ANNEX 7
The Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir: A Critique

Alex de Waal
Social Science Research Council
8 January 2009

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, 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 and the whole of Darfur, though specifically referring to the Fur, Masalit and Zagawa tribes. The OTP alleges 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 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 additional allegation that President Bashir indirectly committed these crimes—'perpetration by means.' This is also an ambitious claim. It requires the Prosecutor to prove Bashir's total control over every institution of the state, something not demonstrated in the evidence presented.

4. 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, and that this is inconsistent with the international strategy of negotiating with the Sudan Government to achieve peace and democracy. The approach is therefore a gamble with unknowable consequences and possibly very large risks. It is already contributing to a negative reaction against the ICC by African governments and civil society.

5. It is not easy to understand why the Prosecutor has chosen the most controversial and difficult approach to the case, unless his aim were restricted to securing the maximum publicity and controversy for his case.
The Genocide Charges

6. In deciding to indict 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. Success would depend upon the Prosecutor managing to demonstrate three things:

   a. The target groups qualify for the status as ‘ethnic’ or ‘national’ under the Genocide Convention;
   b. That the acts committed against these groups (actus reus) were of sufficient nature and gravity to warrant the categorization of “genocide”;
   and
   c. That the accused (President Bashir) possessed the intent (mens rea) to destroy these groups, as such, in whole or in part.

Determining the Identities of the Groups

7. 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. 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 Rizeigat [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 very 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.

Inferring Intent

8. 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.

9. 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. It was such a method of inference that allowed the ICTR to attribute genocidal intent to the former Rwandese Prime Minister Jean Kambanda and thereby obtain a conviction for genocide. This case 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 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. The Public Application contains such a theory, derived from the paradigmatic case of the Nazi Holocaust and Rwanda in 1994. But transferring it to Darfur is implausible. If this implied theory can successfully be challenged, then it automatically 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

10. 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. The narrative he developed 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.

11. The first indication of this 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.

12. 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.

13. 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.

14. 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 the 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.

15. 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.’

16. 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. 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.’ As a rebuttal this falls well short of a refutation. 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 are not appropriate.

17. Speaking publicly following his presentation to the UN Security Council in December 2008, the Prosecutor 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.

18. The most substantive summation of the case for genocide 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. 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. The Prosecutor wishes to argue that when all these factors are taken into account, an overall picture of genocidal intent emerges. 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 far from comprehensive and is in fact sufficiently shaky to be readily refuted as an element of proof of genocide.

19. 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 powerful evidence for the ethnic nature of the campaign of destruction. 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, or was obliged 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. It is however unclear whether this would make them genocidal criminals as opposed to those with command or superior responsibility for war crimes.

20. In the context of arguing that President Bashir provided total impunity to those who were carrying out his orders, the Public Application makes reference to Bashir’s decision to keep Ahmed Harun in his position as supporting evidence. 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 in themselves crimes.
comparable to war crimes or genocide, and nor do they constitute supporting evidence that such crimes have been committed.

21. A second factor argued by the Prosecutor is the ‘existence of a genocidal plan or policy.’ Documents he cites in support of such a plan or policy are the Armed Forces Memorandum and 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 attests to the reactive nature of the government’s planning rather than, as the Prosecutor implies, any genocidal plan pre-existing the insurgency.

22. 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 cited.

23. These paragraphs 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 the there would be two separate forces operating on independent plans.’ It is however perfectly conceivable that there is 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. 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 consistent 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.

24. 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 is an indication that Harun knew of his responsibility for crimes committed. It is not relevant to proving a case for genocide.

25. 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. The 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, and arguably to the first civil war in southern Sudan (1955-72) and also to colonial policing operations and the 19th century wars of conquest, 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. The Prosecutor is presumably citing these statements because no detailed plans or policies exist, either in writing or in the form of verbal instructions to the forces, which might lend substance to the claim of a genocidal policy or plan. The reason why such documents do not exist is that they do not need to exist for the purposes of the standard counterinsurgency operation: once the forces in the field understand that they have full license to operate ‘ethics free’, they know from history how they can behave.

26. 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 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.

27. This wider context points to the need to see racist statements in their context, namely the height of mobilization to destroy the insurgency. 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.

