensity of the lethal violence there.

26. The Prosecutor emphasizes gravity, both by citing numbers and by making comparisons. In the 14 July press conference, avoiding the question of the numbers of dead (perhaps because the ICC’s estimate of 35,000 violent deaths is lower than others),

he described the *entire* Fur, Masalit and Zaghawa populations in Darfur as victims of genocide. But he prefers high numbers for mortality too. Speaking publicly following his presentation to the UN Security Council in December 2008, he said that 5,000 IDPs were dying monthly. No data were provided in support of this claim. Neither the UN nor humanitarian agencies have put forward such a claim or data in support of it. A thorough expert review of mortality estimates for Darfur carried out by the U.S. General Accountability Office in 2006,<sup>2</sup> concluded that the high-end estimates for death rates (such as those produced by Eric Reeves) were the least credible.

27. A final observation on the socio-political theory of genocide is in order. This observation is that, once an allegation of genocide has been made by a credible authority, the prospects for a negotiated peace become more remote. If one party to a conflict possesses a specifically genocidal intent, the other (victim) party has reason to refuse to agree to peace on terms short of secession, regime change or international military protection. The socio-political theory of genocide adopted by the OTP implies two possible endings only, namely the overthrow of the genocidal regime or the elimination of the target group. There is no middle way.

#### *The Flawed Argument for Genocidal Intent*

28. The most substantive summation of the case for genocidal intent is contained in Paragraphs 364-400, which comprise the Prosecutor's argument that 'AL BASHIR's intent to destroy the target groups as such in substantial part is the only available inference.' The document promises a 'comprehensive consideration of nine factors', eight of which are to be detailed in the following paragraphs (one having already been presented). In fact only six such factors are presented (the seventh being a concluding sentence), a copyediting error that is characteristic of a document that shows that hallmarks of having been hastily put together and poorly edited.<sup>3</sup> The Prosecutor wishes to argue that when all these factors are taken into account, an overall picture of genocidal intent emerges.

29. The Prosecutor's argument is not that each one of the factors is itself an act of genocide, but rather that these factors are sufficient to infer Bashir's *mens rea*. It is unclear from this whether the refutation of any one of the factors would be sufficient to knock down the genocide charge. However, each of the six factors is sufficiently shaky to be refuted as an indication of genocidal intent.

30. The first factor mentioned is the 'meticulous' targeting resulting in burning of villages, and deaths of 35,000 people by violence. These and the continuing attacks on the IDP camps caused the 'slow death' of 85,000-265,000 others by other means. The selective targeting of villages for burning—in which predominantly Fur, Masalit and Zaghawa settlements were destroyed but Arab villages and camps left untouched—is

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<sup>2</sup> GAO, "Darfur Crisis: Death estimates demonstrate severity of crisis, but their accuracy and credibility could be enhanced," Washington DC, GAO 07-24, November 2006.

<sup>3</sup> It reportedly required thirty pages of errata before being publicly released more than two months after the application was made.

powerful evidence for the ethnic nature of the campaign of destruction. As a piece of evidence, this stands. The OTP infers that a genocidal policy for such selective targeting must have come from the highest level. However, there are other reasonable inferences. If the central government chose to make use of, ethnically-based proxy militia as its forces, it would follow automatically that the destruction would be ethnically selective. The architects of such a policy could be held responsible for unleashing such forces in the knowledge of the near-certain outcomes of their actions. Thus (as indicated in the ICID report), it is possible that acts of genocide might be committed by individuals who directly perpetrated crimes, without there being a genocidal plan among those in positions of command. It is unclear whether this would make the latter genocidal criminals as opposed to those with command or superior responsibility for war crimes. And it is also unclear whether the perpetration of a number of genocidal acts during a military campaign is sufficient to make a ‘genocide.’<sup>4</sup>

31. In the context of arguing that President Bashir provided total impunity to those who were carrying out his orders, the Public Application gives as supporting evidence, Bashir’s decision to keep Ahmed Harun in his position. The decision to keep Harun in the sensitive position as Minister of State for Humanitarian Affairs following his naming by the OTP and the issuing of the arrest warrant by the Court two months later, is evidence for the Sudan Government’s disregard for international public opinion and its support for impunity. However, maintaining an indicted war criminal in a ministerial position and failing to hand him over to the ICC to face trial are not of course offenses comparable to war crimes or genocide. Nor do they constitute supporting evidence from which specifically genocidal intent can be inferred.

32. A second factor argued by the Prosecutor is the ‘existence of a genocidal plan or policy.’ In support of such a plan or policy he cites the Armed Forces Memorandum and documents from the West Darfur State Security Committee. These documents are instructions for the conduct of a coordinated counterinsurgency between the armed forces, the militia and other organs of state. The late date at which they were produced—after the outbreak of major hostilities—attests to the reactive nature of the government’s planning rather than, as the Prosecutor implies, any genocidal plan pre-existing the insurgency.

33. There was a policy or plan for the conduct of the *war*. The issue is whether this policy or plan is genocidal or not. The Prosecutor argues backwards from the evidence presented for the ethnic targeting of attacks to the necessity of the existence of a single plan, rather than proving from the content of the planning documents that genocidal intent existed. As such this second factor does not actually add to the first factor claimed.

