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Your Ref: TBA

Our Ref: CRIM/026/2010

Date: 8th April 2013

The Honourable the Attorney General
State Law Office
Harambee Avenue
NAIROBI

Dear Sir,

**REQUEST FOR PRESIDENT AL BASHIR'S ARREST AND FORMAL PROTEST
AGAINST HIS EXPECTED PRESENCE IN KENYA ON 9TH APRIL 2013**

We have received credible information from the daily newspapers and other sources indicating that President Omar Hassan Ahmad al Bashir is among the list of invited State guests to the inauguration of the Honourable Uhuru Muigai Kenyatta as the 4th President of the Republic of Kenya, which is scheduled to take place tomorrow, 9th April 2013.

As you are well aware, the International Criminal Court (ICC) issued two warrants of arrest against President al Bashir in connection with charges of genocide and other crimes against humanity, on 4th March 2009 and 12th July 2010 respectively, and these warrants remain in force. As a State Party to the Rome Statute establishing the ICC (and as a State which has received a request for cooperation in the enforcement of the said warrants) Kenya is under an obligation to enforce the warrants by arresting and surrendering President al Bashir to the ICC if he enters Kenyan territory.

Apart from cooperation with the ICC being a matter of treaty obligation, Article 2(6) of our Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. As such, non-compliance with a treaty which Kenya has ratified is a breach of the law, and of the Constitution. In addition to this, President al Bashir's invitation is itself a serious undermining of the International Crimes Act, 2008, which was enacted for the implementation of the Rome Statute. Whether President al Bashir enters Kenyan territory or not will therefore be a crucial test, indeed the litmus test, for the incoming

administration as to its commitment to the Constitution and the rule of law. Already, the willingness and commitment of the outgoing administration towards cooperation with the ICC (and in particular ensuring that suspects in the post-election violence are brought to justice) has been constantly and increasingly seriously questioned both locally and internationally, and by the Court itself. Against that background, the invitation lends credence to the concern that it is official government policy that persons bearing the greatest responsibility for the most serious crimes will find a safe haven within the country. Both the outgoing and incoming administrations urgently need to redeem themselves from this negative image.

On a related note, we need not overemphasize the fact that when President al Bashir visited Kenya on 27th August 2010 during the promulgation of the new Constitution, the ICC on the same day informed the United Nations Security Council and the Assembly of States Parties to the Rome Statute about his presence on the territory of the Republic Kenya, with the request for the taking of any measure the Security Council deemed appropriate. You will also recall that on 25th October 2010 the ICC asked the Government to inform it about any problem which would have impeded or prevented President al Bashir's arrest and surrender in case he had visited the country (as he had been scheduled to do for an Inter-Governmental Authority for Development (IGAD) summit) on 30th October 2010. In these circumstances, there is little doubt that this time round, President al Bashir's presence in Kenya would be seen as a grave and direct affront and disrespect for both the ICC and the UN Security Council, and it is not too far-fetched to expect that sanctions may be imposed on the country, with an adverse effect on the body politic.

In addition to the foregoing, as a party to the relevant court proceedings, you are aware of the fact that under instructions from the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), our firm obtained a provisional warrant of arrest against President al Bashir on 28th November 2011 (vide. *High Court Miscellaneous Criminal Application No. 685 of 2010 (Milimani Law Courts)*], and the provisional warrant is still in force. The said provisional warrant was itself issued due to the Government's invitation of President al Bashir into the country and its failure to enforce the ICC warrants under Section 29 of the International Crimes Act. We hasten to add that in issuing the provisional warrant, the High Court decided that "any legal person- ICJ-Kenya included- who has the requisite mandate and capacity to enforce and/or to execute the warrant may be at liberty to do so".

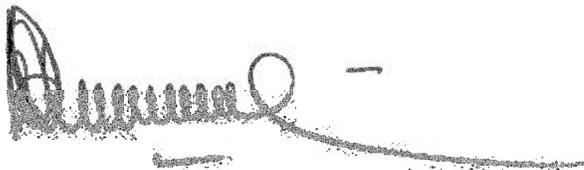
It is with the above in mind that we request you as the principal adviser to the Government under Article 156(4)(a) of the Constitution, and as a member of the Committee to the Assumption to the Office of President, to advise both the incoming and outgoing President that President al Bashir's invitation and subsequent presence on the territory of Kenya amounts to a breach of the Constitution, the International Crimes Act, and the Rome Statute of the International Criminal Court. In addition, we request you to enforce the provisional warrant in

keeping with the decision of the High Court to the effect that any legal person may enforce the provisional warrant. We are making this latter request in view of the that fact that Professor George Saitoti, who had been served with the provisional warrant as the then Minister in charge of Internal Security has since died, while his successor the Honourable Katoo ole Metito has since resigned from office. We are not aware of who is supposed to exercise ministerial powers under the International Crimes Act at the moment in view of the Honourable ole Metito's resignation. However, bearing in mind the High Court decision as to enforcement of the provisional warrant by any legal person, we take the view that the death or resignation of the previous holders of the office of Minister for Internal Security cannot be an impediment against, or legal justification for the failure of, your enforcement of the warrant. (The original provisional warrant is still in the custody of the office of the Minister for Internal Security, while we are in possession of a counterpart of the warrant which is immediately available for your use in case the one in the Minister's office is not immediately available. In the meantime, we enclose a copy of the warrant for your records.)

Finally, we take the humble but considered view that as a party to the proceedings in relation to which the provisional warrant of arrest against President al Bashir was issued, there are legal consequences that may be visited on your office for failure to ensure his arrest and surrender to the ICC. We therefore look forward to and count on your fullest cooperation in this matter.

Yours faithfully

For: Nderitu & Partners Advocates

A handwritten signature in black ink, appearing to read 'Wilfred Nderitu', with a long horizontal flourish extending to the right.

WILFRED NDERITU

cc: Mr. Keriako Tobiko
Director of Public Prosecutions
NSSF Building
NAIROBI

Mr. Mutea Iringo
Permanent Secretary
Ministry of State for Provincial Administration and Internal Security
Harambee House
NAIROBI

Deputy Registrar
(Criminal Division) **(High Court Misc. Appl. No. 685 of 2010)**
High Court of Kenya
Milimani Law Courts
NAIROBI

Deputy Registrar
Kenya Court of Appeal **(Civil Appeal No. 105 of 2012)**
NAIROBI

Mr. Albert Kamunde
Chairman
Kenyan Section of the International Commission of Jurists (ICJ-Kenya)
NAIROBI