28. Factor four (paragraphs 387ff) refers to forcible transfers as a component of genocide. Four considerations are relevant here. However, a coherent logic must be extracted from the Public Application with some effort.
   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. 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
scale and 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,
one 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 this resettlement of vacated land is occurring and that the
Government is (in many instances) facilitating it and supporting it, 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 International Commission of Inquiry into Darfur 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 150 lethal incidents which occur each
month in Darfur. Such 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.

29. 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. High levels of sexual violence are consistent with explanations other than genocidal intent.

30. 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, although the latter was inefficient, brief 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.

31. 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, and also significantly edited the NCOI report. These are marks of a confused and clumsy policy, with the default options of denial and prevarication usually winning out. This policy has led to the
Government admitting crimes against humanity. This is not a sophisticated strategy for perpetrating genocide through admitting, in the words of the International Commission, 'crimes no less serious and heinous than genocide'.

**Crimes against Humanity and War Crimes**

32. 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 slightly different implicit socio-political theory of crime, namely that it is the product of collective action by an institution or group.

33. The charges of war crimes and crimes against humanity laid against President Bashir consist essentially of a restatement of these charges with the additional charge 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.

34. The Application against President Bashir also 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 investigations discovered, first, that the intended target for the attack was 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 children were not in fact among the wounded, who were only adults. Paragraph 233 reproduces the incorrect version of events. 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.

35. 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.

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

37. 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.

38. The Public Application charges Bashir with committing the crimes ‘through persons, including the state apparatus, the members of the Armed Forces, and Miltia/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.

39. 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.

40. 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. 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, where proof of intent is so important.

41. Lacking either a confession or the documentary evidence which would substantiate the charge that President Bashir directly instructed others to commit the crime, 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 is
again relying on inference from the general facts. However, other inferences are compatible with these facts and the defence would have no difficulty in disposing of this line of argument.

42. 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.’ However the main argument is detailed in paragraphs 250-346. It has the following elements.

43. 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.

44. 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.

45. The difference between reporting and control is significant. President Bashir received reports from all branches of government, and is reportedly a master of detail. 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 strong evidence for Bashir’s executive decision-making.

46. 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 his source indicates)\(^1\) 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.

47. 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.

48. Central to the Prosecution case is 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.

49. 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.

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The Interests of Justice, Peace and Democracy

50. The Prosecutor of the ICC is required to ensure that any prosecution is in the interests of the victims and the interests of justice. He is required to balance his own interest in mounting prosecutions with broader political factors. 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. This is a flaw within the ICC structure that has been revealed by the Bashir case.

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

52. The international community, including the strongest critics of the Sudan Government such as the United States, has decided to engage in a negotiated transition to peace and democracy with the Sudan Government, and also to negotiate the consensual deployment of two international missions in the country, one in support of the Comprehensive Peace Agreement and one to provide civilian protection and other peace support activities in Darfur. 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 government avows nor as bad as its critics claim. The international partners have also had a mixed record of fulfilling their promises. 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 intensify.

53. The Prosecutor’s application to arrest President Bashir is a completely opposed strategy that, if it is to be carried out, demands a change in regime. 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, but it is also possible that it will have the converse effect of destabilizing the transitions to peace and democracy, with adverse results. It is in fact an immense gamble with the future of Sudan.

54. 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.

55. 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 the consolidation of power of a new democratic government. 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 safe asylum in Nigeria (an undertaking later betrayed by the Nigerians). The arrest warrants against the Bosnian Serb leaders did not derail the Dayton peace talks because there was a higher authority (President Slobodan Milosevic) which had the power to sell them out and did so. The later warrant against President Milosevic himself was issued when he was under military assault by NATO. The case of President Bashir should be assessed on its own merits.

56. In Sudan, several impacts can already be seen, and some hoped-for or feared repercussions have not materialized, at least not yet. The government has not expelled UN missions. Nor has it reneged on existing commitments including the Comprehensive Peace Agreement. It has neither declared a state of emergency nor cancelled elections.

57. The Chief 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.

58. One difficulty with the ICC-related pressure on Sudan is that it is not clear to the Sudan Government what it needs to do to meet the demands in full. There is a vocal activist constituency, which appears to want 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 institution which is legally debarred from making binding concessions on the key issues about which the Sudan Government cares, such as amnesty.