34. These paragraphs in the Application appear to be an attempt to rebut the case that the targeted destruction was the outcome of a counterinsurgency method that arose through the fusion of local and national actors. In paragraph 379, the document cites a redacted source to the effect that it is ‘inconceivable that there would be two separate forces operating on independent plans.’ It is however perfectly conceivable that there is

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<sup>4</sup> This definitional problem arises in part because genocide is both a legal term and a socio-political one.

extremely close tactical coordination between the proxy forces carrying out a mission and the central government forces cooperating in that mission, and directing its overall conduct, in the absence of the two sharing all their strategic objectives and plans. The militia had their own agenda and exploited Khartoum's support to pursue these aims. Indeed this is precisely how the Sudan Government has conducted its wars for a quarter century. The divergence between the objectives of the two is illustrated by the recurrent and predictable mutiny of the proxies when their leaders believe they have been misused. This refusal to obey orders occurred in the war in the south and it occurred again with the largest Arab militia leaders in Darfur during 2006 and 2007.

35. The Prosecutor mentions that Harun refused to reveal the contents of the plan or circulate the document fearing it would end up with ICC, and by implication, implicate him and others for the crimes committed. This could be an indication that Harun knew of his responsibility for crimes committed. It is not relevant to proving a case for genocide.

36. The third supposed factor (paragraphs 384ff) consists of statements of those involved in the crimes revealing their intention. These statements include President Bashir's announcement that the rebellion should be ended within two weeks and no prisoners should be taken. Such an appeal to end the insurgency speedily is consistent with Bashir's propensity to fiery and aggressive rhetoric, manifest many times over the years. The declaration attributed to him that he 'didn't want any villages or prisoners, only scorched earth,' is a clear incitement to his forces to commit violations of the laws of war. This is wholly consistent with standing practices going back to the mid-1980s,<sup>5</sup> that war zones are 'ethics free zones' in which any conduct is tolerated, need not be reported upon, and will not be called to account.

37. The Prosecutor quotes statements by militiamen and soldiers, obtained from victim testimonies, expressing extreme racist sentiment. Three observations are in order.

- a. While it is important to pay close attention to the testimonies of victims, for many reasons, it is problematic to infer the *mens rea* of a perpetrator from the *mens rea* of a victim.
- b. Racism is an aggravating factor in murder and other crimes. But adding racism to the motives of the perpetrator does not turn such a crime into genocide.
- c. The correlation between racist statements and the crimes committed does not necessarily signal cause and effect. There is no doubt that such racist statements were made consistently during the height of the conflict, especially during military operations. There is also no doubt that there is an ingrained racism in much of Sudanese society, and that this racism is underwritten by the Arab and Islamist tenor of many official statements and broadcasts. Some individuals have also indicated more ambitious agendas for the racial reshaping of Darfur. But some of the Darfurian militia leaders who have been reported to be responsible for both crimes

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<sup>5</sup> Also, arguably to the first civil war in southern Sudan (1955-72), to colonial policing operations and the 19<sup>th</sup> century wars of conquest.

and racist statements, have also at different times rebelled against the government, making deals with their erstwhile victims and enemies, and have made comparably fiery anti-government statements, accusing the government of 'evil' and resolving to fight it 'to judgement day'. On then making deals with the government, such fiery statements abruptly end. It is quite consistent to argue that racist feelings were whipped up in order to encourage militiamen to participate in operations which had already been decided for other (military) reasons, knowing that ethnic sentiments are the simplest way to mobilize and motivate irregular forces.

38. Also relevant here is the claim that Bashir 'ordered' the genocide, with a number of public statements canvassed in this regard (paragraphs 270-275). The statements made by Bashir are concerned with using all measures to destroy the rebellion, and do not include racist or ethnically-targeted exhortations. These statements can certainly be canvassed as evidence that Bashir authorized the armed forces and militia to operate with impunity and commit war crimes. The statements attributed to the direct perpetrators of the crimes (militiamen cited in paragraphs 276-279) are different. They include both references to the authority given to them by President Bashir and examples of extreme racism, but not the two conjoined.

39. Any connection between Bashir's statements and the racism of the militiamen is implied by the Prosecution but not demonstrated. An equally reasonable inference from the evidence is that President Bashir ordered a counterinsurgency (as his words indicate) and gave a high degree of latitude to the implementing forces to operate beyond the law. If indeed acts of genocide were committed, individual responsibility for these needs to be ascertained on a case-by-case basis.<sup>6</sup>

40. This wider context points to the need to see racist statements in their context, namely the height of mobilization to destroy the insurgency. Racist exhortations are, quite possibly, instrumental in the service of the counterinsurgency, rather than a causal factor for the campaign. This does not mitigate the gravity of the crimes committed during the counterinsurgency. Nor does it disregard the racist or supremacist motives of some individuals. But it does cast doubt on whether a coordinated plan for a racist redefinition of Darfur was the driving force behind the crimes committed.

41. Factor four (paragraphs 387ff) refers to forcible transfers as a material fact relevant to deducing genocidal intent. It is possible that forcible displacement may be an act of sufficient gravity to warrant consideration as an act of genocide in itself, and it may also be a consideration relevant to inferring genocidal intent. It requires some effort to extract a coherent logic from the Public Application. Four considerations are relevant here.

- a. The first element alleged is that the displacement was conducted in such a way as to ensure the death through starvation and thirst of substantial numbers of the target group (i.e. the displacement is itself genocidal).

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<sup>6</sup> Once again, it seems that the report of the ICID, produced far more rapidly with much more modest resources than those available to the OTP, contains a superior grasp of the situation in Darfur.

There is one documented case of forcible starvation during the Darfur conflict, namely Kailak in early 2004 (cited in the Harun/Kushayb application). There are other cases in which the destruction of villages in the desert areas of north Darfur led, in a predictable and predicted way, to deaths through starvation and thirst. These are both crimes. Whether they constitute genocide depends upon intent. During the height of hostilities (July 2003-March 2004), the Sudan Government restricted (but did not prohibit entirely) humanitarian operations in Darfur. Subsequently it (under pressure and with ill grace) permitted the world's largest humanitarian operation.

