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**International
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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN DARFUR, SUDAN

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

Public Redacted Version

**Decision on the Prosecution's Application for a Warrant of Arrest against Omar
Hassan Ahmad Al Bashir**

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Detention Section

**Victims Participation and Reparations
Section**

Other

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PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court”, respectively) has been seized of the Prosecution’s Application for a warrant of arrest, filed on 14 July 2008 pursuant to article 58(1) of the *Rome Statute* (“the Statute”), in the investigation of the situation in Darfur, Sudan. Having examined the written and oral submissions of the Prosecution, the Chamber

RENDERS THIS DECISION.

I. Background

1. On 31 March 2005, the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593¹ referring the situation in Darfur, Sudan since 1 July 2002 (“the Darfur situation”) to the Prosecutor of the International Criminal Court, in accordance with article 13(b) of the Statute.
2. On 21 April 2005, the Presidency issued a decision assigning the Darfur situation to the Chamber, pursuant to regulation 46 of the *Regulations of the Court* (“the Regulations”).²
3. On 1 June 2005, the Prosecution informed the Chamber of its decision to initiate an investigation into the Darfur situation, pursuant to article 53 of the Statute and rule 104 of the *Rules of Procedure and Evidence* (“the Rules”).³
4. On 14 July 2008, the Prosecution filed an application under article 58⁴ (“the Prosecution Application”) requesting the issuance of a warrant of arrest against Omar Hassan Ahmad Al Bashir (hereinafter referred to as “Omar Al Bashir”) for his alleged criminal responsibility in the commission of genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups in Darfur from 2003 to 14 July 2008.

¹ United Nations Security Council Resolution 1593, S/RES/1593 (2005), issued on 31 March 2005 (hereinafter the “UN Security Council Resolution, S/RES/1593 (2005)”).

² ICC-02/05-1-Corr.

³ ICC-02/05-2.

⁴ ICC-02/05-151-US-Exp and ICC-02/05-151-US-Exp-Anxs1-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxs1 & 2. Public redacted version of the Prosecution Application, ICC-02/05-157-AnxA (hereinafter referred to throughout the present decision as “the Prosecution Application”).

5. On 19 September 2008, the Chamber issued a “Decision Convening a Hearing”⁵ whereby an *ex parte* hearing with the Prosecution was convened and held on Wednesday 1 October 2008.⁶

6. On 15 October 2008, the Chamber issued a “Decision Requesting Additional Supporting Materials in relation to the Prosecution’s Request for a Warrant of Arrest against Omar Hassan Al Bashir”⁷ in which the Chamber requested the Prosecution to provide the Chamber with additional supporting materials.

7. On 17 November 2008, the Prosecution filed its additional supporting materials in the “Prosecution’s Submission of Further Information in Compliance with “Decision Requesting Additional Supporting Materials in relation to the Prosecution’s Request for a Warrant of Arrest against Omar Hassan Al Bashir” dated 15 October 2008”.⁸

8. On 11 January 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed the “Application on behalf of Citizens’ Organisations of The Sudan in relation to the Prosecutor’s Applications for Arrest Warrants of 14 July 2008 and 20 November 2008”⁹ whereby they requested, pursuant to rule 103 of the Rules, the leave of the Chamber to make written and oral submissions on the following matters:

The Applicants request that no arrest warrants are issued by the Pre-Trial Chamber at this time on grounds that (1) issuing such warrants would have grave implications for the peace building process in Sudan and that deference must be given to considerations of national interest and security; (2) that the interests of justice will not be served particularly in light of the Prosecutor’s conduct in bringing these applications; (3) that such warrants could entrench the negative perceptions of the ICC and thus contribute to a deterioration of the situation in Sudan; and, (4) that alternative means of transitional justice and resolution are

⁵ ICC-02/05-158.

⁶ ICC-02/05-T-2-Conf-Exp-ENG ET.

⁷ ICC-02/05-160 and ICC-02/05-160-Conf-Exp-Anx1.

⁸ ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J.

⁹ ICC-02/05-170.

being and will pursued without the need for any consideration of involvement of the ICC at this stage.¹⁰

9. On 30 January 2009, the Chamber issued the “Decision scheduling an *Ex Parte* Hearing and Providing an Agenda”,¹¹ thereby scheduling an *ex parte* hearing which was held in closed session with the Prosecution, the Registry and Victims and Witnesses Unit on 3 February 2009.¹²

10. On 3 February 2009, the Prosecution filed the “Prosecution’s written submissions Pursuant to “Decision scheduling an *Ex Parte* Hearing and Providing an Agenda” dated 30 January 2009”.¹³

11. On 3 February 2009, the Registry filed its “First report of the Registry in relation to the “Decision scheduling an *Ex Parte* Hearing and Providing an Agenda” of 30 January 2009”.¹⁴

12. On 4 February 2009, the Prosecution filed the “Provision of Information Pursuant to PTC I Request Made During Hearing on 3 February 2009”.¹⁵

13. On 4 February 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed the “Supplement to the Application and Annexes to the Application on behalf of Citizens’ Organisations of The Sudan in relation to the Prosecutor’s Applications for Warrants of 14 July 2008 and 20 November 2008”,¹⁶ in which they provided further information in support of their request under rule 103 of the Rules.

¹⁰ ICC-02/05-170, para. 8.

¹¹ ICC-02/05-176 and ICC-02/05-176-Conf-Exp-Anx1.

¹² ICC-02/05-T-4-Conf-Exp-ENG ET.

¹³ ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxs1-5.

¹⁴ ICC-02/05-181-Conf-Exp.

¹⁵ ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E.

¹⁶ ICC-02/05-182.

14. On 5 February 2009, the Chamber issued the "Decision Requesting Additional Information from the Prosecution and the Registry".¹⁷

15. On 5 February 2009, the Chamber issued the "Decision on Application under Rule 103",¹⁸ in which the Chamber rejected the request made by the Sudan Workers Trade Unions Federation and the Sudan International Defence Group pursuant to rule 103 of the Rules as, according to the Statute and the Rules, "the Chamber neither has the power to review, nor is it responsible for, the Prosecution's assessment that, under the current circumstances in Sudan, the initiation of a case against Omar Al Bashir and three alleged commanders of organised armed groups would not be detrimental to the interests of justice."¹⁹

16. On 6 February 2009, the Prosecution filed the "Prosecution's Additional Submissions Pursuant to Undertaking made during the Hearing on 3 February 2009".²⁰

17. On 11 February 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed the "Application for Leave to Appeal Against Decision on Application under Rule 103".²¹

18. On 13 February 2009, the Prosecution filed the "Prosecution's Submission of Information Pursuant to Decision of PTC I of 4 February 2009".²²

19. On 16 February 2009, the Registry filed the "Additional information from the Registry pursuant to the "Decision Requesting Additional Information from the Prosecution and the Registry" dated 4 February 2009".²³

¹⁷ ICC-02/05-184-Conf-Exp.

¹⁸ ICC-02/05-185.

¹⁹ ICC-02/05-185, para. 29.

²⁰ ICC-02/05-186-US-Exp.

²¹ ICC-02/05-187.

²² ICC-02/05-188-US-Exp.

²³ ICC-02/05-190-US-Exp.

20. On 19 February 2009, the Chamber issued the “Decision on the Application for Leave to Appeal Against Decision on Application under Rule 103”.²⁴

21. On 23 February 2009, the Chamber issued the “Public notice of the Decision on the Prosecution’s Application under article 58 of the Statute”²⁵ in which the Chamber declared that “the decision of the Chamber on the Prosecution Application shall be issued on 4 March 2009 and filed publicly on the same date.”

II. Preliminary remarks

22. In the Prosecution Application, the Prosecution requests that a warrant of arrest be issued for Omar Al Bashir for his alleged responsibility in the commission of genocide, crimes against humanity and war crimes against the members of the Fur, Masalit and Zaghawa groups in Darfur from March 2003 to the date of filing of the Prosecution Application on 14 July 2008.²⁶

23. The Prosecution also submits that had Omar Al Bashir shown any willingness to appear before this Court, issuing a summons to appear could have been a viable alternative.²⁷

24. At the outset, the Chamber emphasises that (i) it falls within the discretion of the Prosecution to decide which materials to present to the Chamber in support of the Prosecution Application for a warrant of arrest against Omar Al Bashir;²⁸ and that

²⁴ ICC-02/05-192.

²⁵ ICC-02/05-193.

²⁶ *The Prosecution Application*, para. 413.

²⁷ *The Prosecution Application*, para. 414.

²⁸ The same approach was followed in the cases of *The Prosecutor v Thomas Lubanga Dyilo* and *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*. See in particular ICC-01/04-01/06-2-tEN, p. 2; ICC-01/04-01/07-1-tENG, p. 2; ICC-01/04-01/07-32 and Annexes.

(ii) the present decision is solely based on the materials provided by the Prosecution in support of the Prosecution Application.²⁹

25. In this regard, the Chamber notes that article 58(1) of the Statute provides that:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial,
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

26. The Chamber also observes that article 58(7) of the Statute provides that:

As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear.

27. As the Chamber has already held, the term "committed" in article 58(1) or (7) of the Statute includes:

- (i) The commission *strictu sensu* of a crime by a person "as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible";
- (ii) Any other forms of accessory, as opposed to principal, liability provided for in article 25 (3) (b) to (d) of the Statute;
- (iii) An attempt to commit any of the crimes provided for in articles 6 to 8 of the Statute;
- (iv) Direct and public incitement to commit genocide (the only preparatory act punishable under the Statute); and

²⁹ The materials in support of the Prosecution Application include the Prosecution filings of 14 July 2008, 17 November 2008 and all materials submitted in relation to the hearings held on 1 October 2008 and 3 February 2009.

- (v) The responsibility of commanders and other superiors under article 28 of the Statute.³⁰

28. Accordingly, the Chamber is of the view that the Prosecution Application for the issuance of a warrant of arrest for Omar Al Bashir can only be granted if the Chamber is convinced that the three following questions are answered affirmatively:

- (i) Are there reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed?
- (ii) Are there reasonable grounds to believe that Omar Al Bashir has incurred criminal liability for such crime under any of the modes of liability provided for in the Statute?
- (iii) Does the arrest of Omar Al Bashir appear to be necessary under article 58(1) of the Statute?³¹

29. According to article 58(7) of the Statute, the Chamber would only issue a summons to appear for Omar Al Bashir if it is convinced that the first two questions are answered in the affirmative, but his arrest does not appear to be necessary under article 58(1) of the Statute.³²

30. If the Chamber is not convinced that both of the two first questions are answered affirmatively, it shall decline to issue any warrant of arrest or summons to appear for Omar Al Bashir.

31. Furthermore, if the Chamber decides to issue a warrant of arrest or summons to appear, it shall only issue it in relation to those specific crimes for which it is convinced that the first two above-mentioned questions are answered in the affirmative.

³⁰ ICC-01/04-520-Anx2, para. 92.

³¹ ICC-01/04-01/06-2-tEN; ICC-01/04-01/07-4.

³² ICC-02/05-01/07-2-Corr, p. 2.

32. This interpretation of article 58(1) and (7) of the Statute is, in the Chamber's view, the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5(1)(c) of the *European Convention on Human Rights*³³ and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the *American Convention on Human Rights*.³⁴

33. Finally, the Chamber highlights that, in discussing whether the Chamber is convinced that the "reasonable grounds to believe" standard and the "appearance" standard required by article 58(1) of the Statute have been met, the Chamber, although under no obligation to do so, will often refer to the materials provided by the Prosecution in support of the Prosecution Application.

34. Nevertheless, the Chamber underscores that the conclusions reached by the Chamber in relation to the findings made in the present decision are not only based on the specific materials expressly discussed, but they are made on the basis of an overall assessment of all information provided by the Prosecution in support of the Prosecution Application.

III. Whether the case against Omar Al Bashir falls within the jurisdiction of the Court and is admissible

A. The case against Omar Al Bashir falls within the jurisdiction of the Court

³³ According to the European Court of Human Rights ("the ECHR"), the reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary deprivation of liberty. See ECHR, *Case of Fox, Campbell and Hartley v United Kingdom*, "Judgment", 30 August 1990, Application No. 12244/86; 12245/86; 12383/86, paras. 31-36. ECHR, *Case of K-F v Germany*, "Judgment", 27 November 1997, Application No. 144/1996/765/962, para. 57. ECHR, *Case of Labita v Italy*, "Judgment", 6 April 2000, Application No. 26772/95, paras. 155-161; ECHR, *Case of Berkilay v Turkey*, "Judgment", 1st March 2001, Application No. 22493/93, para. 199; ECHR, *Case of O'Hara v. United Kingdom*, "Judgment", 16 October 2001, Application No. 37555/97, paras. 34-44.

³⁴ See for instance, Inter-American Court of Human Rights ("the IACHR"), *Case of Bamaca Velasquez v. Guatemala*, "Judgment", 25 November 2000, Series C No.70, paras. 138-144, *Case of Loayza Tamayo v Peru*, "Judgment", 17 September 1997, Series C No.33, paras. 49-55, and IACHR, *Case of Gangaram-Panday v Suriname*, "Judgment", 21 January 1994, Series C No.16, paras. 46-51.

35. Article 19(1) of the Statute requires the Chamber to satisfy itself that any case brought before it falls within the jurisdiction of the Court.

36. In this regard, the Chamber previously stated that:

[...] a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.³⁵

To fall within the Court's jurisdiction, a crime must meet the following three conditions: it must be one of the crimes mentioned in article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in article 11 of the Statute; and the crimes must meet one of the two alternative conditions described in article 12 of the Statute.³⁶

[...] article 12 (2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute.³⁷

37. In relation to the jurisdiction *ratione loci* and *ratione temporis*, the Chamber recalls that the 31 March 2005 referral by the Security Council pursuant to article 13(b) of the Statute³⁸ and the 1 June 2005 Prosecution's decision to open an investigation pursuant to article 53(1) of the Statute³⁹ define the territorial and temporal parameters of the Darfur situation encompassing the territory of the region of Darfur in Sudan (which includes the States of Northern Darfur, Southern Darfur and Western Darfur) since 1 July 2002.

38. The Chamber also notes that the Prosecution Application refers to conduct, including unlawful attacks against civilians, murder, extermination, rape, torture,

³⁵ ICC-01/04-01/06-8-Corr, para. 21.

³⁶ ICC-01/04-101-tEN, para. 85.

³⁷ ICC-02/05-01/07-1-Corr, para. 16.

³⁸ *The Prosecution Application*, para. 2; See also UN Security Council Resolution, S/RES/1593 (2005).

³⁹ ICC-02/05-2.

forcible transfer and pillage, alleged to have taken place from March 2003 to the time of the filing of the Prosecution Application on 14 July 2008, in areas and villages of the Darfur region.

39. In relation to the jurisdiction *ratione materiae*, the Chamber observes that, according to the Prosecution, the said conducts give rise to genocide, crimes against humanity and war crimes⁴⁰ insofar as they:

- i. took place in the context of an armed conflict not of international character on the territory of the Darfur region, which had already started in March 2003 and continued through July 2008;⁴¹
- ii. were part of a widespread or systematic attack directed against the civilian Fur, Masalit and Zaghawa population of Darfur, which started after a speech allegedly given by Omar Al Bashir in El Facher (Northern Darfur) in March 2003, and continued through July 2008;⁴² and
- iii. were not only intended to destroy a substantial part of the Fur, Masalit and Zaghawa groups as such, but could by themselves effect such destruction or were at least part of a manifest pattern of similar conduct against the targeted groups.⁴³

40. Finally, in relation to the jurisdiction *ratione personae*, the Chamber considers that, insofar as the Darfur situation has been referred to the Court by the Security Council, acting pursuant to article 13(b) of the Statute, the present case falls within the jurisdiction of the Court despite the fact that it refers to the alleged criminal liability of a national of a State that is not party to the Statute, for crimes which have been allegedly committed in the territory of a State not party to the Statute.

⁴⁰ In particular, those provided for in articles 6(a), (b) and (c), 7(1)(a), (b), (d), (f), and (g); and 8(2)(e)(i) and (v) of the Statute. *The Prosecution Application*, paras. 1 and 62.

⁴¹ *The Prosecution Application*, paras. 9, 240 and 355.

⁴² *The Prosecution Application*, paras. 9, 16, 29-31 and 65.

⁴³ *The Prosecution Application*, para. 10.

41. Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case.

42. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which "must not go unpunished".⁴⁴

43. Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute provide for the following core principles:

- (i) "This Statute shall apply equally to all persons without any distinction based on official capacity;"
- (ii) "[...] official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence;" and
- (iii) "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

⁴⁴ Preamble of the Statute, paras. 4 and 5.

44. Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* and article 21(3) of the Statute.⁴⁵

45. Fourth, as the Chamber has recently highlighted in its 5 February 2009 “Decision on Application under Rule 103”, by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.⁴⁶

B. No ostensible cause or self-evident factor impels the Chamber to exercise its discretion to determine the admissibility of the case against Omar Al Bashir at this stage

46. The second sentence of article 19(1) of the Statute bestows upon the Chamber a discretionary *proprio motu* power to determine the admissibility of a case:

The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

⁴⁵ ICC-01/04-168, paras. 22,-24, 32-33 and 39.

⁴⁶ ICC-01/05-185, para. 31.

47. Nevertheless, the Chamber observes that the Appeals Chamber, in its 13 July 2006 Judgment,⁴⁷ held that when, as in the present case,⁴⁸ the Prosecution Application is made on a *confidential* and *ex parte* basis, the Chamber, for the purpose of preserving the interests of the relevant person, must exercise its discretion under article 19(1) of the Statute only in exceptional circumstances,⁴⁹ such as when an “ostensible cause” or a “self-evident factor” impels the exercise of such discretion.⁵⁰

48. In this regard, the Chamber has already held that:

[...] the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17(1)(a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court.⁵¹

⁴⁷ ICC-01/04-169.

⁴⁸ The Chamber also notes that the proceedings for the issuance of warrant of arrest remain confidential and *ex parte*, despite the fact that the Prosecution has filed a public summary of its Application in the record of the Darfur situation. *The Prosecution Application*, paras. 72-74.

⁴⁹ ICC-01/04-169, para. 52.

⁵⁰ ICC-01/04-169, para. 53.

⁵¹ ICC-01/04-520-Anx2, paras. 29 and 64. In its 10 February 2006 Decision, the Chamber put forward the only existing definition of article 17(1)(d) gravity threshold provided for to date in the jurisprudence of the Court. According to such definition:

any case arising from an investigation before the Court will meet the gravity threshold provided for in article 17(1)(d) of the Statute if the following three questions can be answered affirmatively:

1. Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct);
2. Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and
3. Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crime within the jurisdiction of the Court; and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?

Nevertheless, the Appeals Chamber, in its *obiter dicta* provided for in its 13 July 2006 Decision, stated that this definition of article 17(1)(d) gravity threshold was flawed (ICC-01/04-169, para. 82).

49. The Chamber notes that, in the Prosecution Application, the Prosecution does not raise any issues of admissibility, except to highlight that this case is not being investigated or prosecuted in Sudan.⁵²

50. Further, in the view of the Chamber, the materials presented by the Prosecution in support of the Prosecution Application offer no indication that: (i) national proceedings may be conducted, or may have been conducted, at the national level against Omar Al Bashir for any of the crimes contained in the Prosecution Application; or that (ii) the gravity threshold provided for in article 17(1)(d) of the Statute may not be met.

51. In light of the above-mentioned, the Chamber declines to use its discretionary *proprio motu* power to determine, at this stage, the admissibility of the case against Omar Al Bashir as: (i) the Prosecution Application still remains *confidential* and *ex parte*; and (ii) there is no ostensible cause or self-evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute.

IV. Whether the common requirements under article 58(1) of the Statute for the issuance of a warrant of arrest have been met

A. Whether there are reasonable grounds to believe that at least one of the crimes within the jurisdiction of the Court referred to in the Prosecution Application has been committed

52. As the Chamber has already held:

[...] according to the Statute and the Elements of Crimes, the definition of every crime within the jurisdiction of the Court includes both contextual and specific elements.⁵³

⁵² *The Prosecution Application*, para. 3.

⁵³ ICC-01/04-520-Anx2, para. 94.

53. Hence, the Chamber will first analyse whether there are reasonable grounds to believe that the contextual elements of the crimes alleged by the Prosecution in the Prosecution Application are present, and only if the answer is in the affirmative, will the Chamber turn its attention to the question as to whether there are reasonable grounds to believe that the specific elements of any such crime have been met.

54. Moreover, although the Prosecution Application focuses, for the most part, on the three counts of genocide, the Chamber observes that, according to the Prosecution, the alleged crimes were committed as part of a counter-insurgency campaign launched in March 2003 by the Government of Sudan (“the GoS”).⁵⁴ Hence, the Chamber will first analyse the Prosecution’s allegations concerning war crimes and crimes against humanity, and only then will the Chamber turn its attention to the Prosecution’s allegations relating to the crime of genocide.

1. *War crimes*

(a) Whether there are reasonable grounds to believe that the contextual elements of at least one war crime within the jurisdiction of the Court have been met

55. The Prosecution submits that Omar Al Bashir used, from March 2003 to the date of filing of the Prosecution Application on 14 July 2008, the “apparatus” of the State of Sudan, including the Sudan People’s Armed Forces (“the Sudanese Armed Forces”) and their allied militia groups known as “Janjaweed Militia” (primarily drawn from so-called Arab tribes), the Sudanese Police Forces, the National Intelligence and Security Service (“the NISS”) and the Humanitarian Aid Commission (“the HAC”), to commit acts constituting war crimes under paragraphs (2)(e)(i) and (2)(e)(v) of article 8 of the Statute.⁵⁵

⁵⁴ *The Prosecution Application*, paras. 9-11.

⁵⁵ *The Prosecution Application*, para. 39.

56. In particular, the Prosecution alleges that between March 2003 and 14 July 2008, GoS forces⁵⁶ conducted hundreds of unlawful attacks on towns and villages throughout the Darfur region inhabited by members of the Fur, Masalit and Zaghawa groups.⁵⁷

57. According to the Prosecution Application, this conduct took place in the context of an armed conflict, which, by reference to paragraphs (2)(e)(i) and (2)(e)(v) of article 8 of the Statute, the Prosecution appears to characterise as an armed conflict not of an international character.⁵⁸

58. In this regard, the Chamber observes that article 8(2)(f) of the Statute, which defines “armed conflicts not of an international character” for the purpose of article 8(2)(e) of the Statute, states that:

Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State where there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.

59. As the Chamber has already held in relation to these types of armed conflicts:

[...] in addition to the requirement that the violence must be sustained and have reached a certain degree of intensity, Article 1.1 of the Protocol Additional II provides that the armed groups must: (i) be under responsible command implying some degree of organisation of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the implementation of the Protocol; and (ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations.⁵⁹

The ICTY Appeals Chamber has held that an armed conflict not of an international character exists whenever there is a resort to ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’ This definition echoes the two criteria of Protocol Additional II,

⁵⁶ Unless otherwise expressly provided, the term “GoS’ forces” is used hereinafter to refer to the forces of the Government of Sudan, which included *inter alia*, the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.

⁵⁷ *The Prosecution Application*, para. 237.

⁵⁸ *The Prosecution Application*, paras. 1 and 9.

⁵⁹ ICC-01/04-01/06-803-tEN, para. 232.

except that the ability to carry out sustained and concerted military operations is no longer linked to territorial control. It follows that the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character.⁶⁰

60. The Chamber has also highlighted that article 8(2)(f) of the Statute makes reference to “protracted armed conflict between [...] organized armed groups”, and that, in the view of the Chamber, this focuses on the need for the organised armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time.⁶¹ In this regard, the Chamber observes that, to date, control over the territory by the relevant organised armed groups has been a key factor in determining whether they had the ability to carry out military operations for a prolonged period of time.⁶²

61. According to the Prosecution, since March 2003, an armed conflict has existed in the Darfur region between (i) the GoS; and (ii) the Sudan Liberation Movement/Army (“the SLM/A”), the Justice and Equality movement (“the JEM”) and other opposition armed groups seeking political change in the Darfur region.⁶³

62. In this regard, the Chamber considers that there are reasonable grounds to believe that the SLM/A and the JEM (i) were the two main groups opposing the GoS in Darfur; (ii) organised themselves between 2001 and 2002; and (iii) began to resort to acts of armed violence in 2002.⁶⁴ Moreover, despite internal disputes and splits, the Chamber considers that there are reasonable grounds to believe that, since at least

⁶⁰ ICC-01/04-01/06-803-tEN, para. 233.

⁶¹ ICC-01/04-01/06-803-tEN, para. 234.

⁶² ICC-01/04-01/07-717, para. 239.

⁶³ *The Prosecution Application*, paras. 9 and 240.

⁶⁴ Human Rights Watch (hereinafter “HRW”) Report, *Sudan Darfur in Flames – Atrocities in Western Sudan* (Anx 10) DAR-OTP-0003-0185 at 0194; International Crisis Group Report, *Darfur Deadline A New International Action Plan*, 23 August 2004 (Anx 11) DAR-OTP-0004-0055 at 0057, 0059, 0061, 0064, 0065, 0068; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0027, 0030-0040, 0058; HRW, *If We Return, We Will Be Killed – Consolidation of Ethnic Cleansing in Darfur, Sudan*, November 2004 (Anx 38) DAR-OTP-0107-1403 at 1405.

March 2003, both the SLM/A and the JEM fulfil the organisational requirements contained in article 8(2)(f) of the Statute.⁶⁵

63. Concerning the ability to carry out sustained military operations for a prolonged period of time, the Chamber considers that there are reasonable grounds to believe that the SLM/A and the JEM were involved in numerous military operations against GoS forces, such as those carried out (i) at the end of 2002/beginning of 2003 in the Jebel Marra locality;⁶⁶ (ii) in March/April 2003 on government installations in Kutum and Tine;⁶⁷ (iii) on 25 April 2003 on the El Fasher airport;⁶⁸ (iv) in July 2003 on the police station in Bindisi;⁶⁹ (v) in August 2003 on a Central Reservists office in Mukjar⁷⁰ and on the military garrison in Arawala;⁷¹ and (vi) on 13 and 22 March 2004 on various official buildings, including the police station and prison in Buram.⁷²

⁶⁵ *The Prosecution Application*, paras. 241-242; J. Flint/A. de Waal, *Darfur. A Short History of a Long War*, 2005 (Anx 75) DAR-OTP-0120-0678 at 0772-0775. Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3-4 September 2003 at DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement at DAR-OTP-0115-0563 at 0567-0638.