59. The hardline group, which controls the security apparatus, is currently doing its mandated task and preparing for worst-case scenarios. It is preparing the military defence of the capital. It has increased its surveillance and harassment of human rights activists and humanitarian workers, especially those working with the survivors of sexual violence. Clinics providing medical and psychosocial assistance to rape victims may be forced to restrict their activities and even close. There have been several sweeps in which activists have been detained and one incident in November in which three were tortured. There are fears that this is just the beginning of a wider clampdown. Human rights activists in Sudan are concerned that the Prosecutor has set in motion a process which is likely to result in repression, without him having any means to contain the consequences and protect those at risk from the backlash.

60. Another international strategy for pressuring the Sudan Government is to hold out the promise of deferring the arrest warrant for twelve months by a resolution at the UN Security Council invoking Article 16 of the Rome Statute. 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 this as an instrument to press the Sudan Government to expedite the deployment of the UN-African Union Mission in Darfur, make political concessions on the Darfur peace process and the Comprehensive Peace Agreement, and take steps to either hand over Harun and Kushayb to the ICC or initiate a credible judicial process for the crimes committed in Darfur.

61. This approach faces three main difficulties.

a. The ICC is intrinsically ill-suited to be used as an instrument of coercive diplomacy. Unlike sanctions, the Court is a judicial institution with its own independent processes. It has no off switch.

b. Another difficulty is the distrust between Khartoum and the P3: the Sudanese leadership suspects that if it makes concessions, western policies will not change (or it may win only a year’s reprieve). Thus while the immediate concessions demanded from the Sudan Government are clear, it is not at all evident what it needs to do to satisfy all the international demands.

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.

62. A third international approach is to indicate that should the Sudan Government cooperate with the ICC—hand over Bashir and the two other indicted men for trial—then a process of political normalization can begin. The 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, has in the eyes of Sudanese, criminalized 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. Whatever assurances may be given by western governments or even the Prosecutor himself on the limits of his prosecutorial ambitions are not legally binding.

63. There is a possibility that senior members of the government would mount an ‘internal coup’ and depose the President in order either to hand him over to the ICC or prosecute him in a domestic court. Until recently, individuals close to President Bashir indicate that he had indeed contemplated stepping down, because after almost twenty years in power he is tired of what he considers a thankless job. However, the arrest warrant changes this. It creates a strong incentive for him to stay in office. Many among the senior leadership are intense rivals who do not trust one another, and would vigorously contest for the top position, in part because they fear being thrown overboard should their competitor take power. However, all have confidence that President Bashir
will remain loyal to his colleagues. At no point in his tenure has he sacrificed a single Sudanese subordinate save those who have directly challenged his power. The combination of President Bashir’s own calculation that he is personally most secure by remaining in the Republican Palace, and the fact that all others in the leadership consider him dependable, makes an internal coup unlikely.

64. In the last six months, the Sudan Government has not agreed on a strategy. President Bashir responded to the 14 July announcement adroitly, emphasizing the passage of the electoral bill in the National Assembly (a coincidence of timing) and declaring his commitment to peace in Darfur. He was buoyed by the rallying of both northern civil opposition parties and the SPLM, whose leaders feared that the removal of Bashir would mean at best a postponement of their ambitions for self-determination and at worst an abrogation of that commitment. Since then, the strategy of the senior leaders—with Bashir playing a curiously passive role, even less engaged in executive affairs than has been his wont—has been to build up a strong internal coalition against the ICC, leaving the external strategy (an Article 16 deferment) to international allies and especially the African Union. Neither prong of this strategy has worked with enough speed or credibility to promise any respite thus far.

65. The government’s biggest step has been to convene the ‘Sudan People’s Initiative’ (now the ‘Sudan People’s Forum’) in which, for the first time, the ruling National Congress Party invited other political parties to discuss the Darfur crisis, admitted some of its errors, and promised concessions on the rebels’ key political demands. However, the rebels are too fragmented to respond to these overtures with anything other than rejection, and are also unwilling to do so—they rightly judge that the political tide may turn in their favour so it is better to hang tough. They correctly read these concessions as tactical concessions to the P3 and hope that continued pressure can yield more. Key establishment partners in the Sudan People’s Initiative/Forum have also lost patience and condemned the exercise as a sham.