- b. Second is that the destruction and dispersal of the groups is conducted in such a way that they cannot reconstitute themselves. The criteria for being unable to reconstitute themselves are not clear. However, the ethnic identities and sense of common identity of the target groups have not been weakened in the last five years, if anything the reverse. The Sudan Government readily recognizes this and in fact, contrary to the political strategies of the leaders of the rebellion, indeed prefers to cast the conflict in ethnic terms. Government policy is for the Fur, Masalit and Zaghawa to remain constituted as tribes, albeit under the political, administrative and military control of Government-sponsored administrative chiefs.
- c. The third consideration is that considerable parts of Fur and Masalit land, once emptied of their former inhabitants, have now been occupied by others, including both Darfurian Arab groups that formerly had poor access to land and immigrants from west Africa. There is clear evidence both that vacated land is being resettled and that the Government is (in many instances) facilitating and supporting the settlers, in most cases after they have spontaneously moved, for example through the control of the Native Administration system and the associated allocation of positions that involve jurisdiction over land. There are also important actions in the opposite direction including efforts at state and local government level to retain or restore prior patterns of land ownership. Whether land alienation is a systematic policy or simply the widespread outcome of local agendas for land expropriation and settlement, which the government has opportunistically seized upon, is an empirical question, the answer to which remains unclear.
- d. The fourth consideration cited by the Prosecutor is that the attacks against the target population in the IDP camps. He quotes (paragraph 392) the conclusion of the ICID that there would be no policy of genocide 'if the populations surviving the attacks ... live together in areas selected by the government ... where they are assisted.' He argues that on the contrary the population is attacked in the camps, which provides 'a clear indication of AL BASHIR's genocidal intention.' Since early 2005, UN records indicate ongoing violence against the residents of camps. In the last two years these have amounted to as much as half of the approximately 100-200 lethal incidents which occur each month in Darfur. Those incidents which qualify as attacks, by militia, bandits, and units of the security

forces, are equally consistent with a combination of breakdown of law and order and a policy of suppressing real security threats in the camps. Several of the major camps are well-armed, the location for organized crime and armed resistance, and barred to entry by police and security. There have been a number of poorly-planned and brutal security operations in and around the camps, initiated at different places within the security apparatus and government structure. It would require a remarkable leap of inference to take the Sudan Government's policies towards the IDP camps as evidence for the President's genocidal intent.

42. The fifth factor cited in the Public Application as proof of genocidal intent (paragraph 393ff) is the prevalence of rape and sexual violence as part of the destruction process. The level of rape is a particularly sensitive issue in Sudan and the Sudan Government has been at special pains to deny its existence, and any official responsibility. The Prosecutor argues for the destructive impact of rape based on examples from elsewhere (Rwanda, former Yugoslavia) but the parallels with Darfur surely hold. Here again he uses the testimony of the victims in support of the allegation of the *mens rea* of the perpetrators. Key, however, is the claim that the rapes are 'systematic.' The evidence which exists indicates that rapes are indeed widespread; that during the height of the conflict there were many instances of rape by militia and soldiers during military operations, and that subsequently there are many instances of rape with a greater proportion by non-uniformed personnel and not during military operations. The question of what level of sexual violence is necessary to count as 'systematic', and what threshold is then required for such systematic violence to count as evidence for genocidal intent, is not addressed. No evidence is provided that the rapes were carried out on instructions. High levels of sexual violence are consistent with explanations other than genocidal intent.

43. Finally (paragraphs 396ff), the Prosecutor argues that the Sudan Government's 'strategy to deny and conceal the genocide' is evidence of intention. There is no doubt about denial and attempted concealment of the war and atrocities, although concealment only lasted for the first year of the conflict and thereafter was inefficient and ineffective. He argues for a 'sophisticated cover-up strategy... by the person who controlled the entire communication apparatus of the state.' This is a remarkable claim. President Bashir's communication strategy has been anything but sophisticated and has demonstrated very poor control over the state's communication apparatus. It is commonplace for senior spokesmen of the Sudan Government to issue different and contradictory public statements. It was a matter of wry amusement to Sudanese that the TV broadcast of the President's public statement immediately following the Prosecutor's 14 July press conference was cut short, replaced by music, presumably because President Bashir was himself going off-message.

44. The UN's Independent Commission of Inquiry into Darfur was accorded a high degree of access and cooperation by the Sudan Government. The Sudanese national Commission of Inquiry into Darfur, which included a number of independent Sudanese lawyers, was also afforded a high level of access. Both found crimes against humanity but not genocide. The 'no-genocide' findings were welcomed by the Sudan Government,

which took no additional judicial actions on the other findings. These are marks of a confused and clumsy policy, with the default options of denial and prevarication usually winning out.

45. This policy has led to the Government admitting crimes against humanity. It would be both more logical and more constructive to take this admission at face value—namely that crimes against humanity have been committed—than to take it as evidence of concealing a crime of comparable gravity.

## **Crimes against Humanity and War Crimes**

46. The 2007 Application for the arrest of Ahmad Harun and Ali Kushayb for crimes against humanity and war crimes contrasts with the Application against President Bashir in many ways. The Harun/Kushayb Application was made in February 2007 and the Pre-Trial Chamber issued the arrest warrants in April after a relatively brief inspection of the charges and evidence. The 2007 Application details a number of specific crimes committed during the height of hostilities in 2003 and 2004, with particular attention to the southern parts of West Darfur State, and lays out the precise alleged responsibilities of the accused. An impressive array of evidence is produced from a variety of sources in support of the Application. The mode of liability it focuses upon is ‘common purpose’ in committing the crimes. This points to a different implicit socio-political theory of criminal acts in Darfur, namely that they are the product of collective action by an institution or group.