⁶⁶ Witness Statement (Anx 81) DAR-OTP-0148-0110 at 0126, para. 14; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62-63.

⁶⁷ Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0026, para. 65; Witness Statement (Anx 28) DAR-OTP-0097-0619 at 0625-0627, paras. 28-38; United Nations Economic and Social Council (hereinafter "ECOSOC"), *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) DAR-OTP-0115-0673 at 0686, para. 48; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0572-0577.

⁶⁸ Amnesty International Report, *Sudan Darfur: Too many people killed for no reason* (Anx 18) DAR-OTP-00020-067 at 068, para. 3; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-00018-010 at 026, para. 65; ECOSOC, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) at DAR-OTP-0115-0673 at 0686, para. 48; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0589-0595.

⁶⁹ Witness Statement (Anx 25) DAR-00095-049 at 075, 086, paras. 121, 175; Witness Statement (Anx 65) DAR-OTP-0119-0503 at 0514, 0526, paras. 46 and 106.

⁷⁰ Witness Statement (Anx 65) DAR-OTP-0119-0503 at 0517, para. 62; Witness Statement (Anx 25) DAR-OTP-00095-049 at 075, 086, paras. 121 and 176; Witness Statement DAR-OTP-0119-0711 at 0721, para. 52.

⁷¹ Witness Statement (Anx 19) DAR-OTP-00088-129 at 134, para. 22; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0603-0605.

⁷² Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0593, para. 4, and at 0594, para. 3.

64. Furthermore, there are reasonable grounds to believe that, at the relevant time, the SLM/A and the JEM controlled certain areas of the territory in the Darfur region.⁷³

65. As a result, the Chamber concludes there are reasonable grounds to believe that, since at least March 2003, both the SLM/A and the JEM had, as required by article 8(2)(f) of the Statute, the ability to carry out sustained military operations for a prolonged period of time.

66. In the view of the Chamber, there are also reasonable grounds to believe that, as a result of the activities of the SLM/A and the JEM, the GoS issued a general call for the mobilisation of the Janjaweed Militia after the attack on the El Fasher airport in April 2003.⁷⁴

67. The Chamber also finds that there are reasonable grounds to believe that, thereafter, GoS forces began implementing a GoS counter-insurgency campaign throughout the Darfur region against the SLM/A, the JEM and other armed groups opposing the GoS.⁷⁵

68. The Chamber further finds that there are reasonable grounds to believe that the SLM/A and the JEM entered into several agreements with the GoS, most notably (i) the Peace Agreement between the GoS and the SLM/A signed on 3 and 4

⁷³ ICC-02/05-01/07-1 para. 39, Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-00018-040 at 041, para. 132.

⁷⁴ Unofficial version of the *Armed Forces Memorandum concerning the ICC's Inquiries* (Anx 56) DAR-OTP-0116-0721 at 0727-0729; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 027 paras. 67-69; International Mission of Inquiry on Darfur, Mission to West Darfur, 11-17 November 2004, Compiled notes of meetings and interviews (Anx 16) DAR-00016-139 at 159, Witness Statement (Anx 26) at DAR-OTP-0095-0151 at 0168 paras. 82-86; Witness Statement (Anx 28) DAR-OTP-0097-0619 at 0624, para. 21; ECOSOC, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) DAR-OTP-0115-0673 at 0686, para. 48; Pruner, G, *Darfur the ambiguous genocide* (Anx 74) at DAR-OTP-0120-0263 at 0304.

⁷⁵ United Nations Human Rights Council, *Report on Human Rights Situations that Require the Council's Attention*, 28 November 2007 (A/HRC/6/19) (Anx 78) DAR-OTP-0138-0117, at 0124, para. 19; UN Press Release on Humanitarian Situation in Darfur, *Humanitarian situation in Darfur, Sudan, said to be among worst in world*, 8 December 2003 (Anx 79) DAR-OTP-0141-0159; HRW Report, *Darfur in Flames Atrocities in Western Sudan*, April 2006 (Anx 10) DAR-OTP-0003-0185, pp. 12-15 and 22-24; Amnesty International Report, *Darfur "Too many people killed for no reason"*, 3 February 2004 (Anx 18) DAR-OTP-0020-0067, pp. 9-10; Witness Statement (Anx 59) DAR-OTP-0018-0002 at 0019-0022, paras. 75-88, 93-94, 95-101; Transcript of interview (Anx 70) DAR-OTP-0120-0186.

September 2003; (ii) the cease fire agreement signed on 8 April 2004 between the GoS and the SLM/A and the JEM; and (iii) the Darfur Peace Agreement between the GoS and the SLM/A and the JEM signed on 5 May 2006.⁷⁶

69. Nevertheless, in the view of the Chamber, there are reasonable grounds to believe that the said agreements have not been fully implemented, and that, in spite of them, the hostilities between the GoS on the one hand, and the SLM/A, the JEM and other opposition armed groups has continued in the Darfur region.⁷⁷

70. In conclusion, the Chamber finds that there are reasonable grounds to believe that from March 2003 to at least 14 July 2008, a protracted armed conflict not of an international character, within the meaning of article 8(2)(f) of the Statute, existed in Darfur between the GoS and several organised armed groups, in particular the SLM/A and the JEM.

71. Furthermore, the Chamber also finds that there are reasonable grounds to believe that the specific unlawful attacks and acts of pillage alleged by the Prosecution in the Prosecution Application were allegedly committed in the context of and were associated with, the said armed conflict in the Darfur region,⁷⁸ insofar as:

The armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of the battle. Nonetheless, the armed conflict must play a substantial role in the perpetrator's decision, in his or her ability to commit the crime or in the manner in which the conduct was ultimately committed.⁷⁹

⁷⁶ African Union, Agreement with the Sudanese Parties on modalities for the establishment of a ceasefire commission (Anx 12) DAR-OTP-00005-308; Peace Agreement between the Government of the Republic of Sudan and the Sudanese Liberation Army (Anx 50) DAR-OTP-0116-0433. The presence and representation of the SLM/A and the JEM at peace talks shows that the GoS considered them to be key actors in the Darfur conflict.

⁷⁷ Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0027, paras. 70-72; Witness Statement (Anx 29) DAR-OTP-0097-0639 at 0651, paras. 55-56.

⁷⁸ ICC-02/05-01/07-1, para. 47; *The Prosecution Application*, para. 240; African Union, Agreement with the Sudanese Parties on modalities for the establishment of a ceasefire commission (Anx 12) at DAR-00005-308; Peace Agreement between the Government of the Republic of Sudan and the Sudanese Liberation Army (Anx 50) DAR-OTP-0116-0433.

⁷⁹ ICC-01/04-01/06-803-tEN, para. 287.

- (b) *Whether there are reasonable grounds to believe that the specific elements of at least one war crime within the jurisdiction of the Court have been met*

72. The Prosecution submits that from March 2003 to 14 July 2008, Omar Al Bashir used the “apparatus” of the State of Sudan to direct hundreds of attacks against the Fur, Masalit and Zaghawa civilian population taking no direct part in hostilities (article 8(2)(e)(i) of the Statute),⁸⁰ including, *inter alia* in: (i) Kodoom on or about 15 August 2003 and again on or about 31 August 2003; (ii) Bindisi on or about 15 August 2003; (iii) Mukjar on or about 17 August 2003 and again on one occasion between August and September 2003; (iv) Arawala on or around 10 December 2003; (v) Shattaya town and its surrounding villages on 9 February 2004; (vi) Kailek on or around 9 March 2004; (vii) towns and villages in Buram locality between November 2005 and September 2006; (viii) Muhajeriya on or about 8 October 2007; (ix) Saraf Jidad on 7, 12 and 24 January 2008; (x) Silea on 8 February 2008; (xi) Sirba on 8 February 2008; (xii) Abu Suruj on 8 February 2008; (xiii) civilian centres in Jebel Moon between 18 and 22 February 2008; and (xiv) Shegeg Karo on 5 May 2008.⁸¹

73. The Prosecution also alleges that GoS forces carried out acts of pillage (article 8(2)(e)(v) of the Statute) upon the seizure of those towns and villages in Darfur primarily inhabited by members of Fur, Masalit and Zaghawa groups, including, but not limited to, those mentioned in the previous paragraph.⁸²

74. The Chamber has already found that there are reasonable grounds to believe that, in response to the activities of the SLM/A, the JEM and other opposition armed groups in Darfur, soon after the attack on El Fasher airport in April 2003, the GoS issued a general call for the mobilisation of the Janjaweed Militia, and thereafter

⁸⁰ *The Prosecution Application*, paras. 237, 269, 288-290 and 305-310.

⁸¹ *The Prosecution Application*, paras. 107, 202 and 213-233.

⁸² *The Prosecution Application*, paras. 213, 221, 223, 225 and 229.

conducted, through GoS forces a counter-insurgency campaign throughout the Darfur region against the said groups.⁸³

75. The Chamber also finds that there are reasonable grounds to believe that such counter-insurgency campaign continued until the date of filing of the Prosecution Application on 14 July 2008 and was not confined to targeting (i) members of the SLM/A, the JEM and other armed groups involved in the ongoing armed conflict in Darfur; and (ii) individuals who were taking direct part in hostilities as a result of the support and assistance they were providing to the said groups.

76. In this regard, the Chamber is of the view that there are reasonable grounds to believe that a core component of the GoS counter-insurgency campaign, which was underway for well over five years, was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups⁸⁴ - perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur.⁸⁵

⁸³ Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0087-0088; Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0583, para. 36; Witness Statement (Anx J92) DAR-OTP-0128-0002 at 0010, para. 33.

⁸⁴ See Partly Dissenting Opinion of Judge Anita Ušacka, Part III. B.

⁸⁵ In relation to the first attack on Kodoom on or about 15 August 2003, see HRW Report *Targeting the Fur: Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 181-182; Witness Statement (Anx J70) DAR-OTP-00094-119 at 133-134, paras. 60-66. In relation to the second attack on Kodoom on or about 31 August 2003, see Witness Statement (Anx J70) DAR-OTP-00094-119 at 138-141, paras. 81-96. In relation to the attack on Bindisi on or about 15 August 2003, see Witness Statement (Anx 20) DAR-OTP-00088-187 at 192-195, paras.23-36; Witness Statement (Anx 21) DAR-OTP-00088-219 at 227-229, paras. 49-61; Witness Statement (Anx J45) DAR-OTP-00088-060 at 065-068, paras. 19-31; and Witness Statement (Anx J70) DAR-OTP-00094-119 at 135, para. 71. In relation to the aerial attack on Mukjar between August and September 2003, see Witness Statement (Anx 21) DAR-OTP-00088-219 at 233-234, paras. 85-86. In relation to the attack on Arawala on or around 10 December 2003, see Witness Statement (Anx 19) DAR-OTP-00088-129 at 135-136, paras. 26-30; Witness Statement (Anx 43) DAR-OTP-0112-0175 at 0192 and 0193, paras. 73-74, 77-79; and Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568, at 064-065. In relation to the attack on Shattaya town and its surrounding villages (including Kailek) in February/March 2004, see Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-00018-010 at 078, paras. 273-274; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, paras. 34-37; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568, at 0597, para. 6 and at 0598 para. 3; Commission's meeting with key personalities from the Kutum area, 8 July 2004 (Anx 63) DAR-OTP-0119-0402 at 0407. In relation to the attack on Muhajeriya on or about 8 October 2007, see United Nations Human Rights Council, *Report on Human Rights Situations that Require the Council's Attention, 28 November 2007 (A/HRC/6/19)* (Anx 78) DAR-OTP-0138-0116 at 0145-0146, para (xvii). In relation to the attacks on Saraf Jidad on 7, 12 and 24 January 2008, see Ninth periodic report of the United Nations High Commissioner for Human Rights in the Sudan on the situation of human rights in the Sudan, *Attacks on civilians in Saraf Jidad, Sirba, Silea and Abu Suruj in Januaray and February 2008*, March 2008 (hereinafter the "Ninth periodic report of the UN High

77. Furthermore, the Chamber finds that there are reasonable grounds to believe that, as part of the above-mentioned GoS counter-insurgency campaign, GoS forces systematically committed acts of pillaging after the seizure of those towns and villages that were subject to their attacks.⁸⁶

78. Hence, the Chamber concludes that there are reasonable grounds to believe that, since the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport until 14 July 2008, war crimes within the meaning of articles 8(2)(e)(i) and 8(2)(e)(v) of the Statute were committed by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the

Commissioner for Human Rights”) (Anx J76) DAR-OTP-0136-0369 at 0372 and 0373. In relation to attack on Silea on 8 February 2008, see Prosecution Submission, HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) at DAR-OTP-0143-0273 at 0283 and 0294-0296; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0371, 0373 and 0374. In relation to the attack on Sirba on 8 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) at DAR-OTP-0143-0273 at 0283 and 0292-0294; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374. In relation to the attack on Abu Suruj on 8 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0283 at 0290-0292; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) at DAR-OTP-0136-0369 at 0373. In relation to the attack to Jebel Moon between 18 and 22 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0283 and 0297-0300; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0375.

⁸⁶ Commission of Inquiry on Darfur (Anx 17) at DAR-OTP-00018-010 at 065-066; In relation to the first attack on Bindisi on or about 15 August 2003, see Witness Statement (Anx 20) at DAR-OTP-00088-187 at 193, para. 29; Witness Statement (Anx 21) DAR-OTP-00088-187 at 228, para. 53; and at DAR-OTP-00090-173 at 181-182; Witness Statement (Anx 41) DAR-OTP-0110-0054 at 0062; HRW report, *Targeting the Fur Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 180-182; Witness Statement (Anx J70) DAR-OTP-00094-119 at 135, para. 71. In relation to the attack on Arawala on or around 10 December 2003, see Witness Statement (Anx 19) DAR-OTP-00088-129 at 136-138, paras. 30, 36 and 41-42; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604, paras. 2 and 3b. In relation to the attack on Muhajeriya on or about 8 October 2007, see Human Rights Council, Situations that require the Council’s attention (Anx 78) DAR-OTP-0138-0116 at 0145-0146, para (xvii). In relation to the attacks on Saraf Jidad on 7, 12 and 24 January 2008, see Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0602, para. 3, and at 0603, para. 1; Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0373. In relation to attack on Silea on 8 February 2008, see Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568, at 0602, para. 3, and at 0603, para. 1; HRW report, *They shot at us as we fled* (Anx 80) DAR-OTP-0143-0273 at 0283, 0294-0296; and Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0371, 0374-0375. In relation to the attack on Sirba on 8 February 2008, see HRW report, *They shot at us as we fled* (Anx 80) at DAR-OTP-0143-0273 at 0283, 0292-0294; and Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) at DAR-OTP-0136-0369 at 0374. In relation to the attack on Abu Suruj on 8 February 2008, see HRW report, *They shot at us as we fled* (Anx 80) DAR-OTP-0143-0273 at 0283, 0290-0292; Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) at DAR-OTP-0136-0369 at 0373. In relation to the attack on Mukjar on 3 August 2003, see Witness Statement (Anx 24) DAR-OTP-00094-423 at 432; HRW report, *Targeting the Fur Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 180-182.

Sudanese Police Forces, the NISS and the HAC, as part of the said GoS counter-insurgency campaign.

2. *Crimes against humanity*

- (a) *Whether there are reasonable grounds to believe that the contextual elements of at least one crime against humanity within the jurisdiction of the Court have been met*

79. The Prosecution submits that, from March 2003 to 14 July 2008, Omar Al Bashir used the “apparatus” of the State of Sudan to implement a policy of attacking the Fur, Masalit and Zaghawa civilian population of Darfur including, *inter alia*, in: (i) the towns of Kodoom, Bindisi, Mukjar and Arawala, and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur in August/September and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; (vi) Shegeg Karo and al-Ain areas in North Darfur in May 2008.⁸⁷

80. The Chamber observes that article 7(1) of the Statute defines crimes against humanity as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

⁸⁷ *The Prosecution Application*, paras. 214-217, 199-200, 222, 225, 228-229 and 233.

81. Although the terms “widespread” and “systematic” are not specifically defined in the Statute,⁸⁸ the Chamber has previously held that this language excludes random or isolated acts of violence, and that the term “widespread” refers to the large-scale nature of the attack, as well as to the number of victims, while the term “systematic” pertains to the organised nature of the acts of violence and to the improbability of their random occurrence.⁸⁹

82. Furthermore, the Chamber notes that article 7(2)(a) of the Statute provides the following definition of the term “attack directed against any civilian population”:

[...] a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.⁹⁰

83. As found in the previous section, the Chamber considers that there are reasonable grounds to believe that a core component of the GoS counter-insurgency campaign, and consequently a GoS policy, was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups⁹¹ - perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur.⁹²

84. The Chamber also considers that there are reasonable grounds to believe that the above-mentioned attack on the said part of the civilian population of Darfur was

⁸⁸ Lee, R. S. (Ed.), *The International Criminal Court. Elements of Crimes and Rules of Evidence*, New York, Transnational Publishers, 2001, p. 78: “agreement was quickly reached among most delegations that such issues should not be addressed in the Elements and should be left to evolving jurisprudence.”

⁸⁹ ICC-01/04-01/07-717, paras. 394-397; ICC-02/05-01/07-1-Corr, para. 62, quoted in ICC-01/04-01/07-4, para. 33. Cited jurisprudence: ICTY, *The Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 94; *The Prosecutor v Blagojević and Jokić*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, paras. 545-546.

⁹⁰ See METTRAUX, G., *International Crimes and the ad hoc Tribunals*, Oxford, Oxford University Press, 2005, p. 156.

⁹¹ See Partly Dissenting Opinion of Judge Anita Ušacka, Part III. B.

⁹² Witness Statement (Anx 28) DAR-OTP-0097-0619 at 0624, para. 21; Witness Statement (Anx 33) DAR-OTP-0107-0313 at 0331, para. 73; Witness Statement (Anx 41) DAR-OTP-0024-0200 at 0067, para. 52; Witness Statement (Anx J45) DAR-OTP-0088-0060 at 071-072, para. 45; Witness Statement (Anx 42) DAR-OTP-0112-0142 at 0151, para. 45; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 77) DAR-OTP-0143-0273 at 0017, para. 52; Report of the International Commission of Inquiry on Darfur, (Anx 17) DAR-OTP-0018-0010 at 084,086, paras. 304 and 315.

large in scale, as it affected hundreds of thousands of individuals⁹³ and took place across large swathes of the territory of the Darfur region.⁹⁴

85. Furthermore, the Chamber finds that there are also reasonable grounds to believe that the above-mentioned attack was systematic as it lasted for well over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern. For instance, attacks on towns and villages inhabited mainly by members of the Fur, Masalit and Zaghawa groups are consistently described in the materials provided by the Prosecution as coordinated ground attacks in which the attackers had previously encircled the targeted village or came to such village with tens or hundreds of vehicles and camels, forming a sort of wide line.⁹⁵ Moreover, such materials also refer to the fact that such ground attacks were often preceded by aerial bombings by planes bearing the markings or indications of the State of Sudan,⁹⁶ and that Janjaweed Militia arrived on horse or camel-back along with, or shortly followed by, members of the Sudanese Armed Forces in motor vehicles.⁹⁷

86. Finally, the Chamber is mindful that, in order to constitute a crime against humanity, article 7(1) of the Statute also requires that the relevant acts of violence be committed with “knowledge of the attack” such that the perpetrator “knew that the

⁹³ *The Prosecution Application*, para. 213; Witness Statement (Anx J45) DAR-OTP-0088-0060 at 065-066, paras. 19-24; Witness Statement (Anx J70) DAR-OTP-0094-0119 at 135-136, paras. 69-75; Witness Statement (Anx 19) DAR-OTP-0088-0129 at 135-136, paras. 26-28; Amnesty International Report, *Darfur. Too Many People Killed for No Reason* (Anx J5) at DAR-OTP-0002-0207 at 0209-0211; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369; International Crisis Group Report, *Darfur Deadline: A new International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055.

⁹⁴ ICC-02/05-151-US-Exp-Anx1; Office of UN Resident and Humanitarian Coordinator for the Sudan report (Anx J69) at DAR-OTP-0149-0537, HRW Report, *Sudan Darfur in Flames: Atrocities in Western Sudan*, April 2004 (Anx 10) at DAR-OTP-0003-0185; International Crisis Group Report, *Darfur Deadline. A new International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055.

⁹⁵ *The Prosecution Application*, paras. 106 and 361; Report of the International Commission of Inquiry on Darfur (Anx 17) at DAR-OTP-0018-0010 at 0057, para. 186.

⁹⁶ Witness Statement (Anx J45) DAR-OTP-0088-0060 at 065-066, paras. 19-24; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, para. 34; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan, (Anx J76) DAR-OTP-0136-0369 at 0373 and 0375.

⁹⁷ Witness Statement (Anx J70) DAR-OTP-0094-0119 at 0133-0134, paras. 60-64; Witness Statement (Anx J45) DAR-OTP-0088-0060 at 065-066, paras. 19-24; Witness Statement (Anx 19) DAR-OTP-0088-0129 at 0136, paras. 27-28; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, para. 34; Ninth periodic report of the United Nations High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0373; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0291 and 0292-0294.

conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.”⁹⁸

87. As the Chamber has already held, such knowledge should “not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”⁹⁹ On the contrary, this Chamber has previously understood this phrase to mean that the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack.¹⁰⁰

88. In the present case, the Chamber considers that there are reasonable grounds to believe that such a requirement is met as: (i) the attack against the above-mentioned part of the civilian population of Darfur affected at least hundreds of thousands of individuals during a period of more than five years; and (ii) numerous United Nations reports,¹⁰¹ several Security Council resolutions¹⁰² and the Report of the United Nations Commission of Inquiry,¹⁰³ which referred to the existence of a widespread and systematic attack by GoS forces on the above-mentioned part of the civilian population in Darfur, were released during the relevant time period and were widely publicised.

89. The Chamber thus concludes that there are reasonable grounds to believe that the contextual elements referred to in article 7(1) of the Statute have been met.

⁹⁸ Elements of Crimes, paragraph 2 of the Introduction to article 7 of the Elements of Crimes.

⁹⁹ Elements of Crimes, paragraph 2 of the Introduction to article 7 of the Elements of Crimes.

¹⁰⁰ ICC-01/04-01/07-717, para. 401. *See also* ICTY, *The Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 99; ICTY, *The Prosecutor v Blaškić*, Case No. IT-95-14-A, Appeals Judgment, 29 July 2004, para.124; ICTR, *The Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 332.

¹⁰¹ ECOSOC, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) DAR-OTP-0115-0673 at 0694-0695, paras. 92-96.

¹⁰² United Nations Security Council Resolution 1547, S/RES/1547 (2004); United Nations Security Council Resolution 1556, S/RES/1556 (2004); United Nations Security Council Resolution S/RES/1564 (2004); United Nations Security Council Resolution 1574, S/RES/1574 (2004); United Nations Security Council Resolution 1590, S/RES/1590 (2005).

¹⁰³ Report of the International Commission of Inquiry on Darfur, DAR-OTP-0018-0010 (Anx 17) at 0161-0163, paras. 630-638.

- (b) *Whether there are reasonable grounds to believe that the specific elements of at least one crime against humanity within the jurisdiction of the Court have been met*

90. The Prosecution submits that, since March 2003 to 14 July 2008, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, killed thousands of individuals from the Fur, Masalit and Zaghawa groups, throughout the Darfur region, including, *inter alia*, in: (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur in August/September and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.¹⁰⁴

91. Moreover, the Prosecution submits that GoS forces systematically destroyed the means of survival - including food, shelter, crops, livestock and, in particular, wells and water pumps - of the Fur, Masalit and Zaghawa civilian population in Darfur because “[t]he aim was to ensure that those inhabitants not killed outright would be unable to survive without assistance.”¹⁰⁵ In this regard, the Prosecution submits that:

Given Darfur’s hostile desert environment and lack of infrastructure, livelihood strategies historically have centred on the village. It is difficult to survive outside the communal setting. As an example, ensuring adequate access to water has long been an essential component of livelihood strategies. To facilitate access to water by both humans and animals, many villagers dug communal wells or maintained other communal water sources. Militia/Janjaweed and the Armed Forces

¹⁰⁴ *The Prosecution Application*, paras. 62 (Count 1, 3, 4, 5), 371-372), 199, 214-217, 223, 226 and 232-233.

¹⁰⁵ *The Prosecution Application*, para. 175.

repeatedly destroyed, polluted or poisoned these wells so as to deprive the villagers of water needed for survival. In a number of cases, water installations were bombed.¹⁰⁶

92. The Chamber observes that, as there was an ongoing armed conflict at the relevant time, the killing of the following two categories of individuals, without violating international humanitarian law, cannot be considered unlawful, and therefore cannot be taken into consideration in assessing the Prosecution's allegations for crimes against humanity:

- (i) those members of the SLM/A, the JEM or any other armed group opposing the GoS in the ongoing armed conflict in Darfur; and
- (ii) those other individuals who, despite not being members of the said armed groups, were assisting any of them in such a way as to amount to taking direct part in the hostilities.

93. Moreover, the Majority considers that, although there are reasonable grounds to believe that GoS forces at times contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked,¹⁰⁷ there are no reasonable grounds to believe that such a contamination was a core feature of their attacks.¹⁰⁸

94. Nevertheless, in light of the materials provided by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of murder

¹⁰⁶ *The Prosecution Application*, paras. 175 and 176.