66. The Sudan Government is also trying to find a credible mechanism for monitoring ceasefire violations in Darfur, hoping that reliable field reporting (preferably by Americans) will document far lower levels of government-sponsored violence than is widely perceived to be the case in the western media. Its cooperation with UNAMID has also increased so that the main obstacles to the peacekeepers’ deployment are logistics and the UN’s difficult bureaucracy.

67. Khartoum’s leaders know that they have not got any international credit for the (modest) steps they have already taken, making them reluctant to take more. Under these circumstances, it is most likely 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 true democratic exercise to provide popular legitimacy to the Government of National Unity and the CPA. They are now becoming a purely tactical exercise, instrumentalized in support of the National Congress Party 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.

68. 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 (one of whom, Rose Kabuye, was arrested in Germany in November, and later released on bail). The sense among African politicians, and increasingly among civil society leaders and human rights activists, that universal jurisdiction is becoming a tool for western countries to control Africa in neo-imperial fashion, has led to a strong African reaction against 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 a jurisdiction-free zone 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.

69. The interests of justice will be satisfied if those responsible for crimes in Darfur are successfully prosecuted (either domestically or internationally) and the victims of the crimes receive recognition and compensation. The prosecution and conviction of six men accused by the Prosecutor in the Darfur case (President Bashir and two others on the Government side and three commanders on the side of the armed movements) is one possible part of this. Currently, the prospects of President Bashir or the other accused being handed over to the ICC are remote. Proposals for prosecuting Harun or Kushayb in domestic courts (possibly with international judges) have been floated but not advanced substantively. Other domestic mechanisms have not advanced. One of the Sudan Government’s objections to credible domestic prosecutions has been that it fears that any evidence produced in court will be used by the ICC to pursue its own investigations and prosecutions. One of the arguments against compensation payments to victims was that this entailed an admission of guilt (this argument was set aside when the Sudan People’s Initiative agreed on compensation). There is no doubt that the Public Application has generated pressure for the Sudan Government to take domestic prosecutions and compensation measures more seriously. But there are no tangible outcomes to date, only promises and tentative first steps.

70. If the analysis outlined in this memorandum is correct, then there is the theoretically important implication that, were President Bashir to stand trial for genocide, prosecuted by Luis Moreno Ocampo in line with the approach detailed in the Public Application, he would be acquitted. Whether this result would be considered in the interests of justice would be debatable.
Additional Observations

71. 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.

72. 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 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. During these six months, an estimated 900 people have died from violence in Darfur (based on UN reported figures), more than half of these deaths attributable to government and allied forces. 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?

73. 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 a leading Congolese suspect, Jean-Pierre Bemba, using a sealed warrant. A less public route would undoubtedly have increased the chances of success.

Conclusion

74. The substance of the Public Application of 14 July 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 legal 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? The risks include the PTC rejecting all or part of the Application, the case generating such opposition in Sudan,
Africa and the Middle East to jeopardize not only the pursuit of the case but also the credibility of the ICC itself, and President Bashir responding with a defiant stand that sets back the causes of justice, democracy and peace in Sudan.

75. The empirical and analytical faults in the Prosecutor’s Public Application are such that Sudan’s most seasoned human rights advocates have been left puzzled and even aghast. Leading Sudanese human rights activists have long advocated accountability for the crimes committed by the current government during the entirety of its rule. They wonder how and why the Chief Prosecutor of the ICC is seeking to prosecute President Bashir in a case that stands so little chance of either bringing him to court or achieving a conviction.

76. The most remarkable feature of the Prosecutor’s strategy is that, given the wealth of evidence available and number of accessible and attractive options for prosecution, he should seek the most controversial and hardest-to-substantiate charges. The sole 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, with his opponent as the head of a widely-reviled state, with few credible advocates ready to speak out on his behalf.

77. 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 will reflexively choose the latter. Closer scrutiny of the facts of the case in Darfur and the prosecutorial strategy suggest that the Prosecutor has set up a false dichotomy. The interests of peace, democracy and justice in Sudan, and the interests of the ICC, are not best pursued by the approach of demanding an arrest warrant against President Bashir.