47. The charges of war crimes and crimes against humanity laid against President Bashir consist essentially of a restatement of these charges, with some more recent incidents mentioned, and the additional claim that Bashir indirectly perpetrated these crimes, using the institutions of the state and security, and Ahmad Harun in particular, as his intermediaries. While in some respects these charges are simply an add-on to the earlier application, in respect of the mode of liability, they constitute an important departure.

48. The Application against President Bashir refers to recent incidents. It is worth examining these because, in contrast to the evidence presented for the 2007 Application, the investigation does not appear to have been systematic, leading to at least one factual error in the Public Application. The bombing of Shigeg Karo on 5 May 2008 was initially but erroneously reported by activists and the media as an aerial attack on a school in which schoolchildren were killed and injured. Subsequent UN investigations discovered, first, that the intended target for the attack might have been a JEM armed column that was in the vicinity (and which participated in the attack on the national capital five days later), and second, that the school was not in fact hit and children were not among the badly wounded, who were only adults. Paragraph 233 reproduces the incorrect version of events, indicating the Prosecutor’s reliance on quick turnaround reports from advocacy organizations rather than more rigorous investigations. The incident may be a war crime (use of excessive force and failure to take precautions to prevent civilian fatalities), but it did not occur as described by the Prosecutor.

49. The manner in which the 14 July Public Application against President Bashir is constructed makes it look as though the inclusion of the charges of war crimes and crimes against humanity is an afterthought, perhaps inserted because the OTP feared that the genocide charges might not pass muster.

50. These charges will not be further considered in this memorandum, save with respect to the mode of liability proposed.

## **The Mode of Liability**

51. At the 14 July press conference, Luis Moreno Ocampo was asked about his strategy for prosecuting President Bashir. The questioner, a British television journalist, asked whether the Prosecution case would be based upon conspiracy, joint criminal enterprise or command/superior responsibility. The Prosecutor replied, none of the above, and that he held Bashir to be guilty of indirectly committing a crime through another. This represents a bold precedent in prosecutorial strategy and a departure from the previous indictment. In the Harun/Kushayb Application, the mode of liability proposed was criminal ‘common purpose’ responsibility with its implicit corollaries of conspiracy or joint criminal enterprise.

52. The Public Application charges Bashir with committing the crimes ‘through persons, including the state apparatus, the members of the Armed Forces, and Militia/Janjaweed’ (Paragraph 244). While it prefaces this with the disclaimer, ‘Without precluding any other applicable mode of liability,’ the weight of the Public Application, and the Prosecutor’s remarks at the press conference, indicate that he is not actively considering other modes of liability.<sup>7</sup>

53. According to the OTP, proving ‘perpetration by means’ has three elements (paragraph 248):

- a. It requires proof that the perpetrator is able to impose his will over the direct perpetrator.
- b. In the case of perpetration through an organization or group, that organization or group must be structured in a way that it responds to the demand of an individual, and the individual in question—the indirect perpetrator—must possess sufficient authority to be able to enforce his will.
- c. The indirect perpetrator must be aware of his role and use it in order to commit the crimes.

54. The OTP is entering legal territory with few precedents. Let us leave aside the question as to whether this mode of liability, and the way it has been constructed by the OTP, will be acceptable to the Court and examine the argument on its own merits.

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<sup>7</sup> It would be possible for the PTC to revise the Application and issue an arrest warrant based on a different mode of liability, and/or for the Prosecutor to adopt a different strategy should the case ever come to court.

55. Proving that Bashir committed the crimes as an indirect perpetrator in the way proposed, is the most difficult of all modes of liability to prove. The reason why prosecutors have preferred ‘common purpose’ liability, including conspiracy and joint criminal enterprise is precisely because it is much easier to prove guilt in this way, inferring responsibility from involvement in an organization which has committed crimes in a systematic fashion. The avenue of superior or command responsibility also allows for prosecution on the basis that the accused should have known that a crime was going to be committed but took no steps to prevent it, or failed to punish crimes he knew had been committed. It is considerably harder to prove that an individual intended a specific crime and directly instructed others to commit it on his behalf. This is especially the case for genocide, for which proof of intent is all-important.

56. Failing to present either a confession or the documentary evidence which would substantiate the charge that President Bashir directly instructed others to commit the crime of genocide, the Prosecutor relies instead on attempting to prove that Bashir was in total control of a hierarchical organization that responded to his will and only to his will. The Prosecutor again appears to rely on inference from some general facts. However, other inferences are compatible with these facts, plenty of other evidence exists indicating that Bashir did not exercise such total control, and the defence would have no difficulty in disposing of this line of argument.

57. Repeatedly, throughout the Public Application, the Prosecutor asserts that President Bashir is an absolute dictator. For example, Paragraph 40 states that Bashir ‘sat at the apex of, and personally directed, the state’s hierarchical structure and the integration of the Militia/Janjaweed within such structure. He had absolute control.’ Paragraph 41 states that ‘AL BASHIR’s control of the state apparatus was not only formal; it was absolute.’ Paragraph 373 infers from the scale of the destruction and deaths to the *mens rea* of the actor, noting that the principle of inferring from outcome to intent ‘carries particular weight where, as here, the accused exercised total control over the hierarchical structure.’