¹⁰⁷ One source mentions three incidents of destruction of water sources see Physicians for Human Rights, Report *Darfur Assault on Survival, A call for Security, Justice, and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0679 and see *The Prosecution Application* at paras. 174-176. However, neither of the UN High Commissioner for Human Rights reports on attacks by government forces in the Sudan make reference to the destruction of water sources – see Third Periodic report (Anx J75) at DAR-OTP-0108-0563, Ninth Periodic report (Anx J76) DAR-OTP-0136-0369. Indeed the Prosecution implies that many towns were sufficiently habitable for the land to be usurped by other tribes, see *The Prosecution Application*, paras. 179-184.

¹⁰⁸ United Nations High Commissioner for Human Rights Third Periodic report on the human rights situation in the Sudan (Anx J75) DAR-OTP-0108-0563 at 0572, para. 34.

by GoS forces, between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.¹⁰⁹

95. The Prosecution alleges that the materials submitted in support of the Prosecution Application in relation to the crime against humanity of murder, also provide reasonable grounds to believe that acts of extermination were committed, during the relevant period in the Darfur region, by GoS forces, against civilians from the Fur, Masalit and Zaghawa groups.¹¹⁰

96. In this regard, the Chamber highlights that, according to the Elements of Crimes, the crime of extermination requires that the relevant killings constitute or

¹⁰⁹ In relation to the first attack on Kodoom on or about 15 August 2003, see HRW Report, *Targeting the Fur: Mass Killings in Darfur* 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 182; Witness Statement (Anx J70) DAR-OTP-00094-119 at 133-134, para. 66. In relation to the second attack on Kodoom on or about 31 August 2003, see and HRW Report, *Targeting the Fur: Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 182; In relation to the attack on Bindisi on or about 15 August 2003, see Witness Statement (Anx 20) DAR-OTP-00088-187 at 192-194, paras. 23-27 and 32; Witness Statement (Anx 21) DAR-OTP-00088-219 at 227-228, paras. 47-49 and 32; Witness Statement (Anx J45) DAR-OTP-00088-060 at 065-066, paras. 20-23; Witness Statement (Anx 65) DAR-OTP-0119-0503 at 0521, 0522, paras. 81 and 85; and Witness Statement (Anx J70) at DAR-OTP-00094-119 at 135, para. 72. In relation to the aerial attack on Mukjar between August and September 2003, see Witness Statement (Anx 21) DAR-OTP-00088-219 at 233-234, paras. 85-86. In relation to the attack on Arawala on or around 10 December 2003, see Witness Statement (Anx 19) DAR-OTP-0088-0129 at 0136, paras. 27-28; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568, at 0605. In relation to the attack on Shattaya town and its surrounding villages (including Kailek) in February/March 2004, see Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-00018-010 at 078, paras. 273-274; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, paras. 34-37. In relation to attacks in Buram locality between November 2005 and September 2006, see Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 32 and 35-37. In relation to the attack on Muhajeriya on or about 8 October 2007, see United Nation Human Rights Council, *Report on Human Rights Situations that require the Council's attention* (A/HRC/6/19) (Anx 78) DAR-OTP-0138-0116 at 0145-0146, para (xvii). In relation to the attacks on Saraf Jidad on 7, 12 and 24 January 2008, see Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0373. In relation to attack on Silea on 8 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0294-0295; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374-0375. In relation to the attack on Sirba on 8 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0292-0293; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374. In relation to the attack on Abu Suruj on 8 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0290-0291; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0373. In relation to the attack to Jebel Moon between 18 and 22 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0297-0299; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0375. In relation to the attack on Shegeg Karo and al-Ain in May 2008, see Press Article, *The Nation*, *Death in Darfur*, 6 May 2008 (Anx 4, line 168) DAR-OTP-0149-0383 and Press Article, *Sudan Tribune*, *School Bombed in North Darfur, six children killed*, 9 May 2008 (Anx 4, line 168) DAR-OTP-0149-0387.

See also UN News Service, *At five-year mark, Darfur crisis in only worsening – UN aid Chief*, 22 April 2008 (Anx J27) DAR-OTP-0147-1068.

¹¹⁰ *The Prosecution Application*, para. 235.

take place as part of “a mass killing of members of a civilian population”. The Chamber observes that this has also been the interpretation adopted by the case law of the ICTY¹¹¹ and the ICTR.¹¹²

97. In this regard, and based on a review of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber is of the view that there are reasonable grounds to believe that acts of extermination, such as the alleged killing of over a thousand civilians in connection with the attack on the town of Kailek on or around 9 March 2004, were committed by GoS forces against civilians primarily from the Fur, Masalit and Zaghawa groups, in the Darfur region, during the relevant period.¹¹³

98. The Prosecution further submits that, from March 2003 to 14 July 2008, GoS forces forcibly transferred up to 2.7 million civilians from the Fur, Masalit and Zaghawa groups residing throughout the Darfur region,¹¹⁴ including, *inter alia*, from: (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur, between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur, between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu

¹¹¹ ICTY, *The Prosecutor v Jokic*, Case No. IT-02-60-T, Trial Judgement, 17 January 2005, paras.571 and 573; ICTY, *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 August 2001, paras. 497, 501 and 502; ICTY *Prosecutor v Vasiljević*, Case No. IT-98-32-T, Trial Judgement, 29 November 2002, paras. 219-220, 222 and 227.

¹¹² ICTR, *The Prosecutor v Karera*, Case No. ICTR-01-74-T, Trial Judgement, 7 December 2007, paras.551 and 552 ; ICTR, *The Prosecutor v Simba*, Case No. ICTR-2001-76-T, Trial Judgement, 13 December 2005, para. 422.

¹¹³ Witness Statement, (Anx 66) DAR-OTP-0119-0711 at 0718-0719, paras. 34-37 (describing how the witness was given a list of 1700 persons killed, or presumed dead, in an attack on Kailek); Witness Statement (Anx J8) DAR-OTP-0150-0255 at 0263 (saying the dead, missing or captured during the Kailek attacks numbered 1350); Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0078, paras. 273 and 274 (the commission stated it confirmed ‘mass killings of civilians’ in Kailek).

¹¹⁴ *The Prosecution Application*, para. 157.

Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur, between January and February 2008.¹¹⁵

99. Moreover, the Prosecution submits that the forcible transfer of a substantial part of the Fur, Masalit and Zaghawa civilian population was accompanied by the subsequent usurpation of their land by members of those tribes that were allied to the GoS. According to the Prosecution:

Usurpation of the land is often the final blow to the capacity of the target groups to survive in Darfur. Land has always been identified as a key issue, by AL BASHIR himself. In his April 2003 address to the Armed Forces and PDF troops at Al Fashir airport, AL BASHIR declared that "I only want land." [...] Having removed the target groups from their land, and destroyed their means of survival, the GoS encouraged and facilitated resettlement of the land by other ethnic groups.¹¹⁶

100. Based on an analysis of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of forcible transfer by GoS forces between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.¹¹⁷

101. Furthermore, the Chamber also considers that there are reasonable grounds to believe that, at times, GoS forces encouraged members of other tribes, which were

¹¹⁵ *The Prosecution Application*, paras. 199, 221, 224, 227-228, 232.

¹¹⁶ *The Prosecution Application*, paras. 179-180.

¹¹⁷ UN Security Council Press release, 22 April 2008 (Anx J38) DAR-OTP-0147-0859 at 0860; UN Security Council 5872nd meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061; UNCOI Material, (Anx J72) DAR-OTP-0038-0060 at 0065; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604; United Nations Inter-agency Report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0067; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 35, 39, 44; United Nations Human Rights Council, *Report on Human Rights Situations that require the Council's attention* (A/HRC/6/19) (Anx 78) at DAR-OTP-0138-0116 at 0145-0146; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0300, 0291-0296; Ninth periodic report of the United Nations High Commissioner for Human Rights. Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0374.

allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups.¹¹⁸

102. The Prosecution further alleges that, from March 2003 to 14 July 2008, GoS forces tortured numerous civilians from the Fur, Masalit and Zaghawa groups in the Darfur region,¹¹⁹ including, *inter alia*, in: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality, West Darfur in February 2008.¹²⁰

103. The Majority observes that the Prosecution's allegations in relation to torture refer, for the most part, to acts of torture allegedly committed during, or in the immediate aftermath of the attacks conducted by GoS forces against towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups.¹²¹ The Majority also notes that the Prosecution makes no allegations concerning the existence of reasonable grounds to believe that GoS forces established in Darfur long-lasting detention camps where inmates were systematically mistreated and tortured.

104. Based on an analysis of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject to acts of torture by GoS forces in the Darfur region between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.¹²²

¹¹⁸ Witness Statement (Anx J47) DAR-OTP-0125-0665 at 0716, para. 255.

¹¹⁹ *The Prosecution Application*, paras. 119, 120, 146-147, 220 and 237.

¹²⁰ *The Prosecution Application*, paras. 200-201, 220, 228 and 232.

¹²¹ *The Prosecution Application*, paras. 146, 151-154, 220 and 232(c).

¹²² HRW Report, *They Shot at Us as We Fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0290-0300; Witness Statement (Anx 24) DAR-OTP-0094-0423 at 0434, para. 46; Witness Statement (Anx J62) DAR-OTP-0012-0105 at 0105, para. 10; Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan, 27 January 2006 (Anx J35) DAR-OTP-0136-0263 at 0282 and 0283; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, para. 36; UN General Assembly, Human Rights Council, *Human Rights Situations that Require the Council's Attention (A/HRC/7/22)*, 3 March 2008 (Anx J28) DAR-OTP-0148-0259 at 0269-0270, paras. 45 and 46.

105. Finally, the Prosecution alleges that from March 2003 to 14 July 2008, GoS forces raped thousands of women from the Fur, Masalit and Zaghawa groups throughout the Darfur region,¹²³ including, *inter alia*, in: (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.¹²⁴

106. In particular, the Prosecution submits that:

Witnesses interviewed by the Prosecution, the UNCOI, other UN bodies and numerous NGOs have reported that, since March 2003, thousands of women and girls belonging to the target groups were raped in all three States of Darfur by members of the Armed Forces and Militia/Janjaweed. Girls as young as five and women as old as 70 have been raped. Gang rape - the rape of one or more victims by more than one perpetrator - has been a distinctive feature of sexual violence in Darfur [...] Rape has been used as a weapon during the attacks on villages and has been "a critical element in the sweeping, scorched-earth campaign by the Janjaweed and the GoS against the non-Arab Darfurians." Rape has also been a characteristic of the abuses in and around the camps for the internally displaced persons. Most of these rapes have been attributed by victims to members of the Armed Forces, Militia/Janjaweed and other GoS agents.¹²⁵

107. Moreover, the Chamber observes that, according to the Prosecution's allegations, most instances of rape took place when civilian women left the IDP Camps, as opposed to when GoS forces (i) seized those towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups; or (ii) entered IDP Camps within Darfur.¹²⁶

108. Based on an analysis of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of

¹²³ *The Prosecution Application*, p. 22, Count 8 and paras. 120-137, 201, 213, 218-219 and 237.

¹²⁴ *The Prosecution Application*, paras. 201-202, 218-219 and 232.

¹²⁵ *The Prosecution Application*, paras. 121 and 122.

¹²⁶ *The Prosecution Application*, paras. 124-125, 132, 137 and 143-144.

rape by GoS forces between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.¹²⁷

109. The Chamber is therefore satisfied that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport to 14 July 2008, the GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, committed crimes against humanity of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(1)(a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region, pursuant to the GoS policy to unlawfully attack, as a core component of its counter-insurgency campaign, that part of the civilian population of Darfur - belonging to a large extent to the Fur, Masalit and Zaghawa groups¹²⁸ - perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur.

3. *Genocide*¹²⁹

(a) *Introduction*

1. **Prosecution allegations**

110. The Prosecution submits that there are reasonable grounds to believe that Omar Al Bashir bears criminal responsibility under article 25(3)(a) of the Statute for the crime of genocide as a result of:

¹²⁷ UN General Assembly, Human Rights Council, *Human Rights Situations that Require the Council's Attention* (A/HRC/7/22), 3 March 2008 (Anx J28) at DAR-OTP-0148-0259 at 0270, para. 47; Witness Statement, (Anx 20) DAR-OTP-0088-0187 at 0196, para. 41; Witness Statement, (Anx 21) DAR-OTP-0088-0219 at 0230, para. 67; Witness Statement (Anx J15), DAR-OTP-0088-0306 at 0325, para. 146; Witness Statement, (Anx 66) DAR-OTP-0119-0711 at 0718, para. 36; see Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374-0375; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0296; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, para. 44.

¹²⁸ See Partly Dissenting Opinion of Judge Anita Ušacka, Part III. B.

¹²⁹ Judge Anita Ušacka dissents from the findings of the Majority in relation to genocide. See Partly Dissenting Opinion of Judge Anita Ušacka, Part III.

- i. the killing of members of the Fur, Masalit and Zaghawa ethnic groups (article 6(a) - Count 1);
- ii. causing serious bodily or mental harm to members of the Fur, Masalit and Zaghawa ethnic groups (article 6(b) - Count 2); and
- iii. deliberately inflicting on the Fur, Masalit and Zaghawa ethnic groups conditions of life calculated to bring about the groups physical destruction (article 6(c) - Count 3).¹³⁰

111. Nevertheless, the Prosecution acknowledges that (i) it does not have any direct evidence in relation to Omar Al Bashir's alleged responsibility for the crime of genocide;¹³¹ and that therefore (ii) its allegations concerning genocide are solely based on certain inferences that, according to the Prosecution, can be drawn from the facts of the case.¹³²

112. The Majority observes that the crime of genocide is defined in article 6 of the Statute as follows:

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

113. The Majority also notes that the Elements of Crimes elaborate on the definition of genocide provided for in article 6 of the Statute, establishing that the three following elements must always be fulfilled for the existence of the crime of genocide under the Statute:

¹³⁰ *The Prosecution Application*, pp. 20-21.

¹³¹ *The Prosecution Application*, paras. 371-373.

¹³² *The Prosecution Application*, para. 373.

- i. the victims must belong to the targeted group;
- ii. the killings, the serious bodily harm, the serious mental harm, the conditions of life, the measures to prevent births or the forcible transfer of children must take place “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”; and
- iii. the perpetrator must act with the intent to destroy in whole or in part the targeted group.

114. The Majority highlights that the crime of genocide is characterised by the fact that it targets a specific national, ethnic, racial or religious group. In the view of the Majority, its purpose is to destroy in whole or in part the existence of a specific group or people, as opposed to those individuals who are members thereof.¹³³ In this regards, the Majority notes the explanation by Raphael Lemkin concerning the creation of the word “genocide” from the Greek *genos*, meaning race or tribe, and the Latin *caedere*, meaning to kill.¹³⁴

115. The Majority also observes that, in the present case, the Prosecution claims that three different groups have been targeted: the Fur, the Masalit and the Zaghawa. As the definition of the crime of genocide aims at protecting the existence of a specific group or people, the Majority is of the view that the Prosecution should have articulated the counts in a different manner according to the following structure:

- i. one count of genocide against the Fur ethnic group;
- ii. one count of genocide against the Masalit ethnic group;

¹³³ See International Court of Justice (“the ICJ”), *Case concerning the Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment (No.91), 26 February 2007 [hereinafter ‘ICJ Judgment on Genocide’], para.193.

¹³⁴ Lemkin, R., *Axis Rule in Occupied Europe. laws of occupation, analysis of government, proposals for redress*, Lawbook Exchange, 1944, p. 79.

iii. one count of genocide against the Zaghawa ethnic group.¹³⁵

116. Nevertheless, as, for each of the three counts of genocide included in the Prosecution Application, the Prosecution makes a separate analysis of the alleged underlying facts in relation to each of the three targeted groups, the Majority is in a position to analyse the Prosecution's allegations concerning genocide.

2. Contextual elements of the crime of genocide

117. The Majority observes that the definition of the crime of genocide in article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 ("the 1948 Genocide Convention") does not expressly require any contextual element.¹³⁶

118. The Majority also notes that article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("the ICTY") and article 2 of the Statute of the International Criminal Tribunal for Rwanda ("the ICTR") have adopted the same definition of Genocide as the one provided for in article II of the 1948 Genocide Convention.

119. The Majority highlights that the case law of the ICTY and the ICTR has interpreted this definition as excluding any type of contextual element, such as a genocidal policy or plan.¹³⁷ Hence, for the case law of the ICTY and the ICTR, the crime of genocide is completed by, *inter alia*, killing or causing serious bodily harm to

¹³⁵ Each count of genocide would include those acts provided in article 6 of the Statute allegedly committed against the members of the relevant group (killing, causing serious bodily or mental harm and imposing conditions of life calculated to bring about the total or partial destruction of the Fur).

¹³⁶ Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entered into force on 12 January 1951.

¹³⁷ ICTY, *The Prosecutor v Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 400; ICTR, *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, paras. 520 and 523. See also Cryer, R., Friman, H., Robinson, D. and Wilmschurst E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 168 and 177-178. See also Cassese, A., *International Criminal Law*, 2nd edition, New York, Oxford University Press, 2008, pp. 140-141.

a single individual with the intent to destroy in whole or in part the group to which such individual belongs.¹³⁸ As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof.¹³⁹

120. As a consequence, according to the case law of the ICTY and the ICTR, the protection offered to the targeted groups by the penal norm defining the crime of genocide is dependent on the existence of an intent to destroy, in whole or in part, the targeted group.¹⁴⁰ As soon as such intent exists and materialises in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group.¹⁴¹

121. The Majority observes that the definition of the crime of genocide provided for in article 6 of the Statute is the same as that included in article II of the 1948 Genocide

¹³⁸ ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 521; ICTY, *The Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 400 and ICTY, *The Prosecutor v. Blagojević and Jović*, Case No. IT-02-60, Trial Judgment, 17 January 2005, para. 645. See also Cryer, R., Friman, H., Robinson, D. and Wilmschurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, p. 168. See also Cassese, A., *International Criminal Law*, 2nd edition, New York, Oxford University Press, 2008, p. 134. See also Schabas, W.A., *Genocide in International Law The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, p. 112.

¹³⁹ ICTY, *The Prosecutor v. Krstić*, Case No. IT-98-33-A, Trial Judgment, 19 April 2004, para. 133; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 498 and ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 170. See also Cryer, R., Friman, H., Robinson, D. and Wilmschurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 182-185.

¹⁴⁰ For this reason, some commentators have qualified the crime of genocide as 'a crime of *mens rea*.' See Cassese, A. (Ed.) *The Rome Statute of the International Criminal Court a commentary*, Vol. 1, New York, Oxford University Press, 2002, p. 338. See also Cryer, R., Friman, H., Robinson, D. and Wilmschurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 182-185. See also Zahar, A. and Sluiter, G., *International Criminal Law*, New York, Oxford University Press, pp. 163 and 172-173. See also Schabas, W.A., "Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia", *Westlaw* 25 FDMILJ 23, 2001, pp. 9-10.

¹⁴¹ Werle, G. *Principles of International Criminal Law*, The Netherlands. TMC Asser Press, 2005, p. 192, para. 565. See also Ambos K., "Current Issues in International Criminal Law" in *Criminal Law Forum*, vol. 14 no. 3, , Kluwer Academic Publishers, 2003, 225-259.

Convention, and that the Elements of Crimes elaborate upon it by, *inter alia*, requiring a contextual element.¹⁴²

122. The Majority also notes that the Prosecution underlines the existence of this contextual element of the crime of genocide at paragraph 76 of the Prosecution Application.

123. The Majority further observes that, according to this contextual element provided for in the Elements of Crimes, the conduct for which the suspect is allegedly responsible, must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group.

124. In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide – as an *ultima ratio* mechanism to preserve the highest values of the international community – is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.

125. The Majority is aware that there is certain controversy as to whether this contextual element should be recognised.¹⁴³

¹⁴² Some authors have referred to this element as a jurisdictional element insofar as the Elements of Crimes of genocide do not expressly require that it be covered by the knowledge of the perpetrator. According to these authors, this marks a significant difference with the provision on crimes against humanity because, according to article 7(1) of the Statute, the perpetrator must be aware that his or her actions or omission are part of a widespread or systematic attack against a civilian population. See Werle, G. *Principles of International Criminal Law*, The Netherlands, TMC Asser Press, 2005, pp. 191-194. See also Ambos K., “*Current issues in international criminal law*” in *Criminal Law Forum*, 14, 225-260, Kluwer Academic Publishers, 2004, pp. 247-248. However, the Majority observes that, in the absence of an express subjective requirement in relation to the contextual element of genocide, the general subjective element provided for in article 30 of the Statute would be applicable. On the application of the general subjective element provided for in article 30 of the Statute, see ICC-01/04-01/07-717, paras. 226-228, 251, 271, 295, 315, 316, 331, 346, 359 and 372.

¹⁴³ See Cryer, R., Friman, H., Robinson, D. and Wilmschurst, E., *An Introduction to International Criminal Law and Procedure*. United Kingdom, Cambridge University Press, 2007, pp. 177-179. See also Schabas, W.A., *Genocide in International Law. The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009,

126. In this regard, the Majority recalls that, according to article 21(1)(a) of the Statute, the Court must apply “in the first place” the Statute, the Elements of Crimes and the Rules. Moreover, as already held in the previous section on jurisdiction, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be applied when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria provided for in articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* and article 21(3) of the Statute.¹⁴⁴

127. It is in this scenario that, in the view of the Majority, article 10 of the Statute becomes meaningful insofar as it provides that the definition of the crimes in the Statute and the Elements of Crimes shall not be interpreted “as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

128. As a result, the Majority considers that the Elements of Crimes and the Rules must be applied unless the competent Chamber finds an irreconcilable contradiction between these documents on the one hand, and the Statute on the other hand. If such irreconcilable contradiction is found, the provisions contained in the Statute must prevail.

129. In the Majority’s view, this interpretation is not inconsistent with a literal interpretation of article 9(1) of the Statute, which states that “elements of the crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8.”

pp. 245-248. See also Werle, G. *Principles of International Criminal Law*, The Netherlands, TMC Asser Press, 2005, pp.191-194.

¹⁴⁴ ICC-01/04-01/07-717, para. 64; ICC-01/04-01/06-803-tEN, para. 69.

130. Furthermore, it is supported by the contextual interpretation of article 9(1) of the Statute in light of article 21(1) of the Statute and by the existence of the same requirements for the amendment of the Elements of Crimes and the Rules.¹⁴⁵

131. The Majority considers that this interpretation is also supported by the object and purpose of article 9(1) of the Statute, which consists of furthering the *nullum crimen sine lege* principle embraced in article 22 of the Statute, by providing *a priori* legal certainty on the content of the definition of the crimes provided for in the Statute.¹⁴⁶ In the Majority's view, had the application of the Elements of Crimes been fully discretionary for the competent Chamber, the safeguards provided for by the article 22 *nullum crimen sine lege* principle would be significantly eroded.

132. In the case at hand, the Majority does not observe any irreconcilable contradiction between the definition of the crime of genocide provided for in article 6 of the Statute and the contextual element provided for in the Elements of Crimes with regard to the crime of genocide.

133. Quite the contrary, the Majority considers that the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or a part thereof, is (i) not *per se* contrary to article 6 of the Statute; (ii) fully respects the requirements of article 22(2) of the Statute that the definition of the crimes "shall be strictly construed and shall not be extended by analogy" and "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted"; and (iii) is fully consistent with the traditional consideration of the crime of genocide as the "crime of the crimes".¹⁴⁷

¹⁴⁵ According to articles 9(2) and 51(1), the amendments to the Elements of Crimes and to the Rules must be adopted by a two-thirds majority of the members of the Assembly of States Parties.

¹⁴⁶ See Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 178-179. See also Schabas, W.A., *Genocide in International Law The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, pp. 110-111.

¹⁴⁷ Killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs can hardly be said to amount to 'the crime of the crimes'. See Schabas.

3. Specific elements of the crime of genocide

134. The Majority observes that, in addition to the above-mentioned contextual element, the Elements of Crimes provide for the following two elements, which are common to the above-mentioned five categories of genocidal acts provided for in article 6 of the Statute: (i) the victims must belong to a particular national, ethnic, racial or religious group; and (ii) the perpetrator must act with the intent to destroy in whole or in part that particular group.

135. In relation to the first element, the Majority is of the view that the targeted group must have particular positive characteristics (national, ethnic, racial or religious), and not a lack thereof.¹⁴⁸ In this regard, it is important to highlight that the drafters of the 1948 Genocide Convention gave “close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics.”¹⁴⁹ It is, therefore, a matter of who the targeted people are, not who they are not.¹⁵⁰ As a result, the Majority considers that negative definitions of the targeted group do not suffice for the purpose of article 6 of the Statute.

136. The Majority considers that there are no reasonable grounds to believe that nationality, race and/or religion are a distinctive feature of any of the three different groups - the Fur, the Masalit and the Zaghawa – that, according to the Prosecution, have been targeted. In this regard, the Majority highlights that the members of these

W.A. Genocide in International Law: The Crime of Crimes (2nd ed), United Kingdom, Cambridge University Press, 2008, pp. 1, 11, 15, 269, 301, 652, 653, 654.

¹⁴⁸ ICJ Judgment on Genocide, paras. 191-194. ICTR, *The Prosecutor v Akayesu*, Case No. ICTR 96-4-T, Trial Judgment, 2 September 1998, paras. 510-516; ICTY, *The Prosecutor v Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 551-561; ICTY, *The Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 20-28.

¹⁴⁹ ICJ Judgment on Genocide, paras. 191-194. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.