58. The OTP has constructed a socio-political theory of the Sudanese state as a genocidal regime in the tradition of Nazi Germany and Hutu Power Rwanda. This is an extraordinary approach. The main argument in this regard is detailed in paragraphs 250-346. It has the following elements.

59. First, Bashir held supreme authority in the hierarchically organized structure of the Government of Sudan. This is true constitutionally. However, both the 1998 Constitution and the 2005 Interim National Constitution (INC) constrain presidential powers in important ways. While the INC increased the powers of the Presidency as an institution, it also limited the President’s security powers, notably in that the most important national security decisions (e.g. declaring a state of emergency) could now only be taken with the consent of the First Vice President, who is also the President of South Sudan and the Chairman of the SPLM/A.

60. The Public Application details the formal reporting procedures of the government ministries, the armed forces, and state security committees. President Bashir sits at the

apex of these structures and receives their reports. However, for the Prosecution case to stand up, it is important to prove that Bashir exercised *de facto* executive control as well as *de jure* authority. This is particularly important as the record demonstrates that the President's exercise of executive power on a day-to-day basis is largely formal, and that key decisions (including the negotiation of the Comprehensive Peace Agreement and the administration of security organizations) are taken by others. There are in fact multiple power centres within the government, ruling party and security apparatus, and senior figures exercise executive powers independently of the President. Junior officials do so too: in one widely-reported incident in November 2005 when U.S. Deputy Secretary of State Robert Zoellick visited Darfur, a local commissioner defied instructions from Khartoum saying 'I'm Bashir here.' It is quite possible that the President's authority is cited in support of decisions taken by other levels of authority within the Sudan Government's multiple structures, and that while the President is (usually) informed he is not the one making the key decisions in practice. The Prosecutor has thus chosen to argue a viewpoint at odds with most analysis, and he needs strong evidence to make a solid argument, let alone prove his case.

61. The difference between reporting and control is significant. President Bashir received reports from all branches of government, and is reportedly a master of detail.<sup>8</sup> However, his exercise of executive authority need not be commensurate with his receipt of reports. The details of reporting lines laid out in the Public Application (paragraphs 264-5 and Appendix 6) do not constitute evidence for Bashir's executive decision-making.

62. The sole concrete example of *de facto* authority provided is in Paragraph 266, which refers to the important occasion on which the President refused the UN troops mandated under UN Security Council Resolution 1703. He announced this decision at a cabinet meeting on 3 September 2006, without consulting with his First Vice President. The Public Application fails to point out (as sources for this incident indicate<sup>9</sup>) that this was an exceptional occasion in which the President took such executive action, one of only a handful of cases over the previous seventeen years. Moreover, the subsequent history of this decision illustrates the limits of Bashir's power. Despite the President's statement (and contrary to Paragraph 266 of the Application), the African Union peacekeeping operation was not in fact terminated at the end of that month. The military offensive unleashed was a poorly-managed affair which was rapidly defeated, in significant part because of poor coordination based on differences of opinion between the army and militia, and within the army command. In addition, no sooner had the President made his announcement than other senior members of the government were busy revising it and backtracking. This, the apparent centrepiece of the Prosecutor's argument for President Bashir's absolute and total control, in reality demonstrates the reverse: the limited nature of the President's authority.

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<sup>8</sup> He insisted on this reporting after the embarrassment of June 1995, when individuals based in Sudan backed by senior figures in the government tried to assassinate Egyptian President Hosni Mubarak in Ethiopia.

<sup>9</sup> Julie Flint and Alex de Waal, *Darfur: A New History of a Long War*, London, Zed Books, 2008, pp. 268 and 274.

63. The immunity from investigation and prosecution extended by President Bashir to Ahmad Harun, when the Minister of Justice opened an investigation against him, does not prove Bashir's total control. To the contrary, the fact that a cabinet minister would decide to open such an investigation demonstrates the opposite—the President's lack of such control.

### **The Interests of Justice, Peace and Democracy**

64. The UN Security Council referred Darfur to the ICC with Resolution 1593, which affirmed that justice and accountability are critical to achieve lasting peace and security in Darfur.<sup>10</sup> The Security Council has the authority to revisit that decision. It is the only body which could decide that, in the case of the Application against President Bashir, a deferral of prosecution is critical to achieving peace and security in Sudan.

65. According to the Rome Statute, the Prosecutor of the ICC is required to ensure that any prosecution is in the interests of the victims and the interests of justice. Within the ICC, only the Prosecutor has the obligation and authority to weigh these concerns and make the decision. He is required to balance his own interest in mounting prosecutions against any other interests which the victims may have, such as peace and stability. It might have been more logical to place this authority elsewhere within the Court structure so that the Prosecutor is not overly influenced by his professional interest in pursuing prosecutions. Once the Prosecutor has made such a determination there is no additional mechanism within the Court to adjudicate whether this judgement has in fact been correctly made. The Pre-Trial Chamber may only assess an application on the basis of the evidence and the applicable law. Only the Security Council then has the authority to intervene on other grounds.

66. There are strong reasons to suppose that pursuing a case against President Bashir is not in the interests of justice.