¹⁵⁰ ICJ Judgment on Genocide, paras. 191-194. ICTR, *The Prosecutor v Akayesu*, Case No. ICTR 96-4-T, Trial Judgment, 2 September 1998, paras. 510-516; ICTY, *The Prosecutor v Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 551-561; ICTY *The Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 20-28.

three groups, as well as others in the region, appear to have Sudanese nationality, similar racial features, and a shared Muslim religion.¹⁵¹

137. As a result, the question arises as to whether any of the three said groups is a distinct ethnic group. In this regard, the Majority finds that there are reasonable grounds to believe that this question must be answered in the affirmative as there are reasonable grounds to believe that each of the groups (the Fur, the Masalit and the Zaghawa) has its own language, its own tribal customs and its own traditional links to its lands.¹⁵²

138. In relation to the second element, the crime of genocide is characterised by the fact that any of the five categories of genocidal acts provided for in article 6 of the Statute must be carried out with the “intent to destroy, in whole or in part, a national, ethnic, racial or religious group.” In the view of the Majority, this introduces a subjective element that is additional to the general intent and knowledge requirement provided for in article 30 of the Statute.¹⁵³

139. As a result, the Majority considers that the crime of genocide is comprised of two subjective elements:

¹⁵¹ Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-00018-010 at paras. 41, 52-53 and 60.

¹⁵² Report of the International Commission of Inquiry on Darfur (Anx 17) at DAR-OTP-00018-0010 at 023, para. 52. The Majority notes that neither the Statute nor the rules provide for a definition of “ethnic group”. The Majority also observes that international case law has not provided either a clear definition of what an “ethnic group” is. In this regard, the Majority observes that the ICJ, in its recent Judgment on Genocide, did not rule on whether a wholly objective (based on anthropological considerations), a wholly subjective (based only upon the perception of the perpetrators), or a combined objective/subjective approach to the definition of the relevant group should be adopted (see ICJ Judgment on the Genocide, para. 191). However, the Majority considers that, for the purpose of the present decision, it is unnecessary to further explore this issue.

¹⁵³ The Chamber has defined this requirement in its 29 January 2006 Decision on the Confirmation of the Charges in the case of *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, paras. 351 *et seq.*, and its 30 September 2008 Decision on the Confirmation of the Charges in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, paras. 527 *et seq.* In its recent Judgment on Genocide, the ICJ has defined the general subjective element that must cover the specific genocidal acts as follows: “It is well established that the acts – [*here the ICJ enumerates the acts*] – themselves include mental elements. “killings” must be intentional, as must “causing serious bodily or mental harm”. Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words “deliberately” and “intended”, quite apart from the implications of the words “inflicting” and “imposing”; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts.” (para. 186).

- i. a general subjective element that must cover any genocidal act provided for in article 6(a) to (e) of the Statute, and which consists of article 30 intent and knowledge requirement; and
- ii. an additional subjective element, normally referred to as "*dolus specialis*" or specific intent, according to which any genocidal acts must be carried out with the "intent to destroy in whole or in part" the targeted group.¹⁵⁴

140. The Majority observes that, in relation to the additional subjective element, the International Court of Justice ("the ICJ") has recently held in its Judgment on Genocide that:

In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part... [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have

¹⁵⁴ ICJ Judgment on Genocide, para. 186. ICTY, *The Prosecutor v. Jelusic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 66 and 79; ICTY, *The Prosecutor v. Jelusic*, Case No. IT-95-10-A, Appeal Judgment, 5 July 2001, para. 45-46. ICTY, *The Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 550-552, 569, 571. A number of authors have put forward in the recent years an innovative approach to the subjective elements of the crime of genocide, known as 'knowledge-based approach' See also Kress, C., "*The Darfur Report and Genocidal Intent*", J Int Criminal Justice, pp. 562-578, Oxford University Press, March 2005, see in particular pp. 565-572. See also Schabas, W.A., *Genocide in International Law The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, pp. 241-264. According to this approach, direct perpetrators and mid-level commanders can be held responsible as principals to the crime of genocide even if they act without the *dolus specialis*/specific intent to destroy in whole or in part the targeted group. According to these authors, as long as those senior political and/or military leaders who planned and set into motion a genocidal campaign act with the requisite *dolus specialis*/ulterior intent, those others below them, who pass on instructions and/or physically implement such a genocidal campaign, will commit genocide as long as they are aware that the ultimate purpose of such a campaign is to destroy in whole or in part the targeted group. The 'knowledge-based approach' does not differ from the traditional approach in relation to those senior political and/or military leaders who planned and set into motion a genocidal campaign: they must act with the intent to destroy in whole or in part the targeted group because, otherwise, it would not be possible to qualify a campaign of violence against the members of a given group as a genocidal campaign. Moreover, when, as in the present case, those who allegedly planned and set into motion a genocidal campaign are prosecuted pursuant to article 25(3)(a) of the Statute as indirect (co) perpetrators, the mental element of the direct perpetrators becomes irrelevant. As explained in the Decision on the Confirmation of the Charges in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, the reason being that, according to article 25(3)(a) of the Statute, such senior political and military leaders can be held liable as principals of the crime of genocide regardless of whether the persons through which the genocidal campaign is carried out are criminally liable (ICC-01/04-01/07-717, paras. 571-572, 573-576, 579-580). As a result, the "knowledge-based approach" would only differ from the traditional approach to the subjective elements of the crime of genocide in those cases in which mid-level superiors and low-level physical perpetrators are subject to prosecution before this Court. In this regard, the literal interpretation of the definition of the crime of genocide in article 6 of the Statute and in the Elements of Crimes makes clear that only those who act with the requisite genocidal intent can be principals to such a crime pursuant to article 25(3)(a) of the Statute. Those others, who are only aware of the genocidal nature of the campaign, but do not share the genocidal intent, can only be held liable as accessories pursuant to articles 25(3)(b) and (d) and 28 of the Statute. See *Decision on the Confirmation of the Charges in the Case of The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06-803-tEN), paras. 373, 375-376, 396, 398 and 401-402.

occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the “specific intent (*dolus specialis*).” It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.¹⁵⁵

141. Given the factual allegations made by the Prosecution in the Prosecution Application, the Majority considers it to be of particular relevance for the purpose of the present case to distinguish between:

- i. the *dolus specialis*/specific intent required for the crime of genocide (genocidal intent consisting of the intent to destroy in whole or in part a national, ethnic, racial or religious group); and
- ii. the *dolus specialis*/specific intent required for the crime against humanity of persecution (persecutory intent consisting of the intent to discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, against the members of a group, by reason of the identity of the group).

142. The Majority observes that the ICJ has underlined the importance of this distinction in its recent Judgment on Genocide by stating that:

The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY” or “the Tribunal”) did in the Kupreškić et al. case:

“The *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an

¹⁵⁵ ICJ Judgment on Genocide, para. 187. ICTY, *The Prosecutor v Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 66, 79; ICTY, *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 550-552, 569 and 571.

offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide." (IT-95-16-T, Judgment, 14 January 2000, para. 636)¹⁵⁶

143. In the view of the Majority, the distinction between genocidal intent and persecutory intent is pivotal in cases of ethnic cleansing, a practice consisting of "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area".¹⁵⁷ This distinction is particularly relevant in cases such as the one at hand, in which allegations of forcible transfer and/or deportation of the members of the targeted group are a key component.

144. In this regard, the Majority observes that the practice of ethnic cleansing is not referred to in the 1948 Genocide Convention or in article 6 of the Statute. A proposal made during the drafting of the 1948 Genocide Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted.¹⁵⁸ Moreover, the ICJ has recently emphasised in its Judgment on Genocide that:

Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is "to destroy in whole or in part" a particular group, and deportation

¹⁵⁶ ICJ Judgment on Genocide, para. 188. ICTY, *The Prosecutor v Jelusic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 62, 66; ICTR, *The Prosecutor v Athanase Seromba*, Case No. ICTR-2001-66-I, Trial Judgment, 13 December 2006, paras. 316 and 319-320.

¹⁵⁷ ICJ Judgment on Genocide, para. 190. ICTY, *The Prosecutor v. Jelusic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 562 and 578.

¹⁵⁸ ICJ Judgment on Genocide, para. 190. See also the Syrian proposal and amendment (UN Doc. A/C6/234) rejected by 29 votes to 5, with 8 abstentions.

and displacement of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.¹⁵⁹

As the ICTY has observed, while “there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’ [...] yet “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide”.¹⁶⁰

145. Nevertheless, in the view of the Majority, this does not mean that the practice of ethnic cleansing - which usually amounts to the crime against humanity of persecution - can never result in the commission of the crime of genocide. In this regard, the Majority considers that such a practice may result in genocide if it brings about the commission of the objective elements of genocide provided for in article 6 of the Statute and the Elements of Crimes with the *dolus specialis*/specific intent to destroy in whole or in part the targeted group.

146. Finally, in relation to the meaning of the term “part of the group” in the definition of the crime of genocide, the Majority notes that, the ICJ, following the case law of the ICTY and the ICTR, has recently held as follows:

In the first place, the intent must be to destroy at least a substantive part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR).¹⁶¹

Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe” (*ibid.*) The area of the perpetrator’s activity and control are to be considered. As the ICTY Appeals Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant. (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para.13) This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the

¹⁵⁹ ICJ Judgment on Genocide, para. 190. ICTY, *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 520-522.

¹⁶⁰ ICJ Judgment on Genocide, para. 190. ICTY, *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 562; ICTY, *The Prosecutor v Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, para. 519; ICTY, *The Prosecutor v Karadžić*, Case No. IT-95-18-R61. IT-95-5-R61, Transcript of Hearing, 28 June 1996, p. 10.

¹⁶¹ ICJ Judgment on Genocide, para. 198.

opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide. (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para.523)¹⁶²

A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms:

“The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition, to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4”.¹⁶³

4. The application of the law on the proof by inference to the article 58 evidentiary standard in relation to the alleged GoS’s genocidal intent

147. The Prosecution highlights that it relies exclusively on proof by inference to substantiate its allegations concerning Omar Al Bashir’s alleged responsibility for genocide.¹⁶⁴ In particular, the Prosecution relies on inferences to prove the existence of Omar Al Bashir’s *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.¹⁶⁵

148. In this regard, the Majority observes that, according to the Prosecution, Omar Al Bashir was in full control of the “apparatus” of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, and used such State apparatus to carry out a genocidal campaign against the Fur, Masalit and Zaghawa groups.¹⁶⁶

149. As a result, the Majority considers that if the materials provided by the Prosecution support the Prosecution’s allegations in this regard, the existence of reasonable grounds to believe that Omar Al Bashir had a genocidal intent would

¹⁶² ICJ Judgment on Genocide, para. 199.

¹⁶³ ICJ Judgment on Genocide, para. 200.

¹⁶⁴ *The Prosecution Application*, para. 364. See also ICC-02/05-T-2-Conf-Exp-ENG-ET at p.3, line 18 to p.4, line 5, p.6, line 12-14 and p.21, line1-9.

¹⁶⁵ *The Prosecution Application*, paras 365 and 366.

¹⁶⁶ *The Prosecution Application*, paras. 244, 250-269.

automatically lead to the conclusion that there are also reasonable grounds to believe that a genocidal campaign against the Fur, Masalit and Zaghawa groups was a core component of the GoS counter-insurgency campaign.

150. However, the situation would be different if the materials provided by the Prosecution show reasonable grounds to believe that Omar Al Bashir shared the control over the “apparatus” of the State of Sudan with other high-ranking Sudanese political and military leaders. In this situation, the Majority is of the view that the existence of reasonable grounds to believe that one of the core components of the GoS counter-insurgency campaign was a genocidal campaign against the Fur, Masalit and Zaghawa groups would be dependant upon the showing of reasonable grounds to believe that those who shared the control of the “apparatus” of the State of Sudan with Omar Al Bashir agreed that the GoS counter-insurgency campaign would, *inter alia*, aim at the destruction, in whole or in part, of the Fur, Masalit and Zaghawa groups.

151. It is for this reason that the Majority refers throughout the rest of the present decision to “the GoS’s genocidal intent” as opposed to “Omar Al Bashir’s genocidal intent”.

152. Moreover, regardless of whether Omar Al Bashir had full control, or shared control with other high-ranking Sudanese political and military leaders, over the *apparatus* of the State of Sudan, the mental state of mid level superiors and low level physical perpetrators is irrelevant for the purpose of determining whether the materials provided by the Prosecution show reasonable grounds to believe that the crime of genocide against the Fur, Masalit and Zaghawa groups was part of the GoS counter-insurgency campaign that started soon after the April 2003 attack on

El Fasher airport and continued until the filing of the Prosecution Application on 14 July 2008.¹⁶⁷

153. The Majority observes that, according to the Prosecution, an inference of the GoS's genocidal intent "may properly be drawn from all evidence taken together, even where each factor on its own may not warrant such an inference."¹⁶⁸

154. Furthermore, the Prosecution submits that, in order for such an inference to be drawn, the existence of the GoS's genocidal intent "must be the only reasonable inference available on the evidence."¹⁶⁹

155. The Majority also notes that the Prosecution, in support of its submissions on the applicable law concerning the proof by inference, places particular reliance on the case law of the Appeals Chamber of the ICTY.¹⁷⁰ In this regard, the Prosecution emphasises that, in applying the law on the proof by inference at the current stage of the proceedings, the Chamber must take into consideration that (i) the ICTY's case law refers to a "beyond reasonable doubt" standard; and that (ii) "for the purpose of an Art. 58 application of the lower standard of reasonable grounds will instead be applicable".¹⁷¹

156. The Majority finds the Prosecution's submissions to be a correct statement of the law on the proof by inference applicable before this Court. In the Majority's view, they are not only fully consistent with the ICTY¹⁷² and ICTR¹⁷³ case law on the matter,

¹⁶⁷ See Decision on the Confirmation of the Charges in the Case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, paras. 571-572, 573-576, 579 and 580.

¹⁶⁸ *The Prosecution Application*, para. 365.

¹⁶⁹ *The Prosecution Application*, para. 366.

¹⁷⁰ *The Prosecution Application*, paras. 365-366, footnotes 504 and 505.

¹⁷¹ *The Prosecution Application*, para. 366, footnote 505.

¹⁷² ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 53-57; ICTY, *The Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Judgment, 25 February 2004, paras. 120 and 128; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, para. 333; and *The Prosecutor v. Krnojelac* Case No. IT-97-25-T, Trial Judgment, 15 March 2002, para. 83.

¹⁷³ ICTR, *The Prosecutor v. Seromba*, Case No. ICTR-01-66-A, Appeals Judgment, 12 March 2008, para. 176; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 523; ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93 and 94.

but they are also supported by international human rights standards,¹⁷⁴ as well as article 22(2) of the Statute,¹⁷⁵ which fully embraces the general principle of interpretation *in dubio pro reo*.

157. In this regard, the Majority recalls that, according to the consistent interpretation of article 58 of the Statute by this Chamber, a warrant of arrest or a summons to appear shall only be issued in relation to a specific crime if the competent Chamber is satisfied that there are reasonable grounds to believe that the relevant crime has been committed and the suspect is criminally liable for it under the Statute.¹⁷⁶

158. In applying the law on the proof by inference to the article 58 evidentiary standard in relation to the existence of a GoS's genocidal intent, the Majority agrees with the Prosecution in that such a standard would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS's *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.

159. As a result, the Majority considers that, if the existence of a GoS's genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met.

¹⁷⁴ See, in particular, Article 11 of the Universal Declaration of Human Rights, Article 15 of the International Covenant on Civil and Political Rights, Article 7 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights, Article 7 of the African Charter on Human and People's Rights.

¹⁷⁵ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (A/CONF.183/DC/R.33), 27 June 1998; see also Lee, R.S. (ed) *The International Criminal Court. The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, pp. 194-195 and 212-213. See also Triffterer, O. *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Munich, CH Beck Hart Nomos, 2008, pp. 716-717 and 723-726. See also Cassese, A. (Ed.) *The Rome Statute of the International Criminal Court. a commentary*, Vol. 1, New York, Oxford University Press, 2002, pp. 746-756.

¹⁷⁶ ICC-01/04-01/07-717. paras. 263, 284, 307, 326, 338, 354, 364 and 377; ICC-01/04-01/06-803-tEN. paras. 321 and 410.

160. In the Majority's view, this conclusion, besides being fully consistent with the case law of the ICTY¹⁷⁷ and ICTR¹⁷⁸ on the matter, is also required by the application of the general principle of interpretation *in dubio pro reo*, embraced by article 22(2) of the Statute.¹⁷⁹ Moreover, it constitutes the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5(1)(c) of the *European Convention on Human Rights*¹⁸⁰ and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the *American Convention on Human Rights*.¹⁸¹

161. In this regard, the Majority highlights that a different interpretation would result in either an impermissible extension of the applicable law on proof by inference or in an impermissible lowering of the standard of proof that, according to article 58 of the Statute, must be met for the issuance of an arrest warrant or a summons to appear, in relation to any crime within the jurisdiction of the Court.

- (b) *Whether the materials provided by the Prosecution show reasonable grounds to believe in the existence of a GoS's intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups*

¹⁷⁷ ICTY, *The Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 53-57; ICTY, *The Prosecutor v Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, para. 333; ICTY, *The Prosecutor v Vasiljević*, Case No. IT-98-32-A, Appeals Judgment, 25 February 2004, paras. 120 and 128.

¹⁷⁸ ICTR, *The Prosecutor v Seromba*, Case No. ICTR-01-66-A, Appeals Judgment, 12 March 2008, paras. 74-77 and 87; ICTR, *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998 para. 523; ICTR, *The Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93-94.

¹⁷⁹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (A/CONF.183/DC/R.33), 27 June 1998. See also Lee, R.S. (ed) *The International Criminal Court The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, pp.194-195 and 212-213. See also Triffterer, O *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Munich, CH Beck Hart Nomos, 2008, pp. 716-717 and 723-726.

¹⁸⁰ According to the ECHR, the reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary deprivation of liberty. See ECHR, *Case of Fox, Campbell and Hartley v United Kingdom*, "Judgment", 30 August 1990, Application No. 12244/86; 12245/86; 12383/86, paras. 31-36, ECHR, *Case of K-F v. Germany*, "Judgment", 27 November 1997, Application No. 144/1996/765/962, para. 57, ECHR, *Case of Labita v Italy*, "Judgment", 6 April 2000, Application No. 26772/95, paras. 155-161, ECHR, *Case of Berklay v Turkey*, "Judgment", 1 March 2001, Application No. 22493/93, para. 199; ECHR, *Case of O'Hara v United Kingdom*, "Judgment", 16 October 2001, Application No. 37555/97, paras. 34-44.

¹⁸¹ See for instance IACHR, *Case of Bámaca Velásquez v Guatemala*, "Judgment", 25 November 2000, Series C No.70, paras. 138-144, IACHR, *Case of Loayza-Tamayo v Peru*, "Judgment", 17 September 1997, Series C No.33, paras. 49-55, and IACHR, *Case of Gangaram-Panday v Suriname*, "Judgment", 21 January 1994, Series C No.16, paras. 46-51.

162. In the absence of direct evidence, the Prosecution submits that:

In the instant case, the Prosecution respectfully submits that Al Bashir's intent to destroy the target groups as such in substantial part is the only available inference from a comprehensive consideration of [a number of] factors.¹⁸²

163. The Majority observes that the Prosecution, at paragraphs 366 *et seq* of the Prosecution Application, provides for nine different factors from which to infer the existence of a GoS's genocidal intent.

164. In the Majority's view, they can be classified into the following categories:

- i. the alleged existence of a GoS strategy to deny and conceal the crimes allegedly committed in the Darfur region against the members of the Fur, Masalit and Zaghawa groups;¹⁸³
- ii. some official statements and public documents, which, according to the Prosecution, provide reasonable grounds to believe in the (pre) existence of a GoS genocidal policy;
- iii. the nature and extent of the acts of violence committed by GoS forces against the Fur, Masalit, and Zaghawa civilian population.

1. Alleged GoS strategy to deny and conceal the crimes committed in Darfur, GoS official documents, and statements of Omar Al Bashir and other GoS officials

165. In relation to the alleged existence of a GoS strategy to deny and conceal the alleged commission of crimes in Darfur, the Majority considers that, even if the existence of such strategy was to be proven, there can be a variety of other plausible

¹⁸² *The Prosecution Application*, para. 366.

¹⁸³ *The Prosecution Application*, paras. 396-398.

reasons for its adoption, such as the intention to conceal the commission of war crimes and crimes against humanity.

2. Official statements and public documents allegedly related to a GoS genocidal policy

Public Documents

166. The Prosecution places particular reliance on the following documents:

- i. A Secret Bulletin issued by the NIF (intelligence services) in 1992, which is described by the Prosecution as follows:

In 1992, following Bolad's defeat, the NIF issued a secret bulletin advocating the exclusion of the Fur from key Government positions in the intelligence service, the military and the police administration. The bulletin also advocated the destabilization of Fur areas to force the removal of the Fur from Darfur. This idea was also being propagated by a group known as the "Arab Gathering".¹⁸⁴

- ii. A decree issued by Omar Al Bashir in 1994, which according to the Prosecution shows that:

In 1994, AL BASHIR divided Darfur into three states with the aim and effect of diluting the political strength of the Fur by rendering them minorities in each of the three states of Darfur.¹⁸⁵

- iii. A local reform enacted in March 1995 by Muhammad Ahmad Al-Fadul, which the Prosecution describes as follows:

In March 1995, Muhammad Ahmad Al-Fadul, the then Governor of West Darfur, enacted a local Government reform which shifted the balance of power in Dar Masalit, in a manner that reduced the power of the Masalit over land and potentially gave more authority to other tribes. As a result of this change, eight non-Masalit were appointed to outnumber the five Masalit in the electoral college of the tribal administration of West Darfur, creating the possibility for the first time that a non-Masalit could be selected as Sultan for Dar-Masalit. This reform provoked another war in Dar Masalit from 1996 to 1999 during which tribal Militias backed by AL BASHIR's Government

¹⁸⁴ *The Prosecution Application*, para. 351.

¹⁸⁵ *The Prosecution Application*, para. 352.

killed at least 2,000 Masalit civilians and displaced 100,000, 40,000 of whom fled to Chad.¹⁸⁶

- iv. A 1986 Armed Forces Memorandum and some minutes of meetings held in 2003 by the State Security Committee from West Darfur, which the Prosecution refers to in the following terms:

In addition, GoS documents in the possession of the Prosecution, including the "Armed Forces Memorandum" referred to above and the minutes of the State Security Committee of West Darfur define details the mechanism of the plan established by AL BASHIR to ensure the coordination required [...] The "Armed Forces Memorandum" establishes that "The chain of command, with the administration and organization of the forces, is specified in Arts. 11 and 12 [of the Armed Forces Act of 1986], in the form of a pyramid that grants supreme command to the President of the Republic in accordance with the principle of the armed forces being subject to political command.", and "[I]n accordance with political wishes, the recommendations and orders of the Security Committees, and their duties as specified under the Constitution and the law, the armed forces, and the forces working with them, implemented military plans to contain the security situation in Darfur." [...] The minutes of the State Security Committee of West Darfur, confirm the existence of plans, establishing that it also acted in accordance with a national security plan disseminated from Khartoum.¹⁸⁷

167. In the Majority's view, the first three documents (the 1992 NIF Secret Bulletin, the 1994 Decree and 1995 Local Reform) do not provide, by themselves, any *indicia* of a GoS's genocidal intent. In this regard, the Majority considers that they provide, at best, *indicia* of the GoS's intent to discriminate against the members of the Fur, Masalit and Zaghawa groups by excluding them from federal government and implementing political arrangements aimed at limiting their power in their homeland (Darfur).¹⁸⁸ Whether a different conclusion is merited when assessed in

¹⁸⁶ *The Prosecution Application*, para. 354.

¹⁸⁷ *The Prosecution Application*, paras. 380-382.

¹⁸⁸ In this regard, the Majority observes that in paragraph 392 of its recent Judgment on Genocide, the ICJ found that the "Decision on the Strategic Goals of the Serbian People in Bosnia and Herzegovina", issued on 12 May 1992 by Momcilo Krajišnik (the President of the National Assembly of the self-proclaimed Serb Republic of Bosnia, Republic Srpska), did not constitute evidence of intent to destroy the Bosnian Muslim group. The relevant document reads as follows: "The Strategic Goals, i.e. the priorities of the Serbian people of Bosnia and Herzegovina are: (1) Separation as a state from the other two ethnic communities; (2) A corridor between Semberija and Krajina; (3) The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states; (4) The establishment of a border on the Una and Neretva rivers; (5) The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part; (6) An outlet to the sea for the Republika Srpska."

light of the rest of the materials provided by the Prosecution in support of the Prosecution Application is a question that shall be analysed below by the Majority.

168. In relation to the 1986 Armed Forces Memorandum and the 2003 West Darfur State Security minutes, the Majority considers that they are only evidence of the internal organisation and coordination among the three different levels of government in Sudan (Federal, State and Local), and among the different bodies within each of these levels of government.

169. In the Majority's view, evidence of close coordination provides *indicia* of the existence of a well organised governmental structure through which decisions taken in the upper levels of the GoS can be effectively implemented. Nevertheless, considering the ongoing armed conflict between the SLM/A, the JEM and other armed groups (which appear to have broad social support in Darfur) and the GoS, the Majority sees no *indicia* of unlawfulness in securing a close coordination among the military, the police, the intelligence services and the civil administration, as well as among the federal, the state and the local levels of government.

Official Statements

170. The Prosecution places particular reliance on two statements allegedly made by Omar Al Bashir in March/April 2003, at a time in which peace talks with the SLM/A and the JEM broke off, and the GoS preparations for its counter-insurgency campaign were starting:

- i. In March 2003, Omar Al Bashir is said to have declared in front of a number of members of the Sudanese Armed Forces in

El Facher that the rebellion is to be quelled in two weeks and that no prisoners or wounded are to be brought back;¹⁸⁹

- ii. In April 2003, Omar Al Bashir, again in El Facher, is said to have stated in front of Northern Darfur State officials and members of the Sudanese Armed Forces officials that he “did not want any villages or prisoners, only scorched earth”.¹⁹⁰

171. The Prosecution also relies on a statement allegedly given on national television by Omar Al Bashir in January 2004. According to the Prosecution, Omar Al Bashir is said to have confirmed the concept of the operation in Darfur and is said to have told the Sudanese public that he had given the Sudanese Armed Forces *carte blanche* in Darfur not to take prisoners or inflict injuries.¹⁹¹

172. The Majority is of the view that the above-mentioned statements allegedly made by Omar Al Bashir do not provide, by themselves, any *indicia* of a GoS’s genocidal intent. In this regard, the Majority considers that they provide, at best, *indicia* of Omar Al Bashir’s alleged individual criminal responsibility, pursuant to article 25(3)(a) of the Statute, for those war crimes and crimes against humanity that were allegedly a core component of the GoS counter-insurgency campaign. Whether a different conclusion is merited when assessed in light of the rest of the materials provided by the Prosecution in support of the Prosecution Application is a question that shall be analysed below by the Majority.