#### *Tensions between Prosecution and National Stability*

67. Seven years ago, the international community, including the strongest critics of the Sudan Government such as the United States, decided to engage in a negotiated transition to peace and democracy in Sudan. The decision was that a 'soft landing' for the National Congress Party (NCP) was necessary and that negotiated peace and political reform were possible. Although international avowals of commitment to the Comprehensive Peace Agreement (CPA) have not been matched by commensurate diplomatic effort and resources, this remains the international priority engagement with Sudan. Subsequently, international priorities have included the consensual deployment of two international missions in the country, one in support of the CPA (UNMIS) and one to provide civilian protection and other peace support activities in Darfur (UNAMID). Achieving these objectives requires good-faith negotiation with the Sudan Government. The record of the Sudan Government in honouring its obligations has been poor—neither as good as the

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<sup>10</sup> It did this within weeks of authorizing the UN Mission in Sudan to support the implementation of the CPA. The Security Council has often failed to treat Darfur as part of a single nation called Sudan.

government avows nor as bad as some of its critics claim. The international partners have also had a mixed record of fulfilling their promises. But notching up points on the scorecard is not the issue. The challenge is establishing a robust common understanding of the objectives of international policy and the rewards for success. As Sudan faces the toughest test of its post-independence period, in the form of national elections (scheduled for 2009) and a referendum on self-determination in southern Sudan (scheduled for 2011), it is essential that political negotiations are sustained and the pace of implementing agreements is accelerated.

68. The Prosecutor's application to arrest President Bashir stands in contradiction to the negotiation strategy. If the arrest warrant is to be enforced it demands a change in the head of state. Given that the OTP has in effect imputed criminality to the entire government, this entails regime change. It is difficult to see how negotiations can be pursued while also trying to arrest the head of state of the country concerned. While it is possible that this approach will yield sufficient political pressure to generate positive outcomes, it is more likely that it will have the converse effect of destabilizing the transitions to peace and democracy, with adverse results. It is an immense gamble with the future of Sudan.

69. The relationship between peace, democracy and justice is complicated, and should be empirically determined on a case-by-case basis rather than asserted as a matter of principle. The mantra that 'there is no peace without justice' is clearly incorrect, as many countries have obtained peace without justice. Peace, democracy and justice are all good things that are to be pursued for their own sake. Justice is a human right and the argument in support of justice is not that it is instrumental to achieving lasting peace or democracy. In some instances, exercises in accountability will accelerate or consolidate peace and/or democracy, in others they may have no impact, and in yet other cases they may contradict one another.

70. Most of the precedents commonly cited have little bearing on the Sudanese case. Most prosecutions of officials of a former regime occur after a transition to democracy, in the context of a new democratic government consolidating its power. Only two arrest warrants have been issued against serving heads of state, and neither of them is an informative precedent for the Sudan case. The arrest warrant against the former Liberian President Charles Taylor was issued during negotiations for him to step down from power. It served to delay his departure from office, which was secured only on the promise of asylum in Nigeria (an undertaking later betrayed by the Nigerians, prompted in part by Taylor's own failure to abide by the terms of his asylum). The arrest warrant against Yugoslav President Slobodan Milosevic was issued when he was under military assault by NATO.

71. Some arrest warrants have been issued during ongoing conflicts. The arrest warrants against the Bosnian Serb leaders did not derail the Dayton peace talks because there was a higher authority (President Milosevic) which had the power to sell them out and did so. The arrest warrants against the leaders of the Ugandan Lord's Resistance Army galvanized the peace process, but, according to scholars of the conflict, only because the

LRA leader Joseph Kony erroneously believed that the arrest warrants could be withdrawn after a peace settlement were reached. The LRA has come very close to reaching a peace deal but Kony has always insisted that he must have personal guarantees before he signs, and they have not been forthcoming. The LRA remains active.

72. As mentioned above, a genocide charge also carries the important political implication, at least in the popular understanding, that there cannot be any negotiated compromise with a genocidal individual or state. It delegitimizes the government, emboldens the opposition, and implies that reconciliation between victim and perpetrator is either impossible or can only be achieved on the basis of far-reaching changes such as revolution, secession or international military protection.

#### *International Strategies with Respect to the Application*

73. The Prosecutor of the ICC has put the Sudan Government under greater pressure than at any time since 9/11, when the country's prior association with international terrorists exposed it to the possibility of U.S. military action in the war on terror. Pressure in itself is neither good nor bad, it depends how it is used in pursuit of what ends, and how the party under pressure responds. Currently, there is no single or coordinated international strategy with respect to the OTP Application. For this reason alone, international actions either to enforce an arrest warrant or to use it as leverage to achieve other objectives, are likely to fail.

74. An arrest warrant against President Bashir will be extraordinarily difficult to implement. For the UN or foreign governments to demand its implementation would paralyze all their other forms of engagement with the government in Khartoum. It is possible that the Sudan Government will not need to take any steps against the UN or governments that are parties to the Rome Statute, because the latter's lawyers will insist that they cannot do business with Sudan.

75. Leading western governments prefer to see the arrest warrant as a form of political leverage, akin to economic sanctions, to be used in pursuit of other objectives. However, while sanctions can be switched on and off, or applied in different degrees, an ICC arrest warrant cannot be recalled or modified. There are insuperable difficulties in using an arrest warrant as a form of political pressure.

76. One international approach is to demand that the Sudan Government cooperate with the ICC, i.e. hand over Bashir and the two other indicted men for trial. This could then form the basis for a process of political normalization. A problem with this approach is that few people within the ruling party, army and security apparatus have any expectation that the political or judicial purge would stop there. The ICC Prosecutor, by alleging that Bashir has used the entire state apparatus to commit crimes, appeared to criminalize all members of the government. There is much speculation in Khartoum as to who else might be on a supposed sealed list of individuals for arrest held by the Prosecutor. Any assurances that may be given by western governments or even the Prosecutor himself on

the limits of his prosecutorial ambitions are not legally binding. He cannot issue an amnesty.

77. A variant on this is to use the ICC actions as leverage for a domestic political process that would bring prosecutions against those responsible for crimes in Darfur. Following this route could make the cases inadmissible by the ICC on the basis of the principle of complementarity, namely that primary jurisdiction remains with national courts and the ICC only takes up cases if the national authorities are unable or unwilling to do so. Proposals for hybrid courts, using international lawyers to try cases according to Sudanese law in Sudan, have been floated. These could be a workable mechanism to try many cases. But a hybrid court of this nature could only prosecute President Bashir if he were removed from office.

78. Another possible approach is to hold out the promise of deferring the arrest warrant for twelve months using Article 16, in pursuit of objectives such as a peace agreement in Darfur, UNAMID deployment or CPA implementation. Three of the countries that have discreetly canvassed this option (the Permanent Three, P3 of U.S., France and Britain) have all (in different ways) tried to use the ICC as an instrument to press the Sudan Government in these directions. This approach faces three main difficulties.

- a. First is the problem that the ICC is not designed to be used in this manner. The Article 16 provision was itself not designed to be used by the Security Council to countermand its own earlier referrals. While there is no legal obstacle to the Security Council acting in this way, it goes against the spirit of the Court and the Rome Statute.
- b. Second, it is not clear what the Sudan Government needs to do to meet international demands in full. There is a vocal international activist constituency, which wants nothing less than regime change and Bashir in court. A hardline faction within the Sudan Government believes that this is the ultimate position of the western powers and that any other demands are mere tactics to make this goal more easily achievable. Others within the Sudan Government are seeking compromises, but are hampered by the intrinsic difficulty of obtaining a compromise with the ICC. An Article 16 deferral lasts only a year and many in the Sudanese leadership suspects that if it makes concessions, western policies will not change and additional demands will be made a year later. For this reason the Sudan Government does not regard Article 16 as a solution, but demands a revocation of Resolution 1593.
- c. An important but neglected factor is that the Sudanese political system moves at a certain pace which cannot be accelerated, and the time needed to demonstrate results is simply too short for the P3 to see the measurable results they want. If the demands made were a matter of, for example, halting military flights in Darfur, obtaining compliance would be relatively straightforward. But complicated political bargaining in Sudan is a slow process which, if set to work against a tight deadline, tends to

derail. There is simply insufficient time for an Article 16 resolution to be negotiated.

### *Sudanese Responses to the Application*

79. In Sudan, several impacts can already be seen, and some hoped-for or feared repercussions have not materialized, at least not yet. The entire Sudanese political class is preoccupied with the ICC issue. The government has not expelled UN missions. Nor has it reneged on existing commitments including the CPA. It has neither declared a state of emergency nor cancelled elections. It has not mounted major new offensives in Darfur. If any of these things were to happen, direct responsibility for the action would fall upon the Sudan Government. However, the Prosecutor would have played a leading role in bringing about a state of affairs which influenced the Sudan Government to act in this way. Indeed, if the Government were indeed to be the criminal institution that the Prosecutor alleges, it would be expected to act in such a brutal or undemocratic way.

80. It would be a mistake to see the relatively cool response of the Sudan Government in the six months since the 14 July announcement as an indication that business as usual will continue. This period has been marked by the NCP and other Sudanese parties testing the ground, domestically and internationally. The Sudan Government tried and failed to obtain support at the Security Council to force a vote on an Article 16 deferral. It hoped to make sufficient progress in the Darfur peace process to convince the international community that there was a genuine prospect of peace worth protecting, but so far without success. The NCP tried and failed to obtain sufficient domestic political support from partners in the Government of National Unity to present a united front. Perceiving the internal and international weakness of the Government, some opposition forces, including the Popular Congress Party and the Justice and Equality Movement, have been emboldened to make themselves the domestic champions of regime change through handing over Bashir to the ICC.

81. The ICC issue has the potential to be a life and death issue for the government leadership. In this context, the response of the NCP and security leadership to an arrest warrant will depend upon the reactions of others. No options have been ruled out. While the possibility of things continuing unchanged exists, it should not be taken for granted.

82. There is a real possibility of political business grinding to a halt. This would be a threat to Sudan's peace and security, insofar as key deadlines in CPA implementation are looming, notably the national elections, and a further slowing of the political process could easily generate a crisis. A likely scenario is that the arrest warrant will lead to the entrenchment of President Bashir in office, and a slow tightening of the screws on civil society, democracy and the international humanitarian and peacekeeping efforts. The national elections, scheduled for 2009 in accord with the CPA, were initially envisaged as a democratic exercise to provide popular legitimacy to the Government of National Unity and the CPA. They are now in danger of becoming a purely tactical exercise, instrumentalized in support of the NCP and its leader remaining in power. If this is the

outcome of the Prosecutor's initiative it will not be an impressive contribution to peace and democracy in Sudan.

83. The possibility of a crackdown on human rights activists, political opposition and humanitarian workers is real. The possibility of restricting UN and foreign diplomatic and assistance activities is real. The possibility of a new round of hostilities in Darfur is real, possibly in response to military-political initiatives by the armed movements. Human rights activists in Sudan are concerned that the Prosecutor has set in motion a process which is likely to result in their repression, without the ICC having any means to contain the consequences and protect those at risk from the backlash.