173. Finally, the Prosecution also relies on public speeches made by other members of the GoS,¹⁹² and in particular by Ahmad Muhammad Harun (“Ahmad Harun”),

¹⁸⁹ *The Prosecution Application*, para. 271.

¹⁹⁰ *The Prosecution Application*, para. 271.

¹⁹¹ *The Prosecution Application*, para. 275.

¹⁹² The Prosecution also refers to some statements by low level perpetrators, such as those captors of Arawala women who told them “little dogs, this land is not for you”, see *Prosecution Application*, para.138. Likewise, direct perpetrators are said to have told their victims “*the Fur are slaves, we will kill them*”, “*You are Zaghawa tribes, you are slaves*”, “*You are Masalit Why do you come here, why do you take our grass? You will not take anything today*”, see *Prosecution Application*, paras. 277 and 385.

Deputy Minister for Internal Affairs from April 2003 until his appointment as Minister for Humanitarian Affairs in 2005:

- i. On or around 23 July 2003, at Khirwaa, Ahmad Harun is said to have addressed an audience that included two to three hundred conscripts who were wearing military uniforms, saying that there was a need to teach the rebels a lesson and that he had provided enough soap and that the conscripts had to do the remaining cleaning job.¹⁹³
- ii. At a public meeting in Al Geneina in July 2003, where Ahmad Harun is said to have called on the people to go to their sons and ask them to lay down their firearms, he is also said to have stated that “the President had handed over to him the Darfur security file and given him all the power and authority to kill or forgive in Darfur for the sake of peace and security”, and that “for the sake of Darfur, they were ready to kill $\frac{3}{4}$ of the people in Darfur so that a $\frac{1}{4}$ could live”;¹⁹⁴ and
- iii. At a public meeting in Mukjar on 7 August 2003, Ahmad Harun is said to have stated that there was a rebellion against the State in Darfur, and that, since the children of the Fur had become rebels, all the Fur and what they had, had become booty for the Mujahidin”;¹⁹⁵

¹⁹³ Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0020, paras.70-71;

¹⁹⁴ Witness Statement (Anx 25) DAR-OTP-00095-049 at 076-077.

¹⁹⁵ Witness Statement (Anx 65) DAR-OTP-0119-0518, at 076-077. Moreover, the Prosecution, in AnxE1 to the 17 November 2008 Prosecution Submission of Supporting Material, refers to the following excerpts of witness statements, that have not been provided to the Chamber in full: (i) in August 2003, Ahmad Harun is said to have stated in Camp2 that “The Fur are making headache to us [...] We managed the south and the east, but now [...] they are making trouble [...] “God willing, we will kill them and make them homeless [...] and Darfur land will be suitable for people better than them; (ii) at an unknown time and location, Ahmad Harun is reported to have said that “Darfur land will not be dirtied by the ... by the western [...] And upon your arrival we will never hear about those who belong to the west in Darfur”; and (iii) at an unknown time and location, Ahmad Harun is said to have told local leaders that “You the emirs...uh... Clean Darfur; wipe out the blacks and this land will be to you and your friends from Niger, from Mahamid tribe will come and... and live with you on this land and we are capable to change even the name of this land”. See (Anx E1) DAR-OTP-0158-1165 at 1192-1193 and (Anx E1) DAR-0158-0964 at 1001-1007 and at 1016-1021.

174. In the Majority's view, Ahmad Harun's statements contain the harsher language used by GoS officials that can be found in the materials provided by the Prosecution in support of the Prosecution Application.

175. Nevertheless, the Majority notes that there are reasonable grounds to believe that Ahmad Harun, who spent important amounts of time in Darfur, was not actually part of the highest level of the GoS in Khartoum and that his role was that of a link between the State Governors in the three Darfurian States and the said highest level of the GoS in Khartoum.¹⁹⁶

176. Furthermore, the Majority underscores that, when the Prosecution requested the issuance of a summons to appear for Ahmad Harun in 2007, for his alleged responsibility in some of the most brutal acts of violence that allegedly occurred in the Darfur region against members of the Fur, Masalit and Zaghawa civilian population, the Prosecution did not see any *indicia* of genocidal intent on his part as it was only alleged that he acted with a persecutory intent.¹⁹⁷

3. Nature and extent of the acts of violence against members of the Fur, Masalit and Zaghawa groups

¹⁹⁶ ICC-02/05-01/07-2-Corr, p. 5; ICC-02/05-01/07-1-Corr, para. 128; *The Prosecution Application*, paras. 254-262; Meeting with Ahmed Harun, 15 January 2005 (Anx 15) DAR-OTP-0016-0013 at 0013-0016; Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0076-0077, paras. 128-129.

¹⁹⁷ The case of *The Prosecutor v against Ahmad Harun and Ali Kushayb* focuses on following four specific areas of the State of Western Darfur where there are reasonable grounds to believe that the acts of violence against the Fur population were particularly widespread and brutal (thousands of persons killed, numerous acts of rape, outrages upon personal dignity, imprisonment, torture, inhumane acts, pillaging, destruction of property and forcible transfer of the population): (i) Kodoom and surrounding areas; (ii) Bindisi and surrounding areas; (iii) Mukjar and surrounding areas; and (iv) Arawala and surrounding areas. See Warrant of Arrest for Ahmad Harun ICC-02/05-01/07-2-Corr, Count 1-9 (regarding Kodoom), Count 10-20 (regarding Bindisi), Count 21-38 (regarding Mukjar) and Count 39-51 (regarding Arawala).

Conditions within the IDP camps in Darfur and alleged GoS hindrance of humanitarian assistance as the key component of the Prosecution's allegations of the existence of a GoS's genocidal intent

177. As a result of previous findings, and as the Prosecution itself acknowledges,¹⁹⁸ the Prosecution's allegations concerning the existence of reasonable grounds to believe in a GoS's genocidal intent are essentially based on the inference that can be drawn from the alleged clear pattern of mass-atrocities committed by GoS forces between 2003 and 2008 against the Fur, Masalit and Zaghawa civilian population throughout Darfur region.

178. In particular, the Majority observes that, in order to show the existence of a GoS's genocidal intent, the Prosecution relies heavily on what the Prosecution considers to be a key component of an alleged GoS genocidal campaign: the subjection of a substantial part of the Fur, Masalit and Zaghawa civilian population of Darfur (up to 2.700.000 individuals) to unbearable conditions of life within IDP Camps due to the: (i) insufficient allocation of resources by the GoS for IDPs within Sudan; (ii) acts of violence (including murder, rape and mistreatment) committed by GoS forces within the IDP Camps; (iii) unlawful arrest of community leaders and subsequent mistreatment/torture in the facilities of HAC (which was allegedly comprised of former members of the NISS); and (iv) the GoS hindrance of access to international aid.

Prosecution's allegations concerning the GoS insufficient allocation of resources in the IDP Camps in Darfur

¹⁹⁸ *The Prosecution Application*, paras. 364-366 and 373-374.

179. In relation to the alleged insufficient resources allocated by the GoS to ensure adequate conditions of life in IDP Camps in Darfur, the Majority considers that the Prosecution's allegation is vague in light of the fact that, in addition to the Prosecution's failure to provide any specific information as to what possible additional resources could have been provided by the GoS, there existed an ongoing armed conflict at the relevant time and the number of IDPS, according to the United Nations, was as high as two million by mid 2004, and as high as 2.7 million today.¹⁹⁹

Situation within the IDP Camps as reflected in the materials provided by the Prosecution

180. In relation to conditions inside the IDP Camps, the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application reflect a situation within the IDP Camps which significantly differs from the situation described by the Prosecution in the Prosecution Application. The Majority reaches this conclusion as a result of an overall assessment of the materials provided by the Prosecution²⁰⁰ - including the following account of the conditions since February 2004 in one of the largest IDP Camps in Darfur ("the Kalma Camp") given in the latest report issued on 23 January 2009 by the United Nations High Commissioner for

¹⁹⁹ See UN Press Conference by Assistant Secretary-General for Humanitarian Affairs on Humanitarian Situation in Darfur, 31 August 2007 (Anx J60) at DAR-OTP-0147-0891 at 0891.

²⁰⁰ Including, *inter alia*: Security Council 5872nd meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061-1064; United Nations Office for the Coordination of Humanitarian Affairs – Intergrated Regional Information Networks, *Humanitarian access blocked in Darfur*, 12 January 2004 (Anx J54) DAR-OTP-0141-0175; HRW Report, *Darfur Humanitarian Aid under Siege*, May 2006 (Anx J55) DAR-OTP-0107-1076 at 1081-1084; United Nation's System Standing Committee on Nutrition, *Nutrition information in crisis situations – Report number 1*, 29 February 2004 (Anx J56) DAR-OTP-0141-0165; United Nations Resident Coordinator, *Darfur Crisis, Sudan: UN Darfur Task Force Situation Report 11 Mar 2004*, 11 March 2004 (Anx J57) DAR-OTP-0141-0162; United Nations Resident Coordinator, *Darfur Crisis, Sudan. UN humanitarian situation report, 15 Apr 2004*, 15 April 2004 (Anx J58) DAR-OTP-0141-0177; Press Article, USA Today, *Malnutrition, Lawlessness are increasing in Darfur* (Anx J59) DAR-OTP-0147-0889; United Nations Mission in Sudan, *Media Monitoring Report*, 6 May 2008 (Anx J61) DAR-OTP-0147-1077 at 1080; United Nations Inter-agency Fact Finding Mission report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0069-0071; Médecins Sans Frontières, *Mornay Camp, West Darfur State, Sudan No relief in sight*, 21 June 2004 (Anx J68) DAR-OTP-0149-0529 at 0529-0532; Office of UN Resident and humanitarian co-ordinator for the Sudan, *Darfur Humanitarian Profile No 4*, 1 July 2004 (Anx J69) DAR-OTP-0149-0537 at 0543-0550.

Human Rights on the situation in Sudan, which indicates, *inter alia*, that during the relevant period in the Kalma Camp: (i) several violent exchanges between armed elements within the Camp and GoS forces took place; (ii) several sources referred to by UNAMID as “credible, independent sources”, reported on the presence in the Camp of “light and heavy arms”; (iii) the conflict between the GoS forces and the armed elements within the Camp was a very important factor in exacerbating the tension between the IDP community and the GoS; and (iv) poor living conditions in the Camps were not systematically, but only “at times”, exacerbated by measures introduced by the GoS on security grounds, and, in some circumstances, such measures were lifted at the intervention of UNAMID:

The incident at Kalma IDP camp should be analysed in the context of the long-standing tension between the residents of the camp and the Government of Sudan regarding control of the camp. South Darfur governmental authorities have frequently asserted that there is a presence of political, criminal and armed movement elements within the camp. Kalma camp was established in February 2004. As one of the largest camps in Darfur, the total population of Kalma camp is estimated at approximately 80,000 individuals: the majority being from the Fur, followed by the Dajo, Zaghawa, Massalit, Birgit and Tunjer tribes. The camp is one to two kilometers’ long and extends seven kilometers’ along the railway track from east to west. The camp is located 15 km east of Nyala and is divided into eight sectors; each dominated by one or more ethnic group and headed by a sheik nominated by the IDPs in the area. The camp has become tribally fragmented and is plagued by internal divisions and quasi-urban problems that often reflect the political aspirations of the different ethnic groups living in it.

Living conditions in the camp are very poor due to overcrowding, water and food shortages and the lack of basic sanitation infrastructure, which at times have been exacerbated by measures introduced by government on security grounds. For example, prior to the incident IDPs and humanitarian agencies were often unable to operate the pumps to draw water from the wells due to Government imposed fuel restrictions, forcing them at times to utilize unclean water sources, such as rainwater. In some of these circumstances, the measures were lifted at the intervention of UNAMID.

The Government maintains a presence approximately two kilometres from the camp, through two checkpoints (one National Intelligence and Security Services (NISS) and the other of the Humanitarian Aid Commission (HAC).

Prior to the incident, UNAMID police maintained a daily presence at Kalma camp. Following the incident and requests by IDP leadership for increased UNAMID protection, on 13 September 2008, UNAMID began maintaining a 24/7 presence in the camp.

The Government has stated that supporters of Sudanese Liberation Army/Abdul Wahid faction (SLA/AW), Sudanese Liberation Army/Minni Minnawi faction

(SLA/MM) and a much smaller presence of Justice and Equality Movement (JEM) reportedly live within the camp.

According to the Advisory Council for Human Rights of the Government of the Sudan (ACHR), between 2004 and August 2008, the South Darfur State authorities registered 75 cases of criminal offences, including numerous acts of killings and armed robberies, which are believed to have been perpetrated by gangs or individuals sheltered or living within the camp.

Since the establishment of Kalma camp, there have been several violent exchanges between armed elements within the camp and Government security forces. For example, in November 2004 members of a movement attacked the police compound outside of Kalma camp, killing 25 police officers. On 21 August 2007, the Nyala police conducted an operation at Kalma camp in which at least 35 camp residents were arrested on suspicion of alleged involvement in armed attacks on two police stations in nearby Al Salaam IDP camp on 15 August 2007 and in Um Kunduwa on 16 August 2007. The police stated that the attackers later sought refuge and hid stolen weapons in Kalma camp. Credible, independent sources have reported the presence of light and heavy arms in Kalma camp although this information has not been verified by UNAMID.

The conflict between the Government and armed elements has exacerbated tensions between the IDP community and the Government. This tension may stem from attempts by the Government to uproot armed elements as well as significant abuses at the hands of the Government forces and its allied militia. These abuses include rape, arbitrary arrest and detention, assault, intimidation, shooting incidents, commercial bans and other forms of violence. Aid entities conducting humanitarian assistance activities in Kalma camp have faced harassment, restricted movement or entry into the camp, visa denial and other impediments impacting their ability to provide assistance in the camp. The government has also imposed fuel cuts from time to time on the camp on the grounds that fuel supplies destined for humanitarian purposes are being diverted to the movements.

Efforts to dismantle the Kalma camp or break it into smaller more manageable camps began in November 2004 at the suggestion of the Humanitarian Aid Commission. In June 2005, humanitarian agencies initiated an information campaign for voluntary relocation from Kalma Camp to Al Salaam camp, which was rejected by the Kalma IDPs due to their concern that this was the initial stages of a forced relocation.

On 21 August 2008, Judge Kamal El-Deen Ali Mohamed El-Zaki from the Nyala Criminal Court, issued a General Search Order authorizing the police to search "all centres of Kalma IDP camp" for "arms, drugs, stolen property, detainees and anything which violates the law". Although the warrant refers to suspicion of crimes related to unlawful possession of weapons, kidnapping, receipt of stolen property, theft and robbery, the warrant does not refer to specific individuals, locations or previously committed crimes, and appears to be a blanket warrant to search the entire camp.

In more general terms, the lack of protection of civilians, and in particular of IDPs, remains one of the most salient concerns in Darfur. Throughout Darfur, increased presence of Government security forces and armed movements in and around IDP camps has resulted in heightened vulnerability of the IDP community. Following the Kalma incident, IDP leaders in several camps expressed their concern to

UNAMID that similar operations would be conducted in other IDP camps throughout Darfur.²⁰¹

*Level of GoS hindrance of medical and other humanitarian assistance in the IDP
Camps in Darfur as reflected in the materials provided by the Prosecution*

181. In relation to the Prosecution's allegations concerning the alleged GoS hindrance of medical and other humanitarian assistance in the IDP Camps in Darfur,²⁰² the Majority considers that hindrance of humanitarian assistance, as well as cutting off supplies of food and other essential goods, can be carried out for a variety of reasons other than intending to destroy in whole or in part the targeted group. As a result, the Prosecution's claim must be assessed in light of the extent and systematicity, duration and consequences of the alleged GoS obstruction.

182. The Majority observes that this approach has also been taken by the ICJ in its recent Judgment on Genocide. There, the ICJ found that "civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities."²⁰³ In reaching this conclusion, the ICJ placed particular emphasis on the fact that "UNHCR food and fuel convoys had been 'obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces.'"²⁰⁴ The ICJ also stressed the findings contained in the conclusion of the report of the UN Commission of Experts, according to which, the blockade of humanitarian aid had been used as an important tool in the siege of Sarajevo.²⁰⁵ Furthermore, the ICJ

²⁰¹ Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, *Killing and injuring of civilians on 25 August 2008 by government security forces. Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union, ICC-02-05-179-Conf-Exp-Anx2, section on "Background and Context", pp. 3-5.

²⁰² *The Prosecution Application*, paras. 185-188; ICC-02/05-T-2-Conf-Exp-ENG ET, p. 4, line 3 to p. 5, line 3, p. 14, lines 3-9 and p. 24, lines 21-23.

²⁰³ ICJ Judgment on Genocide, para. 328.

²⁰⁴ ICJ Judgment on Genocide, para. 324.

²⁰⁵ ICJ Judgment on Genocide, para. 324.

underscored the following evidence in relation to the siege of towns of Bosnia and Herzegovina other than Sarajevo:

For instance, with regard to Gorazde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient.[...] In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off [...]. Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment [...]. Similar patterns occurred in Bihac, Tuzla, Cerska, and Maglaj.²⁰⁶

183. Nevertheless, despite these findings, the ICJ concluded that it had not been conclusively established that the acts were committed with the *dolus specialis*/specific intent to destroy the targeted group in whole or in part.²⁰⁷ In making such finding, the ICJ gave particular weight to the fact that:

The Special Rapporteur of the United Nations Commission on Human Rights was of the view that “[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croats to flee.”²⁰⁸

184. In relation to the extent, systematicity, duration and consequences of the alleged GoS hindrance of medical and other humanitarian assistance needed to sustain life in the IDP Camps in Darfur, the Majority observes that in the additional materials provided by the Prosecution, at the request of the Chamber on 18 November 2008, the Prosecution included a chronology on the evolution of this alleged GoS practice from 2003 to the end of 2007.

185. According to the reports included in this chronology, the higher level of obstruction to humanitarian aid took place during the first year of the conflict until June 2004, at a time in which GoS forces appear to have launched their two main offensives (summer 2003 and January 2004). The lack of humanitarian assistance is

²⁰⁶ ICJ Judgment on Genocide, para. 327.

²⁰⁷ ICJ Judgment on Genocide, para. 328.

²⁰⁸ ICJ Judgment on Genocide, para. 328.

explained in some reports by the GoS's attempt to hide the magnitude of the crisis.²⁰⁹ Yet, in one of the reports, the United Nations Office for Humanitarian Affairs emphasised the late reaction and lack of coordination of the international community.²¹⁰

186. The reports provided by the Prosecution also underline that, after the conclusion of the Moratorium on Restrictions (July 2004),²¹¹ access to the IDP Camps improved substantially and permitted Darfur to eventually become the site of "the largest world humanitarian effort".²¹²

187. Finally, the said reports also highlight that bureaucratic barriers and difficulties in accessing a number of areas increased again in 2006. Nevertheless, despite increasing difficulties it appears that aid programmes continued to operate.²¹³

188. This, in the Majority's view, is consistent with the account given by the latest report of the United Nations High Commissioner for Human Rights in relation to the Kalma Camp, where it is stressed that the poor living conditions existing in the

²⁰⁹ For year 2003, see ICC-02/05-161-Conf-AnxF, paras. 124-126. For January-June 2004, see ICC-02/05-161-Conf-AnxF, paras. 127-130.

²¹⁰ *Evaluation by UN Office for Humanitarian Affairs of Situation during the previous year* OCHA DHP No.3 June 2004, page 6, reported that access to many areas has remained hindered due to the difficulties resulting from a lack of capacity on the part of UN and other operational agencies, which had been further exacerbated by continued Government of Sudan (GoS) delays in issuing visas and travel permits for humanitarian personnel and the slow release of essential humanitarian supplies and equipment. As of 20 May, there were at least 116 humanitarian workers awaiting either entry visas or travel permits to work in Darfur. The earliest application date pending from 3 April. (ICC-02/05-161-Conf-AnxF, para. 106).

²¹¹ According to the Prosecution (ICC-02/05-161-Conf-AnxF, para. 131), under international pressure, the GoS finally agreed to the July 2004 Moratorium on Restrictions wherein the text of the Joint Communiqué states that the Sudanese government commits to Implement a 'moratorium on restrictions' for all humanitarian work in Darfur –thereby recognizing restrictions – and remove any other obstacles to humanitarian work, including (i) suspension of visa restrictions for all humanitarian workers and permitting freedom of movement for aid workers throughout Darfur; (ii) permitting immediate temporary NGO registration through a simple notification process that OCHA will offer to manage on behalf of NGOs permanent registration shall be processed within 90 days; and (iii) suspension of all restrictions for the importation and use of all humanitarian assistance materials, transport vehicles, aircraft and communication equipment. According to Human Rights Watch (ICC-02/05-161-Conf-AnxF, para. 132): "To a large extent, this new process heavily contributed to the massive increase in humanitarian personnel and programs in Darfur in 2004 and 2005."

²¹² On a statement issued on 27 March 2007, John Holmes (UN Under-Secretary General for Humanitarian Affairs) referred to the aid efforts in Darfur as "the world's largest aid effort" (ICC-02/05-161-Conf-AnxF, para. 135).

²¹³ For the year 2006, see ICC-02/05-161-Conf-AnxF, para. 133. For the year 2007, ICC-02/05-161-Conf-AnxF, paras. 134-137.

Kalma Camp since its establishment in February 2004 “at times have been exacerbated by measures introduced by government on security grounds”.²¹⁴

189. As a result, the Majority considers that the materials submitted by the Prosecution in support of the Prosecution Application provide reasonable grounds to believe that the extent, systematicity and consequences of the GoS hindrance of medical and humanitarian assistance in IDP Camps in Darfur varied greatly over time. Consequently, the Majority finds that such materials reflect a level of GoS hindrance of medical and humanitarian assistance in IDP Camps in Darfur which significantly differs from that described by the Prosecution in the Prosecution Application.

Prosecution’s reliance on the nature and extent of the war crimes and crimes against humanity allegedly committed by GoS forces as evidence of a GoS’s genocidal intent

190. The Majority observes that the second component of the Prosecution’s submissions in relation to the inference of the existence of a GoS’s genocidal intent from the clear pattern of mass-atrocities allegedly committed by GoS forces between 2003 and 2008 against the Fur, Masalit and Zaghawa civilian population, is based on the underlying facts of the Prosecution’s allegations for war crimes and crimes against humanity that have been discussed in previous sections.

191. In this regard, the Majority notes that the Chamber has already found that there are reasonable grounds to believe that a core component of the GoS counter-insurgency campaign, which started soon after the April 2003 attack on the El Fasher

²¹⁴ Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, *Killing and injuring of civilians on 25 August 2008 by government security forces Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union (ICC-02-05-179-Conf-Exp-Anx2, p. 5).

airport and lasted for well over five years, was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups - perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing conflict in Darfur.²¹⁵

192. In particular, the majority observes that there are reasonable grounds to believe that as part of the GoS counter-insurgency campaign, GoS forces:

- i. carried out numerous unlawful attacks, followed by systematic acts of pillage, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups;²¹⁶
- ii. subjected thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of murder, as well as to acts of extermination;²¹⁷
- iii. subjected thousands of civilian women, belonging primarily to the said groups to acts of rape;²¹⁸
- iv. subjected hundreds of thousands of civilians belonging primarily to the said groups to acts of forcible transfer;²¹⁹ and
- v. subjected civilians belonging primarily to the said groups to acts of torture.²²⁰

193. Nevertheless, the Majority considers that the existence of reasonable grounds to believe that GoS forces carried out such serious war crimes and crimes against humanity in a widespread and systematic manner does not automatically lead to the

²¹⁵ See section above on War Crimes.

²¹⁶ See section above on War Crimes.

²¹⁷ See section above on Crimes against Humanity.

²¹⁸ See section above on Crimes against Humanity.

²¹⁹ See section above on Crimes against Humanity.

²²⁰ See section above on Crimes against Humanity.

conclusion that there exist reasonable grounds to believe that the GoS intended to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups.

194. In this regard, the Majority observes that a similar approach has recently been taken by the ICJ in its Judgment on Genocide, in which, leaving aside the specific events following the fall of Srebrenica, the ICJ declined to infer that the Bosnian Serb leadership acted with a genocidal intent from the existence of a clear pattern of mass-atrocities affecting hundreds of thousands of Bosnian Muslims for a period of five years, including *inter alia*:

- i. the mass killings of tens of thousands of Bosnian Muslim civilians and prisoners of war;
- ii. the mass rapes of tens of thousands of Bosnian Muslim civilian women;
- iii. the deportation and forcible displacement of hundreds of thousands of Bosnian Muslim civilians;
- iv. the widespread and systematic beatings, torture and inhumane treatment (malnutrition and poor health conditions) in dozens of detention camps throughout Bosnia and Herzegovina;
- v. the siege of Bosnian Muslim civilians in cities throughout Bosnia and Herzegovina, such as Sarajevo, where shelling, sniping and starvation by hindering humanitarian aid was a matter of course; and
- vi. the destruction of cultural, religious and historical property in an attempt to wipe out the traces of the existence of the Bosnian-Muslim group from Bosnia and Herzegovina.²²¹

²²¹ See ICJ Judgment on Genocide, paras. 276-277, 319, 328, 334, 344 and 354.

195. Moreover, the Majority finds that there are a number of additional factors, resulting from the materials provided by the Prosecution, that must be taken into consideration in determining whether the existence of reasonable grounds to believe that the GoS acted with genocidal intent is the only reasonable conclusion from the commission by GoS forces, in a widespread and systematic manner, of the above-mentioned war crimes and crimes against humanity.

196. First, in relation to the attacks conducted by the GoS forces on towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups, the Majority finds that there are reasonable grounds to believe that in most of such attacks, the large majority of their inhabitants were neither killed nor injured despite the fact that the attackers, in addition to often counting on aerial support, either had previously encircled the targeted village or came to such village with tens or hundreds of vehicles and camels forming a wide line.²²²

197. Second, the Majority observes that the Prosecution does not claim that GoS forces established in Darfur long-lasting detention camps where inmates were systematically mistreated, tortured and executed.

198. Third, in relation to forcible displacement resulting from the attacks, the Majority is of the view that there are reasonable grounds to believe that GoS forces did not attempt to prevent civilians belonging to the Fur, Masalit and Zaghawa groups from crossing the border to go to refugee camps in Chad,²²³ and that the great majority of those who left their villages after the attacks by GoS forces reached IDP Camps in Darfur or refugee camps in Chad.

199. Fourth, in the view of the Majority, the Prosecution has failed to substantiate its claim that the materials that it submitted provide reasonable grounds to believe

²²² *The Prosecution Application*, paras. 106 and 112. See section above on *Crimes against Humanity*.

²²³ *The Prosecution Application*, paras. 160-162, 166. and 167. See section above on *Crimes against Humanity*.

that Janjaweed militiamen were stationed around IDP Camps for the purpose of raping those women and killing those men who ventured outside the camps.²²⁴

200. Fifth, the Chamber observes that, in the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*, the Prosecution never claimed that the existence of reasonable grounds to believe in a GoS's genocidal intent could be inferred from the facts of the case, although there are reasonable grounds to believe that the crimes that are the subject of such case are allegedly among the gravest that occurred in Darfur in terms of their systematicity and brutality.

201. As a result, the Majority considers that the existence of reasonable grounds to believe that the GoS acted with genocidal intent is not the only reasonable conclusion of the alleged commission by GoS forces, in a widespread and systematic manner, of the particularly serious war crimes and crimes against humanity mentioned above. Whether a different conclusion is merited when assessed in light of the other materials provided by the Prosecution in support of the Prosecution Application shall be analysed by the Majority in the following section.

4. Conclusion

202. The Majority observes that the Prosecution acknowledges that it has no direct evidence of the GoS's genocidal intent and that it therefore relies on proof by inference.²²⁵

203. In light of this circumstance, the Majority agrees with the Prosecution in that the article 58 evidentiary standard would be met only if the materials provided by

²²⁴ *The Prosecution Application*, paras.123-124, 132, 137, 144, 145, 158, 163, 165 and 170; Witness Statement (Anx J90) DAR-OTP-0119-0048 at 0053-0054, 0061; US Agency for International Development Report, *The use of rape as a weapon of war in the conflict in Darfur, Sudan*, October 2004 (Anx J18) DAR-OTP-0005-0108 at 0126-0127, 0129-0131; UN General Assembly, Human Rights Council, *Human Rights Situations that Require the Council's Attention (A/HRC/7/22)*, 3 March 2008 (Anx J28) DAR-OTP-0148-0259 at 0269-0270; UN monthly report of the Secretary-General on Darfur, 8 November 2006 (Anx J33) DAR-OTP-0147-1102 at 1105-1106; UNSC, Report of the Secretary-General on Darfur, 27 July 2007 (Anx J34) DAR-OTP-0147-1111 at 1115.

²²⁵ *The Prosecution Application*, paras. 364-366 and 400; ICC-02/05-T-2-Conf-Exp-ENG ET, p. 3, lines 16-20, p. 6, lines 9-14, p. 71, lines 8-16 and p. 74, lines 20-23.

the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe that the GoS acted with a *dolus specialis*/specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups.

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

- i. even if the existence of an alleged GoS strategy to deny and conceal the crimes committed in Darfur was to be proven, there can be a variety of plausible reasons for its adoption, including the intention to conceal the commission of war crimes and crimes against humanity;
- ii. the Prosecution's allegations concerning the alleged insufficient resources allocated by the GoS to ensure adequate conditions of life in IDP Camps in Darfur are vague in light of the fact that, in addition to the Prosecution's failure to provide any specific information as to what possible additional resources could have been provided by the GoS, there existed an ongoing armed conflict at the relevant time and the number of IDPS s, according to the United Nations, was as high as two million by mid 2004, and as high as 2.7 million today;
- iii. the materials submitted by the Prosecution in support of the Prosecution Application reflect a situation within the IDP Camps which significantly differs from the situation described by the Prosecution in the Prosecution Application;
- iv. the materials submitted by the Prosecution in support of the Prosecution Application reflect a level of GoS hindrance of medical and humanitarian

assistance in IDP Camps in Darfur which significantly differs from that described by the Prosecution in the Prosecution Application;

- v. despite the particular seriousness of those war crimes and crimes against humanity that appeared to have been committed by GoS forces in Darfur between 2003 and 2008, a number of materials provided by the Prosecution point to the existence of several factors indicating that the commission of such crimes can reasonably be explained by reasons other than the existence of a GoS's genocidal intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups;
- vi. the handful of GoS official statements (including three allegedly made by Omar Al Bashir himself) and public documents relied upon by the Prosecution provide only *indicia* of a GoS's persecutory intent (as opposed to a genocidal intent) against the members of the Fur, Masalit and Zaghawa groups; and
- vii. as shown by the Prosecution's allegations in the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*, the Prosecution has not found any *indicia* of genocidal intent on the part of Ahmad Harun, in spite of the fact that the harsher language contained in the above-mentioned GoS official statements and documents comes allegedly from him.

205. In the view of the Majority, when all materials provided by the Prosecution in support of the Prosecution Application are analysed together, and consequently, the above-mentioned findings are jointly assessed, the Majority cannot but conclude that the existence of reasonable grounds to believe that the GoS acted with a *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups is not the only reasonable conclusion that can be drawn therefrom.

206. As a result, the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application fail to provide reasonable grounds to believe that the GoS acted with *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups, and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to counts 1 to 3.

207. Nevertheless, the Majority considers that, if, as a result of the ongoing Prosecution's investigation into the crimes allegedly committed by Omar Al Bashir, additional evidence on the existence of a GoS's genocidal intent is gathered, the Majority's conclusion in the present decision would not prevent the Prosecution from requesting, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir so as to include the crime of genocide.

208. In addition, the Prosecution may always request, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir to include crimes against humanity and war crimes which are not part of the Prosecution Application, and for which the Prosecution considers that there are reasonable grounds to believe that Omar Al Bashir is criminally liable under the Statute.

B. Whether there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for the crimes mentioned above²²⁶

209. The Prosecution alleges that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute for committing genocide, crimes against humanity and war crimes through the "apparatus" of the State of Sudan, including the Sudanese

²²⁶ Judge Anita Ušacka appends a partly dissenting opinion in relation to paragraphs 214, 216 and 223. See Partly Dissenting Opinion of Judge Anita Ušacka, Part IV.

Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, from March 2003 to 14 July 2008.²²⁷

210. At the outset, the Chamber highlights that, in the *Lubanga* and the *Katanga and Ngudjolo* cases, the Chamber has held that article 25(3)(a) of the Statute embraces the notion of control of the crime as the determining criterion to distinguish between principal and accessory liability.²²⁸ Furthermore, as the Chamber has held in the said cases, article 25(3)(a) of the Statute also embraces the following four manifestations of the notion of control of the crime: direct perpetration, perpetration through another person or indirect perpetration, co-perpetration based on joint control and indirect co-perpetration.²²⁹

211. In relation to the notion of indirect perpetration, the Chamber highlighted in the decision on the confirmation of the charges in the *Katanga and Ngudjolo* case that:

The leader must use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organisation to secure compliance with his orders. Compliance must include the commission of any of the crimes under the jurisdiction of this Court.²³⁰

212. In relation to the notion of co-perpetration based on joint control, the decisions on the confirmation of the charges in the *Lubanga* and *Katanga and Ngudjolo* cases have underscored that:

[t]he concept of co-perpetration based on joint control over the crime is rooted in the principle of division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.²³¹

²²⁷ *The Prosecution Application*, paras. 62 and 244.

²²⁸ ICC-01/04-01/06-803-tEN, para. 330.

²²⁹ ICC-01/04-01/06-803-tEN, paras. 326-328.

²³⁰ ICC-01/04-01/07-717, para. 514.

²³¹ ICC-01/04-01/06-803-tEN, para. 342. See also ICC-01/04-01/07-717, para. 521.

213. As the Chamber has already held, the notion of indirect co-perpetration is applicable when some or all of the co-perpetrators carry out their respective essential contributions to the common plan through another person.²³² As the Chamber has underscored, in these types of situations:

Co-perpetration or joint commission through another person is nonetheless not possible if the suspects behaved without the concrete intent to bring about the objective elements of the crime and if there is a low and unaccepted probability that such would be a result of their activities.²³³

214. The Majority finds that there are reasonable grounds to believe that soon after the April 2003 attack on the El Fasher airport, a common plan to carry out a counter-insurgency campaign against the SLM/A, the JEM and other armed groups opposing the GoS in Darfur, was agreed upon at the highest level of the GoS, by Omar Al Bashir and other high-ranking Sudanese political and military leaders,²³⁴ in particular [REDACTED],²³⁵ [REDACTED],²³⁶ [REDACTED]²³⁷ and [REDACTED].²³⁸

215. The Chamber also finds that there are reasonable grounds to believe that a core component of such common plan was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups - perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur.²³⁹ Furthermore,

²³² ICC-01/04-01/07-717, para. 522.

²³³ ICC-01/04-01/07-717, para. 537.

²³⁴ Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0013, para. 41; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, para. 48.

²³⁵ Witness Statement (Anx B4) DAR-OTP-0147-0071 at 0110-0120; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0016 para. 70; Witness Statement (Anx. J95) DAR-OTP-0095-0002 at 0013, para. 41, and at 0024, para. 88; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0024, para. 88; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, paras. 47 and 48.

²³⁶ Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0610, para. 144; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0013, para. 41, at 0023, para. 81 and at 0029, para. 112.

²³⁷ Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0017, para. 74; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0016-0017, para. 55, at 0025, para. 89, and at 0029, para. 112; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0025, para. 89, and at 0029, para. 112.

²³⁸ Witness Statement (Anx J95) DAR-OTP-0095-0003 at 0025, para. 92.

²³⁹ Witness Statement (Anx B4) DAR-OTP-0147-0071 at 0110-0120; Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0088, para. 51; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0480, para. 32. *The Prosecution Application*, paras. 9 and 240; HRW Report, *Sudan: Darfur in Flames Atrocities in Western Sudan*, April 2004 (Anx 10) DAR-OTP-0003-0185 at 0194; See also, International Crisis Group Report, *Darfur Deadline A New International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055 at 0057, 0059, 0061, 0064, 0065 and 0068; Information Report on Background, *Q&A* (Anx 14) DAR-OTP-0014-0213 at 0214; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0027, 0058,

the Chamber considers that there are reasonable grounds to believe that, according to the common plan, the said civilian population was to be subjected to unlawful attacks, forcible transfers and acts of murder, extermination, rape, torture, and pillage by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.²⁴⁰

216. Furthermore, the Majority finds that there are reasonable grounds to believe that Omar Al Bashir and the other high-ranking Sudanese political and military leaders directed the branches of the “apparatus” of the State of Sudan that they led, in a coordinated manner, in order to jointly implement the common plan.

217. In particular, the Chamber finds that there are reasonable grounds to believe that the common plan was, to a very important extent, implemented through State and local Security Committees in Darfur.

218. In this regard, the Chamber considers that there are reasonable grounds to believe that Local Security Committees (i) were comprised of the head of the locality, and representatives of the Sudanese Armed Forces, the Sudanese Police Forces, and the NISS at the local level; (ii) worked together with local Janjaweed Militia leaders to implement the common plan in the relevant area; and (iii) reported to the State Governor.²⁴¹

0030-0040; HRW Report, *If We Return, We Will Be Killed Consolidation of Ethnic Cleansing in Darfur, Sudan*, November 2004 (Anx 38) DAR-OTP-0107-1403 at 1405. Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62-63; *The Prosecution Application*, paras. 241-242; J. Flint / A. de Waal, *Darfur A Short History of a Long War*, 2005 (Anx 75) DAR-OTP-0120-0678 at 0772-0775; Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3-4 September 2003 (Anx 50) DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement at DAR-OTP-0115-0563 at 0567-0638.

²⁴⁰ Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62-63. *The Prosecution Application*, paras. 241-242; J. Flint / A. de Waal, *Darfur A Short History of a Long War*, 2005 (Anx 75) DAR-OTP-0120-0678 at 0772-0775. Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3-4 September 2003 (Anx 50) DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement (Anx 44) DAR-OTP-0115-0563 at 0567-0638.

²⁴¹ Witness Statement (Anx J6) DAR-OTP-0124-0196 at 0215, para. 120; *National Security Forces Act, 1999*, articles 38-40 (Anx J79) DAR-OTP-0021-0412 at 0424-0425; *The Interim National Constitution of the Republic of the Sudan 2005*, article 150 (Anx. J80) DAR-OTP-0136-0605 at 0663-0664; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0013, paras. 59-60, 64, 66 and 119-121; Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0058, paras. 40 and 62; Unofficial version of the *Armed Forces Memorandum concerning the ICC's inquiries – Military Operations Summary since January 2002*, DAR-OTP-0116-0721, para. 38.

219. The Chamber also considers that there are reasonable grounds to believe that each of the three Darfurian States had one State Security Committee, which (i) was comprised of the State Governor and representatives of the Sudanese Armed Forces, the Sudanese Police Forces and NISS at the State level;²⁴² (ii) worked together with regional Janjaweed Militia leaders to implement the common plan in the relevant State; and (iii) reported through the Deputy Federal Minister of the Interior [REDACTED].

220. In this regard, in the view of the Chamber, there are reasonable grounds to believe that, while in his position as Deputy Federal Minister of the Interior, Ahmad Harun, who was often in Darfur, was entrusted with the tasks of (i) supervising the three Darfurian State Security Committees, and (ii) acting as a link between the government of the three Darfurian States and the highest level of the GoS in Khartoum.²⁴³

221. The Chamber also finds that there are reasonable grounds to believe that Omar Al Bashir, as *de jure*²⁴⁴ and *de facto*²⁴⁵ President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the common plan.²⁴⁶

²⁴² *The Interim National Constitution of the Republic of the Sudan 2005*, article 150 (Anx. J80) DAR-OTP-0136-0605 at 0663-0064; *The National Security Forces Act* (Anx. J79), 1999, article 17. Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 144; International Mission of Inquiry on Darfur, Mission to West Darfur, 11-17 November 2004, Compiled notes of meetings and interviews (Anx 16) DAR-00016-139 at 0171.

²⁴³ Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0018-0019, paras. 85-86.

²⁴⁴ *The Interim National Constitution of the Republic of the Sudan 2005*, articles 3, 58 (Anx. J80) DAR-OTP-0136-0605 at 0607, 0625-0626; *National Security Forces Act, 1999*, article 14 (Anx J79) DAR-OTP-0021-0412 at 0416-0417; See, ICTY, *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Appeals Judgment, date 20 February 2001, para. 76: "As noted by the Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia*, "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures" and citing *Case Concerning Certain German Interests in Polish Upper Silesia*, Merits, 25 May 1926, PICJ Rep., Series A, No. 7. p. 19. See also Opinion No 1 of the *Arbitration Commission of the Peace Conference on Yugoslavia*, 29 November 1991, para. 1 c, which states that "the form of internal political organisation and the constitutional provisions are mere facts".

²⁴⁵ Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 132; and Witness Statement (Anx 28) at DAR-OTP-0097-0619 at 0624, para. 21. See also Amnesty International Report, *Sudan, Darfur 'Too many people killed for no reason*, 3 February 2004 (Anx 18) DAR-OTP-0020-0067 at 0099.

²⁴⁶ Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0057, para. 40; and at 0068-0069, paras. 94-95.

222. Furthermore, the Chamber finds that, in the alternative, there are reasonable grounds to believe that Omar Al Bashir (i) played a role that went beyond coordinating the implementation of the common plan; (ii) was in full control of all branches of the “apparatus” of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, and (iii) used such control to secure the implementation of the common plan.²⁴⁷

223. As a result, the Chamber finds that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator,²⁴⁸ for those war crimes and crimes against humanity for which the Chamber has already found in the present decision that there are reasonable grounds to believe that they were directly committed, as part of the GoS counter-insurgency campaign, by members of GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.

V. Whether the specific requirements under article 58 of the Statute for the issuance of a warrant of arrest have been met

A. The Prosecution’s allegations

224. In its Application, the Prosecution requests the issuance of a warrant of arrest for Omar Al Bashir.²⁴⁹

²⁴⁷ The following evidence refers to the fact that Ahmad Harun’s orders came directly from Omar Al Bashir: Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 142; Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0091, para. 166. Transcript of Witness Statement (Anx 15) DAR-OTP-0016-0013 at 0013; DAR-OTP-0095-0049 at 0076, para. 128 (Anx. 25); Witness Statement (Anx J86) DAR-OTP-0128-0042 at 0052, para.55. Moreover, according to the Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, para. 47.

²⁴⁸ See Partly Dissenting Opinion of Judge Anita Ušacka, Part IV.

²⁴⁹ *The Prosecution Application*, para. 413.

225. The Prosecution Application states that Omar Al Bashir has “consistently challenged the Court’s jurisdiction and categorically refused that any Sudanese citizen be surrendered to the Court”,²⁵⁰ and that, as a result of his position as Head of State, he is in a position to attempt to obstruct proceedings and to possibly threaten witnesses.²⁵¹

226. Additionally, the Prosecution refers to its filing of 27 May 2008,²⁵² in which it reported that despite initially providing some cooperation to the Court,²⁵³ since the issuance of the arrest warrants against Ahmad Harun and Ali Kushayb, the Government of Sudan has ceased all such cooperation. The Prosecution Application states that there has been no change to this situation since that date.²⁵⁴

B. The Chamber’s evaluation according to article 58(1) of the Statute

227. As this Chamber has previously noted,²⁵⁵ article 58(1) of the Statute requires the Chamber, where it is satisfied that there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court,²⁵⁶ to issue a warrant of arrest for a person if it is satisfied that the arrest of the person appears necessary for one of the following reasons:

- (i) to ensure the person’s appearance at trial;
- (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

²⁵⁰ *The Prosecution Application*, para. 412.

²⁵¹ *The Prosecution Application*, para. 412.

²⁵² ICC-02/05-01/07-36-US-Exp and Anx1-2.

²⁵³ ICC-02/05-01/07-36-US-Exp-Anx1, para. 22.

²⁵⁴ *The Prosecution Application*, para. 411.

²⁵⁵ ICC-02/05-01/07-1-Corr, para. 126.

²⁵⁶ Article 58(1)(a) of the Statute.

- (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

228. The Chamber observes firstly that, according to the materials provided by the Prosecution, the GoS, presided over by Omar Al Bashir, has systematically refused any cooperation with the Court since the issuance of an arrest warrant for Ahmad Harun and Ali Kushayb on 2 May 2007.²⁵⁷

229. In particular, the Chamber notes that the embassy of the State of Sudan in The Hague, The Netherlands, refused on 2 May 2007 and 11 June 2007, to receive from an officer from the Court's Registry, the cooperation request for the arrest and surrender of Ahmad Harun and Ali Kushayb.²⁵⁸ Furthermore, on 18 March 2008, the Registry submitted a report on the execution of the warrants of arrest for Ahmad Harun and Ali Kushayb, in which the Registry reported that "[REDACTED] refused to accept the documents. He indicated that following his government's instructions, he could not receive documents from the Court".²⁵⁹

230. Moreover, the Chamber is also mindful that, upon the issuance of the warrant of arrest for Ahmad Harun for his alleged responsibility, *inter alia*, for the commission of serious violations of international humanitarian law in the Darfur region, Omar Al Bashir appears to have personally maintained the suspect in his position as Federal Minister for Humanitarian Affairs.²⁶⁰

231. The Chamber also finds that the materials submitted by the Prosecution in support of the Prosecution Application do not show any change from the absolute lack of cooperation of the GoS with the Court, referred to in the Prosecution's filing

²⁵⁷ *The Prosecution Application*, paras. 339-343.

²⁵⁸ ICC-02/05-01/07-7-Conf and Anx. See also ICC-02/05-01/07-21-Conf, paras. 6-7 and ICC-02/05-01/07-21-Conf-AnxF.

²⁵⁹ ICC-02/05-01/07-35-Conf-Exp, p. 8.

²⁶⁰ *The Prosecution Application*, para. 267.

of 29 May 2008. Quite the contrary, the Chamber observes that, upon the filing of the public summary of the Prosecution Application for a warrant of arrest against Omar Al Bashir on 14 July 2008, it appears that Omar Al Bashir himself has been particularly defiant of the jurisdiction of the Court in several of his public statements.²⁶¹

232. On this basis, the Chamber is satisfied that the arrest of Omar Al Bashir appears necessary to ensure his appearance at trial in accordance with article 58(1)(b)(i) of the Statute.

233. As the Chamber has already found, there are reasonable grounds to believe that Omar Al Bashir is in control of the “apparatus” of the State of Sudan, or at least shares such control with a few high-ranking Sudanese political and military leaders.²⁶² As a result, he is in a position to attempt to obstruct proceedings and to possibly threaten witnesses. In this regard, the Chamber observes with grave concern that it appears that at least one individual has been recently convicted for the crime of treason as a result of his alleged cooperation with the Court.²⁶³

234. The Chamber is therefore satisfied that, in accordance with article 58(1)(b)(ii) of the Statute, the arrest of Omar Al Bashir appears necessary in order to ensure that he does not obstruct or endanger the proceedings.

²⁶¹ *The Prosecution Application*, paras. 341-343, 396 and 397. Also see *China Daily* ‘Sudan reiterate rejection of ICC jurisdiction’ 14 July 2008 at http://www.chinadaily.com.cn/world/2008-07/14/content_6843988.htm; McDoom, O. *International Herald Tribune* ‘Thousands rally in Sudan against ICC move’ 13 July 2008 at <http://www.iht.com/articles/reuters/2008/07/13/africa/OUKWD-UK-SUDAN-ICC-PRO1151.php>; *BBC World News* ‘Sudan president defiant in Darfur’ 23 July 2008 at <http://news.bbc.co.uk/2/hi/africa/7520991.stm>; Embassy of the Republic of the Sudan, Washington DC, Press Release ‘Ocampo’s Political Pursuits Jeopardize Peace’ 7 November 2008 at <http://search.globescope.com/sudan/index.php?mact=News.cntnt01.detail.0&cntnt01articleid=49&cntnt01returnid=102>; and *Sudan Tribune* ‘Sudan accuses ICC of working to destabilize the country’ 24 February 2009 at www.sudantribune.com/spip.php?article30268 - 9 uur geleden

²⁶² *The Prosecution Application*, paras. 250-269, 280-287; Witness Statement (Anx J86) at DAR-OTP-0128-0042 at 0052, paras. 54 and 57; Witness Statement (Anx J47) DAR-OTP-0125-0665 at 0687-0690, paras 108-112, 116, 120-121, 0698; Witness Statement (Anx J48) DAR-OTP-0016-0080 at 0089; Witness Statement (Anx J83) DAR-OTP-0060-0247 at 0255-0256, para. 53; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0006, 0019, paras 15, 66; UN Interim Report on the situation of human rights in the Sudan, 18 November 1993 (Anx 46) DAR-OTP-0115-0699 at 0715; Witness Statement (Anx J86) DAR-OTP-0128-0042 at 0050-0051; Witness Statement (Anx 23) DAR-OTP-0094-0064 at 0573; *See section B above*: Whether there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for the crimes mentioned above.

²⁶³ ICC-02/05-179-Anx1, paras. 21-22.

235. Finally, the Chamber takes note that the latest report issued on 23 January 2009 by the United Nations High Commissioner for Human Rights on the situation in the Sudan, entitled “Killing and injury of civilians on 25 August 2008 by governmental security forces: Kalma IDP Camp, South Darfur, Sudan”, concludes that GoS forces appear to continue to commit some of the crimes within the jurisdiction of the Court for which an arrest warrant for Omar Al Bashir is issued, on the basis of the present decision.²⁶⁴

236. As a result, and given that there are reasonable grounds to believe that Omar Al Bashir is the *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces, the Chamber is satisfied that his arrest appears also necessary, pursuant to article 58(1)(b)(iii) of the Statute, to prevent Omar Al Bashir from continuing to commit the above-mentioned crimes.

VI. Execution of the warrant of arrest

A. Competent organ to make and transmit the cooperation request for arrest and surrender of Omar Al Bashir

237. As the consistent case law of this Chamber has held, the Chamber is the only competent organ of the Court which may: (i) issue and amend a warrant of arrest; (ii) coordinate with the national authorities of the requested State concerning any incident which might affect the surrender of the person to the Court once the person has been arrested; and (iii) thoroughly follow up on the execution of cooperation requests for both arrest and surrender of the relevant person.²⁶⁵ Hence, the Chamber, assisted by the Registry, in accordance with rules 176(2) and 184 of the Rules, must

²⁶⁴ Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan. *Killing and injuring of civilians on 25 August 2008 by government security forces Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union, ICC-02-05-179-Conf-Exp-Anx2,

²⁶⁵ ICC-01/04-520-Anx2, para. 131; ICC-02/05-01/07-1-Corr, para.135.

be regarded as the only organ of the Court competent to make and transmit a cooperation request for arrest and surrender.²⁶⁶

238. The Chamber also considers that it is necessary for the protection and privacy of witnesses and victims within the meaning of article 57(3)(c) of the Statute, that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit to the Chamber and the Registry as soon as possible, any information related to the potential risks that the transmission of the cooperation requests for the arrest and surrender of Omar Al Bashir, may cause to victims and witnesses.