#### *Wider Implications for the ICC*

84. More widely, the Bashir case is undermining the standing of the ICC across Africa. African countries, which were early supporters of the Court, are having second thoughts. The 14 July Application came in the wake of the arrest of the Congolese opposition leader Jean-Pierre Bemba while visiting Brussels, and arrest warrants issued by French and Spanish magistrates against Rwandan government officials.<sup>11</sup> The sense among African politicians, and increasingly among civil society leaders and human rights activists, that international justice is becoming a tool for western countries to control Africa in neo-imperial fashion, has led to a strong African reaction against universal jurisdiction and the ICC. When the Peace and Security Council of the AU met in closed session in September 2008, to review the ICC-Sudan case, every single representative who spoke criticized the ICC. Many regretted having signed the Rome Statute. Few made reference to Sudan, rather focusing on the wider implications of the OTP strategy for Africa. It is inconceivable that another African state will refer a case to the ICC in the foreseeable future, and most unlikely that any will cooperate with the ICC in executing arrest warrants. Africa may become zone free from ICC jurisdiction as a result, quite the opposite outcome to that heralded by the drafters of the Rome Statute and those African leaders who enthusiastically embraced the Court in its early days.

#### **Additional Observations**

85. Several additional aspects of the Public Application demand attention. First is the poor technical quality of the document, purely in terms of the extent to which it has been copy-edited and fact-checked. Although the Prosecutor announced the Application at a press conference on 14 July, the document itself was not released to the public until September. In the meantime, many pages of errata were added. This indicates that the document was not ready in final version at the time when the Application was announced.

86. The Prosecutor explained the timing of his announcement by referring to the fact that he did 'not have the luxury to look away' and that urgent action was needed in the context of an ongoing genocide. If this was indeed the case, then it is odd that he took

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<sup>11</sup> One Rwandese official, Rose Kabuye, was arrested in Germany in November, and later released on bail.

such a long time to produce a document that could easily have been compiled at the outset of his investigations. (The ICID report of January 2005, produced in just three months, is no less substantive.) In addition, the Prosecutor had two other options which might have yielded a more rapid decision by the Pre-Trial Chamber. One was to present a shorter, more focused and less controversial application. At the time of writing, the judges of the PTC have been considering the Application for six months. This is a long time to wait for action. If the case were so urgent, why construct such an elaborate Application which demands such time for it to be scrutinized and adopted as the basis for an arrest warrant? Why not pursue simpler prosecutorial options, the approval of which would have been a rapid formality for the PTC?

87. The second option was to present a sealed application to the judges of the PTC. If indeed the Prosecutor's intention is to have the accused arrested and brought to court, he has a far better chance of success if his deliberations and the decision of the PTC are made in secret. Following the Public Application for an arrest warrant for Harun, precisely this point was made—namely that a sealed warrant would have surely led, sooner or later, to the arrest of the suspect. Just seven weeks before the July Application, the Prosecutor secured the arrest of Jean-Pierre Bemba using a sealed warrant. A less public route would undoubtedly have increased the chances of success.

## **Conclusion**

88. I conclude that if the Prosecutor were to prosecute President Bashir for genocide using the arguments contained in the Public Application, then he would most probably fail to obtain a conviction. Bashir would be acquitted.

89. I further conclude that if the Prosecutor were to prosecute President Bashir for war crimes and crimes against humanity using the mode of liability, 'perpetration by means,' he would also face a high likelihood of failing to obtain a conviction.

90. It is remarkable that, facing a government which during its nineteen years in power has presided over a wide range of unspeakable violations including some of the most heinous crimes under international law, the Prosecutor of the ICC should set himself up for such a failure. Sudan's most seasoned human rights activists and its best-informed political analysts are astonished at this shortcoming.

91. My recommendation to the Pre-Trial Chamber is that the Application should not go forward. While President Bashir has a case to answer, the Prosecutor has not made that case. The Application shows that he is not ready for a trial. The case should be returned to the OTP for reconsideration.

92. The substance of the Public Application does not delimit the Prosecutor's strategy should the Bashir case ever come to court. The Prosecutor still retains the option of abandoning the charge of genocide and the mode of liability presented in the Public Application, and instead pursuing a prosecutorial strategy much more likely to result in a conviction. This may indeed be his intention. He has surely received advice on the flaws

in his approach. However, if this is the strategy, why would the Prosecutor gamble on presenting such a flawed document in such a manner?

93. It is remarkable that, given the wealth of evidence available and number of accessible and attractive options for prosecuting those suspected of responsibility for crimes in Darfur, including President Bashir, the Prosecutor should seek the most controversial and hardest-to-substantiate charges. The principal benefit of this approach is that it gains the maximum publicity for the Prosecutor and places him at the centre of a major international controversy. On the international stage, Moreno Ocampo appears as the champion of justice while his opponent, the head of a widely-reviled state, has few credible advocates ready to speak out on his behalf. A trial of sorts is already being conducted in the court of international public opinion. This perhaps is where the Prosecutor feels most comfortable.

94. The Prosecutor of the ICC has forced the hand of the most prominent international supporters of the Court, including both State Parties to the Rome Statute and non-governmental human rights advocates. Given the choice between backing Sudan and backing the ICC, most instinctively choose the latter. Closer scrutiny of the facts of the case in Darfur and the prosecutorial strategy suggest that the Prosecutor is not only gambling with the future of Sudan, but with the future of the Court as well.

95. My recommendation to the UN Security Council and its member states is that they should use Article 16, flawed though it is, to defer the Bashir application for twelve months. No case should be brought against the Sudanese President at least until such time as the CPA has been successfully completed. This deferral should be unconditional. To place conditions on it would be to undermine the principle of justice and make it ancillary to political objectives.

96. The awful suffering of the people of Darfur, and especially the victims and survivors of war crimes and crimes against humanity, should not be the occasion for public posturing in ways that cannot bring real material benefits to them, and hold out no real prospects for advancing peace or justice. The best interests of the Darfurians will be surely served by maintaining humanitarian programmes, making progress towards peace, and implementing the provisions of the CPA leading Sudan towards democratization.