239. Furthermore, the Chamber considers that it would be beneficial for the expeditious execution of the cooperation requests for arrest and surrender of Omar Al Bashir that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit as soon as possible, to the Chamber and the Registry, any information that, in the view of the Prosecution, would facilitate the expeditious execution by national authorities of such cooperation requests for arrest and surrender.

B. Obligation of the State of Sudan to fully execute the Court's cooperation request

240. The Chamber observes that the State of Sudan is not a party to the Statute and has not made any declaration pursuant to article 12(3) of the Statute and rule 44 of the Rules.

241. Nevertheless, the Chamber emphasises that the State of Sudan has the obligation to fully cooperate with the Court.

²⁶⁶ ICC-02/05-01/07-1-Corr, para. 135; ICC-02/04-01/05-1, pp. 6-7.

242. In this regard, the Chamber notes that the case against Omar Al Bashir has arisen out of the investigation into the Darfur situation, which was the subject of the United Nations Security Council's referral, pursuant to article 13 (b) of the Statute.

243. The Chamber also observes that, as provided for by article 13(b) of the Statute, the United Nations Security Council decided to refer the Darfur Situation to the Court in Resolution 1593 issued under Chapter VII of the Charter of the United Nations, on 31 March 2005.²⁶⁷

244. Furthermore, the Chamber highlights that the United Nations Security Council, after making an express determination that "the situation in Sudan continues to constitute a threat to international peace and security",²⁶⁸ decided in the dispositive part of its Resolution 1593 that "the Government of Sudan and all other parties to the conflict in Darfur *shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution*".²⁶⁹

245. In this regard, the Chamber notes that according to articles 24(1) and 25 of the United Nations Charter, the members of the United Nations, including the State of Sudan (i) "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf"; and (ii) "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

246. Furthermore, according to article 103 of the United Nations Charter, "[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

²⁶⁷ UN Security Council Resolution, S/RES/1593 (2005), p. 1.

²⁶⁸ UN Security Council Resolution, S/RES/1593 (2005), p. 1.

²⁶⁹ UN Security Council Resolution, S/RES/1593 (2005), p. 1 (emphasis added).

247. As a result, the Chamber finds that the GoS's obligations, pursuant to United Nations Security Council Resolution 1593, to *cooperate fully with and provide any necessary assistance to the Court* shall prevail over any other obligation that the State of Sudan may have undertaken pursuant to "any other international agreement".

248. Moreover, the Chamber emphasises that, according to article 87(7) of the Statute, if the GoS continues failing to comply with the above-mentioned cooperation obligations to the Court, the competent Chamber "may make a finding to that effect" and decide to "refer the matter [...] to the Security Council." In this regard, the Chamber is mindful that, according to articles 41 and 42 of the United Nations Charter:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

249. Finally, the Chamber highlights that, in relation to States other than Sudan, as well as regional and international organisations, the dispositive part of United Nations Security Council Resolution 1593 expressly states the following in relation to their cooperation with the Court:

While recognizing that States not party to the Rome Statute have no obligation to the Statute, [the United Nations Security Council] urges all States and concerned regional and other international organisations to cooperate fully".²⁷⁰

FOR THESE REASONS

²⁷⁰ United Nations Security Council Resolution 1593, S/RES/1593 (2005), issued on 31 March 2005, p. 1.

DECIDES to issue a warrant of arrest for Omar Al Bashir for his alleged responsibility for crimes against humanity and war crimes under article 25(3)(a) of the Statute for:

- i. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities as a war crime within the meaning of article 8(2)(e)(i) of the Statute;
- ii. pillage as a war crime within the meaning of article 8(2)(e)(v) of the Statute;
- iii. murder as a crime against humanity within the meaning of article 7(1)(a) of the Statute;
- iv. extermination as a crime against humanity within the meaning of article 7(1)(b) of the Statute;
- v. rape as a crime against humanity within the meaning of article 7(1)(g) of the Statute;
- vi. torture as a crime against humanity within the meaning of article 7(1)(f) of the Statute;
- vii. forcible transfer as a crime against humanity within the meaning of article 7(1)(d) of the Statute;

DECIDES that the warrant of arrest for Omar Al Bashir shall be included in a separate self-executing document containing the information required by article 58(3) of the Statute;

DECIDES that, as soon as practicable, the Registry: (i) shall prepare a request for cooperation seeking the arrest and surrender of Omar Al Bashir and containing the information and documents required by articles 89(1) and 91 of the Statute, and by rule 187 of the Rules; and (ii) shall transmit such request to the competent Sudanese authorities in accordance with rule 176(2) of the Rules and to the following States:

- (i) All States Parties to the Statute;
- (ii) All United Nations Security Council members that are not States Parties to the Statute.

DIRECTS the Registrar, as appropriate, to prepare and transmit to any other State any additional request for arrest and surrender which may be necessary for the arrest and surrender of Omar Al Bashir to the Court pursuant to articles 89 and 91 of the Statute, and if the circumstances so require, to prepare and transmit a request for provisional arrest in accordance with article 92 of the Statute;

FURTHER DIRECTS the Registrar, pursuant to article 89(3) of the Statute, to prepare and transmit to any State any request for transit which may be necessary for the surrender of Omar Al Bashir to the Court;

ORDERS the Prosecution to transmit to the Chamber and to the Registry, as far as its confidentiality obligations allow, all information available to the Prosecution that may assist in averting any risks to victims or witnesses associated with the transmission of the above-mentioned cooperation request;

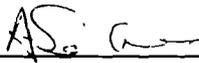
INVITES the Prosecution to transmit to the Chamber and to the Registry, as far as its confidentiality obligations allow, all information available to it that, in its view, would facilitate the transmission and execution of the above-mentioned cooperation request;

RECALLS that:

- (i) the obligations of the Government of Sudan, pursuant to United Nations Security Council Resolution 1593, to cooperate fully with and provide any necessary assistance to the Court, prevail over any other obligations that the State of Sudan may have undertaken pursuant to “any other international agreement”; and that
- (ii) if the Government of Sudan continues to fail to comply with the above-mentioned cooperation obligations with the Court, the competent Chamber, pursuant to article 87(7) of the Statute, “may make a finding to that effect” and decide to “refer the matter [...] to the Security Council” to take appropriate measures pursuant to the United Nations Charter.

FURTHER RECALLS that, in the dispositive part of Resolution 1593, the United Nations Security Council has expressly urged all States other than Sudan, as well as regional and international organisations, to cooperate “fully” with the Court.

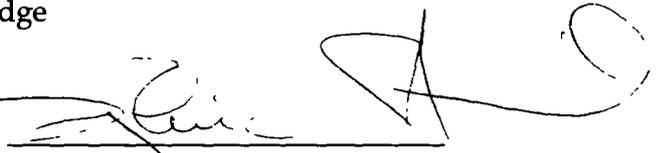
Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka



Judge Sylvia Steiner

Dated this Wednesday 4 March 2009

At The Hague, The Netherlands

Separate and Partly Dissenting Opinion of Judge Anita Ušacka

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I. Introduction

1. I agree with my colleagues as to the outcome of the decision, as I am satisfied that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for war crimes and crimes against humanity, and that a warrant should be issued for his arrest. I disagree with the Majority, however,

as I am satisfied that there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent and is criminally responsible for genocide.

2. This difference results from a divergence of opinion regarding

- (i) whether the Prosecution must demonstrate, in order to establish reasonable grounds, that the only reasonable inference available on the evidence is that of genocidal intent, and;
- (ii) the conclusions drawn from the analysis of the evidence presented.

Since my divergent perspective on these issues also has implications for other aspects of the decision, including the sections on crimes against humanity and mode of liability, I will explain such effects in separate reasoning included in the following partly dissenting opinion.

3. In order to reach a conclusion regarding the existence of reasonable grounds, the Chamber has looked to the findings and jurisprudence of other legal and quasi-legal bodies which have previously considered allegations of genocide. In my view, however, since there are substantial differences between the mandate of the Pre-Trial Chamber with regard to the present Application and the mandates of these other institutions, I also consider it important to appreciate the implications of such differences in determining the relevance of their findings and jurisprudence to the matter presently before the Chamber.

4. For example, since the International Court of Justice adjudicates only inter-state disputes,¹ its examination of genocide in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* was framed by the matter of state responsibility.² In contrast, not only does the Statute provide solely for the criminal responsibility of natural persons,³ but a proposal to include responsibility for legal persons, including states and corporations, was explicitly rejected during the drafting process.⁴

5. The UN Commission of Inquiry (UNCOI), which was tasked with (i) conducting a fact-finding mission in order to establish whether alleged violations of international humanitarian law and human rights law committed in Darfur amounted to genocide and (ii) identifying the perpetrators of such violations,⁵ examined alleged violations only between February 2003 and mid-January 2005,⁶ and made conclusions regarding the responsibility of the GoS. Upon an independent review of the facts and the receipt of additional evidence, however, the Application filed by the Prosecution covers a longer time period, from March 2003 to 14 July 2008, and focuses on the individual responsibility of Omar Al Bashir.

6. Thus, the factual findings of such bodies may be directly relevant to the Chamber's inquiry at this stage, such as where the Prosecution has referred to

¹ Article 34 of the ICJ Statute.

² See generally *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007.

³ Article 25(1) of the Statute.

⁴ Ambos, K., *Article 25: Individual Criminal Responsibility* in *Commentary on the Rome Statute of the International Criminal Court*, (Triffterer, O., ed.), Munich, Verlag C.H. Beck oHG, 2008, p. 746. For this reason, and as I explain below, I disagree with the Majority's assertion that it is necessary to assess the genocidal intent of the GoS instead of the individual intent of Omar Al Bashir himself. Majority Decision, para. 151. If there are reasonable grounds to believe that Omar Al Bashir shared control over the "apparatus" of the Sudanese state, it would still not be proper to analyse the intent of the government as an entity, rather than the intent of the individual members of the common plan. Accordingly, since I am satisfied that there are reasonable grounds to believe that Al Bashir is criminally responsible under article 25(3)(a) as an indirect perpetrator, I would limit my analysis of the mode of liability to this question.

⁵ UN Security Council Resolution, S/RES/1564 (2004) § 12.

⁶ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at para. 11.

the UNCOI report as evidence, for example. In contrast, the factual characterisations or legal conclusions of such bodies are drawn from their different mandates, and therefore may be relevant only by analogy.⁷ As another Chamber has previously acknowledged, even the jurisprudence of the ICTY and ICTR (the “*ad hoc* tribunals”), which are also vested with the competence to adjudicate individual criminal responsibility for violations of international criminal law, is not directly applicable before this Court without “detailed analysis”, because of significant differences between the procedural frameworks of this Court and the *ad hoc* tribunals.⁸ However, for the crime of genocide in particular, the substantive jurisprudence of these tribunals may be instructive, since, like the Statute, the genocide provisions of the *ad hoc* tribunal statutes are based on the *Convention on the Prevention and Punishment of the Crime of Genocide* (“Genocide Convention”).⁹ I have therefore found it useful to examine the ways in which such tribunals have considered various types of evidence in connection with allegations of genocide.

II. The evidentiary thresholds applicable at different stages of the proceedings under the Statute

⁷ For example, in connection with legal proceedings regarding the disintegration of the former Yugoslavia, other courts have analysed the relevance of evidence of forced displacement to an allegation of genocidal intent. It must be observed, however, that forced displacement into Bosnian terrain may have different consequences for the displaced persons than forced displacement into Darfuriian terrain. Thus, in different contexts, the same action may support different inferences. See discussion at part III.D.iii. *infra*. See also Straus, S., *The Order of Genocide*, Ithaca, Cornell University Press, 2006 at p. 7 (describing the context of the genocide in Rwanda, including the density of state institutions at the local level, the commonality of civilian mobilisation, and the resonance of the idea of state power).

⁸ *The Prosecutor v Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, para. 44.

⁹ Compare article 6 of the Statute with article 6 of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Statute, UN Doc. S/25704, annex (1993), *reprinted in* 32 I.L.M. 1192 (1993) and with article 2 of the Statute of the International Criminal Tribunal for Rwanda, in S.C. Res. 955, U.N. Doc S/RES/955 (July 1, 1994); see also Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entered into force on 12 January 1951.

7. The framework established by the Statute provides for three distinct stages at which the Pre-Trial and Trial Chambers examine and review the evidence presented by the Prosecution to determine whether there is sufficient evidence to justify (i) the issuance of a warrant of arrest or summons to appear under article 58 of the Statute; (ii) the confirmation of the charges and committal of a person for trial under article 61 of the Statute; and (iii) the conviction of an accused person under article 66 of the Statute.

8. The Statute proscribes progressively higher evidentiary thresholds which must be met at each stage of the proceedings.¹⁰ At the arrest warrant/summons stage, the Pre-Trial Chamber need only be “satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”.¹¹ In contrast, when deciding whether or not to confirm the charges, the Chamber must determine whether there is “sufficient evidence to establish substantial grounds to believe that the person committed the crime charged”.¹² Finally, the Trial Chamber must “be convinced of the guilt of the accused beyond a reasonable doubt” in order to convict an accused.¹³

9. At each stage, of course, there may be different views regarding the sufficiency of evidence required to reach the requisite threshold.¹⁴ Yet, this Chamber has previously likened the “reasonable grounds” standard under article 58 of the Statute to the “reasonable suspicion” standard applied by the

¹⁰ Compare articles 58(1)(a), 61(7) and 66(3) of the Statute. Further, at the confirmation of the charges stage, the Prosecution may rely on documentary or summary evidence and “need not call the witnesses expected to testify at trial”. See article 61(5) of the Statute.

¹¹ Article 58(1)(a) of the Statute.

¹² Article 61(7) of the Statute.

¹³ Article 66(3) of the Statute.

¹⁴ See, e.g. *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, p. 1-217; compare *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, p. 217-227.

European Court of Human Rights,¹⁵ which has elaborated on that standard as follows:

With regard to the level of "suspicion", the Court would note firstly that . . . sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) does not presuppose that the [investigating authorities] should have obtained sufficient evidence to bring charges, either at the point of arrest or while [the arrested person is] in custody. Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others" (loc. cit., p. 29, para. 53). The object of questioning during detention under sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, *facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge*, which comes at the next stage of the process of criminal investigation.¹⁶

Applying this principle in the context of the Statute, it is clear to me that the terms of article 58 of the Statute should be construed in a manner which is consistent with the fact that the Prosecution must meet an increasingly demanding evidentiary threshold at each stage of the proceedings. In other words, when presenting evidence to support the issuance of a warrant of arrest, the Prosecution should not be required to meet an evidentiary threshold which would be also sufficient to support a conclusion beyond a reasonable doubt at trial.

10. As the procedural framework is substantially different at the *ad hoc* tribunals,¹⁷ most of the tribunals' existing public jurisprudence is drawn from the trial and appellate stages. Thus, the fact that the Pre-Trial Chamber is currently tasked with determining whether to issue an arrest warrant rather than whether to confirm the charges or convict an accused means that the

¹⁵ *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ICC-01/04-01/06-8-Corr, para. 12.

¹⁶ European Court of Human Rights, *Murray v United Kingdom*, 28 October 1994, para. 55 (emphasis added).

¹⁷ See, e.g. ICTY Rules of Procedure and Evidence, IT/32/Rev. 42, Rule 47 (Submission of Indictment by the Prosecutor); ICTR Rules of Procedure and Evidence, Rule 47 (Submission of Indictment by the Prosecutor).

evidentiary threshold espoused in these decisions is not directly applicable to the Chamber's present analysis.

11. On this basis, I will analyse the evidence presented in relation to counts 1, 2 and 3 of the Prosecutor's Application.

III. Counts 1, 2 and 3: Genocide

12. The Prosecution alleges that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 6 of the Statute for three counts of genocide:

- i. Genocide by killing under article 6(a) of the Statute;
- ii. Genocide by causing serious bodily or mental harm under article 6(b) of the Statute; and
- iii. Genocide by deliberately inflicting conditions of life calculated to bring about the destruction of the group under article 6(c) of the Statute.¹⁸

13. According to the Elements of Crimes, each of these counts shares three common elements. The first, a "contextual" element, requires the Prosecution to establish reasonable grounds to believe that the genocidal conduct occurred "in the context of a manifest pattern of similar conduct" directed against a protected group, or that the conduct "could itself effect such destruction [of the group]".¹⁹ The second common element requires the

¹⁸ ICC-02/05-151-US-Exp-Corr-Anx2 ("Prosecution Application"), para. 62. According to the Majority, the Prosecution should have articulated the counts differently, so as to allege one count of genocide against the Fur, one count of genocide against the Masalit, and one count of genocide against the Zaghawa. I note, however, that no legal authority is cited in support of this proposition, and that taking such an approach would require proof of multiple *actus rei* within the same count. Alternatively, it could be possible for the Prosecution to allege nine counts of genocide, one for each *actus reus*, against the Fur, Masalit and Zaghawa. However, for reasons I will explain subsequently, I consider this approach unnecessary. See section III.B. *infra*.

¹⁹ Elements of Crimes, Articles 6(a)(4), 6(b)(4) and 6(c)(5).

Prosecution to provide reasonable grounds to believe that the victims were members of a “particular national, ethnical, racial or religious group”.²⁰

14. Third, each count requires the Prosecution, at the arrest warrant stage, to provide sufficient evidence for the Chamber to be satisfied that there are reasonable grounds to believe that the perpetrator, Omar Al Bashir, “intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such”.²¹

15. Accordingly, I will first consider the question of whether there are reasonable grounds to believe that each of the common elements is met, before turning to the issue of whether there is sufficient evidence to establish reasonable grounds of belief in relation to the *actus reus* associated with each count.

A. The common element of a manifest pattern of similar conduct

16. As the Majority acknowledges, there is a divergence of opinion concerning whether or not this contextual element is consistent with the Statutory definition of genocide,²² as required by article 9(3) of the Statute. For the reasons outlined below, in my view, this question need not be settled by the Chamber at the instant stage.

17. First, I disagree with the Majority’s contention that “the Elements of Crimes and the Rules *must* be applied unless the competent Chamber finds an *irreconcilable contradiction* between these documents, and the Statute on the other hand”.²³ Although article 21(1) of the Statute states that “[t]he Court

²⁰ Elements of Crimes, Articles 6(a)(2), 6(b)(2) and 6(c)(2).

²¹ Elements of Crimes, Articles 6(a)(3), 6(b)(3) and 6(c)(3).

²² Majority Decision, para. 125 (citing Cryer, R. Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 177-179).

²³ Majority Decision, para. 128 (emphasis added).

shall apply . . . in the first place, this Statute, Elements of Crimes and its rules of Procedure and Evidence”, I note that the introduction to the Elements of Crimes states that “the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute”.²⁴ Indeed, several commentators have stated that the Elements of Crimes are not binding upon the Court.²⁵

18. Moreover, in my view, article 22(2) of the Statute is not a convincing justification for the application of the contextual element, as this provision refers to the definition of the crime. The legal definitions of the crimes are espoused in the Statute alone. Since article 9(3) of the Statute requires that the Elements of Crimes be consistent with the Statute, it can be inferred that only the Statute outlines the operative definition of the crime. Again, I recall that the introduction to the Elements of Crimes state only that the Elements of Crimes “shall assist” the Court in the interpretation of the Statute.

19. Even if the application of the contextual element were required, however, it has been met in the instant case, in my view. In accordance with the *Vienna Convention on the Law of Treaties*, I consider that the plain meaning of the term “manifest pattern” refers to a systematic, clear pattern of conduct in which the alleged genocidal conduct occurs.²⁶ This interpretation is also consistent with

²⁴ General Introduction (1), Elements of Crimes (emphasis added).

²⁵ Von Hebel, H., *The Making of the Elements of Crimes in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Lee, R., ed), Transnational Publishers, 2001, p. 8. “It has sometimes been argued that, because of the use of the word ‘shall,’ the instrument has a binding effect. In light of the negotiating history, this argument is not tenable. Throughout the negotiations, there was never a Majority in favour of binding elements. Only by formulating article 9 as it now stands, specifying that the instrument is only of assistance to the Court and has to be consistent with the Statute, did the inclusion of a provision on the Elements of Crimes become acceptable to all delegations.” *Ibid* See also Triffterer, O., *Can the “Elements of Crimes” narrow or broaden responsibility for criminal behaviour defined in the Rome Statute?* in *The Emerging Practice of the International Criminal Court* (Stahn, C. and Sluiter, G., eds.), Koninklijke Brill Publishers, 2009, p. 387.

²⁶ In this respect, I disagree with the meaning given to the term by the Majority, which interprets it to mean that “the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof.” Majority Decision, at para. 124. In my view, this interpretation converts the term into a “result-based” requirement, which would then

the second introductory element of article 6 of the Statute, which states that the term “manifest” is an objective qualification.²⁷

20. Recalling the findings of the Chamber regarding the existence of reasonable grounds to believe that there was a widespread and systematic attack on members of the Fur, Masalit and Zaghawa population, I consider that this element is met in the instant case, regardless of whether or not it should be applied.²⁸ Accordingly, I would decline to settle the question of whether or not the contextual element is consistent with the statutory definition of genocide at the present stage, as it need not be addressed here.

B. The common element of the existence of a protected group under article 6 of the Statute

21. Article 6 of the Statute, which is consistent with the Genocide Convention in this regard,²⁹ extends protection only to national, ethnical, racial or religious groups.³⁰ I therefore consider it necessary to define the contours of the protected group before analysing whether there are reasonable grounds to believe that the elements of the crime of genocide have been committed.

22. In the context of war crimes and crimes against humanity, the Majority refers to a group which it defines as “that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups - perceived by the GoS as being close to the SLM/A, the JEM and the other

duplicate the purpose of the second part of the sentence, “or was conduct that could itself effect such destruction.” See Oosterveld, V., *The Context of Genocide in The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Lee, R., ed.), Transnational Publishers, 2001, p. 46.

²⁷ Elements of Crimes, Article 6, Introduction.

²⁸ Majority Decision, paras. 88-89.

²⁹ Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entered into force on 12 January 1951.

³⁰ Article 6 of the Statute. *Cf* the crime of persecution under article 7(1)(h) of the Statute, which – in addition to protecting national, ethnical, racial, and religious groups – also protects groups defined by political, cultural and gender characteristics, as well as by “other grounds that are universally recognized as impermissible under international law.”

armed groups opposing the GoS in the ongoing armed conflict in Darfur.”³¹ Upon an examination of the evidence, however, I do not see any indication that the GoS targeted only a part of the Fur, Masalit and Zaghawa population which was perceived by the GoS as being close to the rebel groups. Rather, the Prosecution submits evidence demonstrating that the Fur, Masalit and Zaghawa were targeted,³² as well as evidence tending to show that the Fur, Masalit and Zaghawa were accused of being rebels, despite a lack of evidence proving such support or membership.³³ One witness transcript even provides reasonable grounds to believe that the so-called “Zurga” were targeted outright:

[QUESTION] ... did he [REDACTED] tell you, ‘You have to fight the rebels’ or did he tell you, ‘You have to fight ... uhm ... whoever’? ... [ANSWER] Uh ... no. What he said is I do not want any, one single village for the Zurgas in Darfur.³⁴

Thus, for me, there are reasonable grounds to believe that the Fur, Masalit and Zaghawa population itself was targeted as the result of a perception of an affiliation between the Fur, Masalit and Zaghawa and the rebel groups.

23. In connection with the allegations regarding genocide, the Prosecution claims that three different groups have been targeted: the Fur, the Masalit and the Zaghawa.³⁵ According to the jurisprudence of the *ad hoc* tribunals, the existence of an ethnic group must be assessed on a case-by-case basis using

³¹ See e.g. Majority Decision, at paras. 76, 83 and 109.

³² See evidence cited in notes 132-134, *infra*.

³³ Witness Statement, DAR-OTP-0097-0619 (Anx 21) at 0624 at para. 21 (“In April 2003, the President, Al-Bashir, went to AL FASHER and publicly gave orders to the military to eliminate the opposition and leave no survivors. . . They did not attack the opposition or rebels even though they knew where they were. These rebel bases were well-known to people in the area and the Government. They only attacked civilian villages which could not inflict damage to the military.”); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at para. 245; Physicians for Human Rights Report, 2006, DAR-OTP-0119-0635 (Anx J44) at 0644, 0688; *See also* UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0161 at para. 631 (“Even assuming that in all the villages they attacked there were rebels present, or at least some rebels were hiding there, or that there were persons supporting rebels - *a fact that the Commission has been unable to verify for lack of reliable evidence* - the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack.”) (emphasis added).

³⁴ Witness Transcript, DAR-OTP-0147-0071 (Anx B4) at 0114, lines 1457-1463.

³⁵ Prosecution Application, para. 77.

both subjective criteria, such as the stigmatisation of the group by the perpetrators,³⁶ as well as objective criteria, such as “the particulars of a given social or historical context”.³⁷

24. Although the Fur, Masalit and Zaghawa do differ from each other, according to the Prosecution, the Fur, Masalit and Zaghawa have historically challenged “their political and economic marginalization by successive regimes in Khartoum”.³⁸ Additionally, the Fur, Masalit and Zaghawa have each maintained separate tribal structures in order to oversee relations with other groups. Historically, these structures have also administered tribal land through a land grant system,³⁹ which has in turn influenced the development of social structures.⁴⁰ Finally, the Fur, Masalit and Zaghawa each speak their own language, in addition to Arabic.⁴¹

25. Various pieces of evidence presented by the Prosecution suggest that these populations are perceived and targeted as a unitary – though diverse – entity of “African tribes”, even though neither the perceived entity nor the Fur, Masalit or Zaghawa are, in fact, racially distinct from the perceived “Arab” tribes. For example, the derogatory epithets reported by witnesses, including the terms “Zurga”, “Nuba”, and “black”, do not distinguish between the Fur, Masalit and Zaghawa as distinct groups, but refer to a perceived unitary entity of “African tribes”.⁴² Similarly, various reports describe how persons

³⁶ ICTY, *Prosecutor v Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 684; see also ICTY, *Prosecutor v Blagojević*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, para. 667; ICTR, *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, para. 254.

³⁷ ICTR, *Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 317.

³⁸ Prosecution Application, para. 79.

³⁹ See, e.g. Witness Statement, DAR-OTP-0095-0151 at para.14; UNCOI Report, DAR-OTP-0018-0010 at 024, para. 54.

⁴⁰ Physicians for Human Rights, Report *Darfur Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0675-0677.

⁴¹ See Prosecution Application, para. 83; UNCOI Report, DAR-OTP-0018-0010, para. 52.

⁴² See, e.g. Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0065 at para. 21 (“When the attackers got closer to the town, they started killing people and set fire to the huts. I heard them shouting ‘Nuba nuba’ or ‘black’ as they attacked the town. I heard them say, in Arabic, that they did not

most affected by a perceived African-Arab polarization “have come to perceive themselves as either ‘African’ or ‘Arab’”.⁴³

26. Accordingly, my view of the target of the counter-insurgency campaign differs from the Majority’s. I also disagree with the Majority’s analysis of the protected group in connection with genocide. I would define the protected group – and the target of the counter-insurgency campaign – as a single ethnic group of the “African tribes”,⁴⁴ which is in turn comprised of smaller groups, including the Fur, Masalit and Zaghawa.⁴⁵

C. *Mens Rea* under article 6 of the Statute

i. The legal element of genocidal *mens rea* and the requisite evidentiary threshold at the arrest warrant stage

27. It is well-recognised that the lack of direct evidence or explicit manifestations of intent by the perpetrator renders the establishment of the *dolus specialis* of genocide particularly difficult.⁴⁶ Since a well-disguised intent should not be a barrier to prosecution or to conviction, other international tribunals assigning individual responsibility for the crime of genocide have

want any black person to survive.”) (emphasis added); Witness Statement, DAR-OTP-0148-0110 at 0123, para. 60 (“The abductors called them *zurga*.”); UNCOI Report, DAR-OTP-0018-0010 at 0133, para. 511.

⁴³ UNCOI Report, DAR-OTP-0018-0010 at 0133, para. 510. See also *ibid*, paras. 60 and 511. See also Amnesty International, Sudan: Darfur: “Too Many People Killed for No Reason”, DAR-OTP-002-0067 at 0078 (“The attackers portray themselves as “Arabs, the civilians being attacked are called “Blacks” or even “slaves”. At the same time, the Zaghawa and the Fur claim that these are attempts to drive all “Africans” away from Darfur.”).

⁴⁴ In this respect, see UNCOI Report, DAR-OTP-0018-0010 at 0133, para. 512 (“it may be considered that the tribes who were the victims of attacks and killings subjectively make up a protected group”) (emphasis added).

⁴⁵ I would stress, however, that this term is not intended to connote a racial distinction between the ethnic “Africans” and the ethnic “Arabs”.

⁴⁶ See *e.g.*, ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1, Trial Judgment, 21 May 1999, para. 93; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Appeals Judgment, 26 May 2003, para. 525.

held it permissible to infer the existence of genocidal intent from a variety of indicia.⁴⁷

28. It is imperative to note, however, that the trial judgments of the *ad hoc* tribunals, require a chamber to conclude – beyond a reasonable doubt – that a perpetrator possessed genocidal intent and therefore an inference must be “the only reasonable [one] available on the evidence”.⁴⁸ The Majority suggests (i) that the Prosecution states in its Application that this threshold is applicable at the instant stage,⁴⁹ and (ii) that such threshold is properly applicable to the Prosecution’s burden to establish reasonable grounds in connection with article 58 of the Statute.⁵⁰ I disagree with both assertions.

29. The Prosecution does not suggest that the application of this standard would be appropriate at this stage. In particular, I note the text of footnote 506 of the Prosecution’s Application, which states in part,

[w]hile this is the evidentiary standard required for proof beyond reasonable doubt, the Prosecution notes that for the purposes of an Art. 58 application the lower standard of reasonable grounds will instead be applicable.

I therefore consider that Prosecution’s statement in the first sentence of paragraph 366 is in fact a restatement of the law applicable at the trial stage under *ad hoc* tribunal jurisprudence. I read the second sentence of paragraph 366 as a submission with respect to the Prosecution’s case as a whole, rather than with respect to the Application itself.⁵¹

⁴⁷ ICTY, *Prosecutor v Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 970; ICTR, *Prosecutor v Rutaganda*, Case No. ICTR-96-3, Appeals Judgment, 26 May 2003, para. 525; ICTY, *Prosecutor v. Sikirica et al*, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, 3 September 2001, para. 46.

⁴⁸ ICTY, *Prosecutor v Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 970.

⁴⁹ Majority Decision, para. 158.

⁵⁰ Majority Decision, para. 159.

⁵¹ The Prosecution states at para. 366 of its Application, “In the instant case, the Prosecution respectfully submits that AL BASHIR’s intent to destroy the target groups as such in substantial part is the only available inference from a comprehensive consideration of nine factors. . .”.

30. Regardless, in my view, even if the Prosecution had suggested that this threshold was applicable at the arrest warrant stage, such a submission would not be binding on the Chamber. For the reasons set out below, I do not consider its application appropriate.

31. Firstly, I note that the trial chambers of the *ad hoc* tribunals have applied this threshold in relation to their conclusions at trial, at which point, rather than being satisfied that there are reasonable grounds, a chamber must be satisfied beyond a reasonable doubt.⁵² Yet, a recent decision of the ICTR Appeals Chamber explains the link between this evidentiary threshold and the burden of proof at trial:

It is well established that a *conclusion of guilt* can be inferred from circumstantial evidence only if it is the only reasonable conclusion available from the evidence. Whether a Trial Chamber infers the existence of a particular fact upon which the guilt of the accused depends from direct or circumstantial evidence, *it must reach such a conclusion beyond a reasonable doubt*. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion of *guilt beyond a reasonable doubt* cannot be drawn.⁵³

Thus, in my view, requiring the Prosecution to establish that genocidal intent is the only reasonable inference available on the evidence is tantamount to requiring the Prosecution to present sufficient evidence to allow the Chamber to be convinced of genocidal intent beyond a reasonable doubt, a threshold which is not applicable at this stage, according to article 58 of the Statute.

32. It is, clear to me, however, that when the Prosecution alleges that the evidence submitted supports an inference of genocidal intent, in order for

⁵² Indeed, the *ad hoc* tribunal jurisprudence cited by the Majority in support in this regard consists of judgments made at the trial and appellate stages. Majority Decision at para. 160 (citing, *inter alia*, ICTY, *The Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 53-57; ICTY, *The Prosecutor v Vasiljević*, Case No. IT-98-32-A, Appeals Judgment, 25 February 2004, paras. 120, and 128; and ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, para. 333.).

⁵³ ICTR, *Prosecutor v Karera*, Case No. ICTR-01-74-A, Appeals Judgment, 2 February 2009, para. 34 (emphasis added).

there to be reasonable grounds to believe that such an allegation is true, the inference must indeed be a reasonable one. Yet, in light of the differing evidentiary burdens at different phases of the proceedings, the Prosecution need not demonstrate that such an inference is the *only* reasonable one at the arrest warrant stage.

33. When several reasonable inferences may be drawn from the evidence, at the arrest warrant stage, the Prosecution need not prove whether there are substantial grounds, as would be necessary if the article 58 standard was equivalent to the standard of article 61(7) of the Statute. Nor must the Prosecution prove an allegation beyond a reasonable doubt, as would be required at trial under article 66(3) of the Statute. All that is required in order to obtain an arrest warrant is for the Prosecution to establish reasonable grounds to believe that an allegation is true.

34. Thus, once sufficient evidence is presented to render an inference of genocidal intent reasonable, one can be satisfied that there are reasonable grounds to believe that genocidal intent exists, unless evidence is also presented which would render an inference of genocidal intent unreasonable. Applying this lower evidentiary threshold is, in my view, consistent with the preliminary nature of the proceedings at the arrest warrant stage, as well as with article 22(2) of the Statute, which pertains to the definition of a crime rather than to the applicable evidentiary threshold at a given stage of the proceedings.

35. Having set out the applicable standard above, I shall now consider whether the evidence presented meets this standard.

ii. Evaluation of the evidence

36. Although *ad hoc* tribunal jurisprudence is by no means binding on this Court,⁵⁴ and despite the difference between the evidentiary threshold applicable at the arrest warrant stage and that which must be met at trial, the types of evidence considered by *ad hoc* tribunal trial chambers may nevertheless be useful insofar as they indicate the types of evidence deemed relevant to the conclusions ultimately drawn at the trial stage. In particular, *ad hoc* tribunal trial chambers have used specific types of evidence in the manner described below to support conclusions that (i) an Accused possessed an *intent*, (ii) that intent consisted of the intent to *destroy* (iii) the intent was to *destroy a group or a substantial part thereof* and (iv) the intent to destroy a group consisted of the intent to destroy the group *as such* (as distinguished from an intent to destroy a group of individuals within the group or substantial part thereof). I will examine each of these different types in turn before considering some examples of evidence submitted by the Prosecution in support of its Application. I highlight, however, that the list of evidentiary examples provided below is not intended to be exhaustive.

a) The existence of *intent*

1) *Evidence emanating from or relating to the Accused*

37. Various forms of communication, including discrete words and utterances by the Accused,⁵⁵ statements of the Accused,⁵⁶ and evidence tending to show

⁵⁴ See, e.g. *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, para. 45.

⁵⁵ ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-A, Appeals Judgment, 1 June 2001, para. 148; ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93 and 542; ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 75; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 496; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, paras. 252-3.

⁵⁶ ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgment, 7 June 2001, para. 63; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 728

that the Accused ordered attacks on the target group, are relevant to show the possible formation of intent.⁵⁷

38. The Prosecution submits, *inter alia*, the following evidence relating to statements by Omar Al Bashir and/or evidence that Omar Al Bashir ordered attacks. Additional evidence corroborates these examples.⁵⁸ One witness reported that

In April 2003, the President, Al-Bashir, went to AL FASHER and publicly gave orders to the military to eliminate the opposition and leave no survivors. . . . Having received orders from their chief, the military then went to African villages and left nothing behind. Together with the Janjaweed, they burned houses, killed small children and raped girls. They did not attack the opposition or rebels even though they knew where they were. These rebel bases were well-known to people in the area and the Government. They only attacked civilian villages which could not inflict damage to the military.⁵⁹

Another witness related,

I personally heard BASHIR say at the meeting words to the effect of: 'I have given instruction to the army to quell the rebellion and not to bring any prisoners or wounded'.⁶⁰

According to another witness,

The shurta and the army in Darfur were not fighting the opposition fighters but they would attack villages, kill innocent people, children and the elderly, and burn the villages. President AL-BASHIR said on national television that he gave the military a *carte blanche* (in Arabic "atlakto yad al-jaysh") in Darfur not to take *asra* (war

⁵⁷ ICTR, *Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 429; ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 542; ICTR, *Prosecutor v Rutaganda*, Case No. ICTR-96-3, Trial Judgment, 6 December 1999, para. 399; ICTR, *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, para. 259.

⁵⁸ Witness Statement, DAR-OTP-0128-0042 (Anx J86) at 0078 at para. 242 ("I was asked if there were orders to refrain from illegal acts during an attack: No, in fact, the govt. sends some signals about what they want to happen during attacks. As an example, the President gave a speech at Al Fashir where he said that he does not recognize the concept of injured persons or prisoners. I understood this to mean that the fighting forces could do what they wanted with injured persons and they should not carry out arrests."); Witness Statement, DAR-OTP-0133-0573 (Anx J81) at 0607 at para. 130 ("The president added that he had asked HARUN to remain in Darfur to implement his orders. HARUN also made a public statement saying he performed his function based on what he was told to do as a public officer.").

⁵⁹ Witness Statement, DAR-OTP-0097-0619 (Anx 28) at 0624 at para. 21.

⁶⁰ Witness Statement, DAR-OTP-0100-0075 (Anx 31) at 0087- 0088 at para. 52.

prisoners) or inflict injuries. I interpreted this to mean that the President instructed his military to kill and destroy without restraint.⁶¹

39. Evidence of the Accused's position of power or authority can be relevant to support an inference that an accused not only knew of a genocidal plan, but also that he or she shared the genocidal intent of the members of the plan.⁶² I therefore consider the evidence of Omar Al Bashir's power and authority to be relevant in this connection as well.⁶³

2) Evidence relating to others

40. The words and deeds of others acting with or at the behest of the Accused can also be relevant to support an inference of the formation of intent as well. For example, evidence that during attacks led by an accused against the targeted group "the attackers were chanting 'Tuba Tsembe Tsembe', which means 'Let's exterminate them', a reference to the Tutsi" has been held to support an inference of genocidal intent.⁶⁴

41. The Prosecution submits – *inter alia*⁶⁵ – the following witness statements relating the words and/or deeds of others acting with or at the behest of Omar Al Bashir:

When [Harun's] time came, he stated that for the sake of Darfur, *they were ready to kill 3/4 of the people in Darfur, so that 1/4 could live.* . . . We understood from what he

⁶¹ Witness Statement, DAR-OTP-0107-0473 (Anx J88) at 0480-0481 at para. 32.

⁶² ICTY, *Prosecutor v. S. Milošević*, Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T, 16 June 2004, para. 288.

⁶³ See, e.g. evidence cited at footnote 249 of Majority Decision.

⁶⁴ ICTR, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Trial Judgment, 16 May 2003, paras. 413 and 419.

⁶⁵ See also Witness Statement, DAR-OTP-0107-0781 (Anx J16) at 0784 at para. 12 (" . . . [T]he attackers would say 'Kill them, burn them' and scream and shout. They would curse and swear at them saying 'these are animals, these are ignorant, kill them!' They would also say 'clean them from the country, they are like dirt.'...."); Witness Statement, DAR-OTP-0088-0150 (Anx H, line 48) at 0158 at paras. 45-46 ([After describing rape attack] "Those who abducted us told us that "Ibnal kelb, al arat ma-hagatkum which in Arabic means "little dog, this land is not for you"....").

said that the ¾ signified that the Fur, Zaghawa and Masalit were going to be targeted by him.⁶⁶

During both attacks the Janjaweed insulted us and called us several names. They said that we were the wives and *mothers of Toro Bora [rebels] and called us black Nubas....* During the second attack I remember the Janjaweed saying that they will wipe us out, and that we are of no benefit to them. . . . *They said clearly that they had permission from the government so as to wipe us out, to kill us, to chase us away, and that we women who were there were their wives.*⁶⁷

The fursan said they were sent and ordered not to leave any Nuba. . . . *They also told the men that they were sent to kill every black thing except the Laloba and Daylabc trees which are also black....*⁶⁸

Quoting a secret memorandum allegedly circulated within the National Islamic Front, a book excerpt submitted by the Prosecution explained,

*'... the Islamic Movement has overlooked this tribe and worked towards strengthening other tribes in the spirit of dividing up the elements that make up the Sultanate of Darfur (the Fur, Tanjur and others'). The Islamic Movement will not be appeased so long as this tribe [the Fur] is not undermined or exterminated, so that the western front remains safe.'*⁶⁹

3) Contextual evidence

i) Plans, policies and preparation

42. Although the existence of a genocidal plan or policy has not been considered a legal element of the crime of genocide under *ad hoc* tribunal jurisprudence, proof of such a plan or policy has been deemed relevant to the formation of intent.⁷⁰ A Chamber may infer the existence of such a plan or policy from a variety of indicia. Proof of governmental involvement in attacks,⁷¹ through the involvement of public officials or soldiers in carrying

⁶⁶ Witness Statement, DAR-OTP-0095-0049 (Anx 25) at 0076- 0077 at para. 128 (emphasis added).

⁶⁷ Witness Statement, DAR-OTP-0088-0187 (Anx 20) at para. 47 (emphasis added).

⁶⁸ Witness Statement, DAR-OTP-0088- 0219 (Anx 21) at 0230 at paras. 65-66 (emphasis added).

⁶⁹ Book: Darfur Dotting The 'i's And Crossing The 't's by Professor Sulayman Hamid Al Hajj, DAR-OTP-0150-0105 (Anx 82) at 0118 (emphasis added).

⁷⁰ ICTY, *Prosecutor v Jelisić*, Case No. IT-95-10-A, Appeals Judgment, 5 July 2001, para. 48; see also ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 94.

⁷¹ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 309 – 312; ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para. 35.

out the attacks,⁷² or through the provision of transportation for the attackers⁷³ have been considered relevant in this regard.

43. The Prosecution submits a variety of different types of evidence describing the involvement of the GoS through the presence and participation of members of the Sudanese Armed Forces in attacks,⁷⁴ through the supply of arms to the Janjaweed,⁷⁵ and through the direction of discriminatory acts by a member of the Sudanese military.⁷⁶

⁷² ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 536; ICTR, *Prosecutor v Niyitegeka*, Case No. ICTR-96-14-T, Trial Judgment, 16 May 2003, para. 414; ICTR, *Prosecutor v Kamuhanda*, Case No. ICTR-95-54A-T, Trial Judgment, 22 January 2005, para. 644.

⁷³ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 536

⁷⁴ Witness Statement, DAR-OTP-0084-0507 (Anx J2) at 0513 at para. 30 (“From the mountain, I could see clearly the Janjaweed with their horses and *the government troops behind them*. The troops started shooting, they had Doshka guns on their cars and other big weapons -I do not know the exact type. The army vehicles had yellow number plates as all army vehicles do have. I saw the soldiers shooting the people that could not manage to get right up the hill area, the elderly, the people who couldn't run. They were shooting with doshkaks and some of them had shoulder-held guns. The army had been guarding the Janjaweed from the outside of the village while the Janjaweed attacked us. From the mountain, I saw the army's uniforms and their landcruisers. Most of the cars were the same mixture of colours as the uniforms I already described.”) (emphasis added); Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0065 at para. 21 (“At about 0900 hrs [on 15/08/2003], the Janjaweed and government soldiers attacked the town [Bendisi] from the east. I was in my house. All the government soldiers arrived in 7 camouflaged-coloured Toyota Land Cruisers. The trucks had 'Doshkas' mounted on them. The Janjaweed were on horseback and camelback. Some of the Janjaweed were on foot. They started firing randomly.”); Witness Statement, DAR-OTP-0126-0005 (Anx 77) at para. 13 (“After the air bombing Janjaweed and soldiers entered the village. The soldiers had cars with guns on them. The Janjaweed were riding on horses and camels. The Janjaweed gathered the cattle. The soldiers shot doors open and gathered belongings like mattresses. Both Janjaweed and soldiers killed a number of people when they found them in their houses. While the Janjaweed were doing this they sang "Hail the name of Allah, our orders came from Ali Usman TAHA.”); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at para. 315 (“The destruction was targeted at the areas of habitation of African tribes, in particular the Fur, Zaghawa and Massalit. There was no military necessity for the destruction and devastation caused as a joint venture by the Janjaweed and the Government forces.”).

⁷⁵ See, e.g. Witness Statement, DAR-OTP-0088-0187 (Anx 20) at 0192-0193 at paras. 20-29 (“The Janjaweed are a group of people armed by the Sudanese government comprising of Arabs, Gimir and Tama; they are not well trained. As far as I know they were trained in June and July 2003 and received their weapons from the Reserve Force.”).

⁷⁶ DAR-OTP-0120-0678 (Anx H, line 818) at 0148 (“Prominent members of the Masalit community were arrested, imprisoned and tortured; Masalit civilians were disarmed, placed under curfew and restricted in their movements; Masalit youths were forcibly conscripted and sent to Southern Sudan to fight. In a three-year war, 1996-98, hundreds of civilians were killed. most of them by government-backed militias. Another 100,000 fled to Chad.... The atrocities were well planned, and *directed by the Sudanese military governor of the area.*”) (emphasis added).

44. Evidence tending to show that preparations for genocide, such as the mobilisation of civil defence forces or militia groups⁷⁷ and the distribution of weapons to civilians,⁷⁸ would also support an inference that a genocidal plan existed.

45. The Prosecution submits numerous witness statements and other evidence which each describe the mobilisation and involvement of the civil defence forces in attacks.⁷⁹ Further, both the UNCOI Report and witness statements submitted by the Prosecution describe the distribution of arms by the GoS to the civilian Arab, Gimir and Tama population.⁸⁰

46. Additionally, indicia such as (i) the existence of execution lists targeting the protected group; (ii) the dissemination of extremist ideology; and (iii) the

⁷⁷ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 283, 284.

⁷⁸ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 298.

⁷⁹ Witness Statement, DAR-OTP-0119-0711 (Anx 66) at 0714-0721 at para. 15; Witness Statement, DAR-OTP-0097-0639 (Anx 29) at 0643- 0645 at para. 19; Investigator's Notes, DAR-OTP-0014-0213 (Anx 14) at 0213; DAR-OTP-0116-0889 (Anx 57) at 0891.

⁸⁰ Witness Statement DAR-OTP-0088-0219 (Anx 21) at para. 15 ("Soon after . . . there was a general call to receive weapons. However, when some men went to receive their weapons they were informed that the distribution is restricted to Arabs, Tama and Gimir. . . eventually, these were the people who got the weapons."); Witness Statement, DAR-OTP-0097-0328 (Anx 27) at para. 19 ("I am aware of three cases of weapons distribution in Garsila area. In the first case I observed a gathering of Arabs, Tama and Gimir, receiving their firearms from the intelligence office in 2001. . . 20. The weapons distribution started at around 9:00am and ended around 2:00pm. From my position in the market I could see the large gathering around the intelligence office of Arabs, and a few Tama and Gimir. . . There was definitely no Fur person among the gathering."); Witness Statement, DAR-OTP-0118-0002 (Anx 59) at 0026-0027 at paras. 126 – 127 ("Before that part of the government's work was not apparent but after calling Musa HILAL to the meeting it started freely arming, recruiting and training the Arabs and coordinating with the police. MUSTAFA told me that this meeting involved Salah GOSH, Brigadier General Omar Dafaai Al SID (Director of the Society Security) and Colonel Abbas Ali KHALIFA."); Witness Statement, DAR-OTP-0156-0164 (Anx H, line 803) at 0178 at para. 58 ("The plan of the Islamic Front is to support the Arab tribes by taking the following measures: . . . We shall arm the Arab tribes in order to make them the nucleus of the Arabic, Islamic congregation."); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at n 189 ("Epithets that eyewitnesses or victims reported to the Commission include the following: "This is your end. The Government armed me."); UNCOI Material, DAR-OTP-0011-0111 at 0018-0019 ("By the government who gave them uniforms and arms. The witness knows this because the type of uniforms and weapons are only available from the government. The Janjaweed are regarded as PDF because their uniforms and arms are distributed from the PDF Headquarters north of Nyala. There are 85 OMDA's in the Nyala region. The Arab OMDA's were invited to mobilize their tribesmen as army through the PDF. Witness was told this by Arab Omda's. (The witness opinion is that GOS believe all non-Arab Omda are rebels or rebel supporters.) The Arab Omda's attended a mobilization meeting at PDF HQ and received uniforms and arms.").

screening and selection of victims on the basis of their membership in the protected group may also be relevant to show the formation of intent.⁸¹ Moreover, the existence of a plan or project to create an ethnically homogenous state, along with evidence of an intent to exclude non-members by violence and evidence that the targeted group could not lay claim to any specific territory, has been held to support an inference that the plan contemplates the destruction of the non-member ethnic groups.⁸²

47. The Prosecution submits the following evidence which would be relevant to the existence of a plan. According to one witness,

The Government believed that the strongest rebel component was the Zaghawa tribe, and that therefore the Zaghawa tribe had to be destroyed. . . in similar fashion the Government believed that the Massalit and Fur supported the rebels and that they therefore had to be driven out of their lands. *This was a hidden agenda* which is only obvious from the effect on the ground in Darfur, as told to me by the civilian population, military colleagues and fellow detainees. . . .⁸³

Another witness recalled,

. . . the NIF issued a secret bulletin in 1992 relating to the Fur. It was entitled 'vision on the Fur for the future perspective'. After a historical introduction on the Fur the document indicated that they were to be excluded from key positions in the intelligence service, military, or the police administration and secondly, the Fur areas were to be destabilized in order to instigate the moving out of the Fur from Darfur. . . .⁸⁴

As mentioned previously, a memorandum allegedly circulated within the National Islamic Front and submitted by the Prosecution stated,

The Revolution has decided to bypass this tribe, [even though] it occupies a strategic place in dissemination the concepts of the Islamic Movement to Western and Central Africa. It also occupies an area considered to be the Movement's last line of defence in the event of its being cornered. . . . *The Movement will not feel*

⁸¹ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-A, Appeals Judgment, 1 June 2001, para. 139.

⁸² ICTY, *Prosecutor v Karadžić*, Case No. IT-95-5/IT-18-1-R-61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94.

⁸³ Witness Statement, DAR-OTP-0125- 0665 (Anx J47) at 675 at paras. 55, 56 (emphasis added).

⁸⁴ Witness Statement, DAR-OTP-0095-0002 (Anx J95) at 0007 at para. 20.

*safe until this tribe [the Fur] is contained or exterminated and the Western front made secure. . . .*⁸⁵

A book excerpt submitted by the Prosecution corroborates this report:

The document is irrefutable evidence of the insistence by the National Islamic Front to go on with the plot despite the failings it has faced in Darfur. . . . In the same document it is stated: "For these reasons, the Islamic Movement has overlooked this tribe and worked towards strengthening other tribes in the spirit of dividing up the elements that make up the Sultanate of Darfur (the Fur, Tanjur and others'). *The Islamic Movement will not be appeased so long as this tribe is not undermined or exterminated, so that the western front remains safe.*" This is exactly what is happening in Darfur now before our very eyes: a war to completely exterminate the tribe that does not discriminate between men, women and children or the elderly or disabled. Instead, the people in the camps in Darfur and Chad, and the sick in hospitals are pursued and killed until they have been finished off. They burn the houses and the things and people inside them, obliterate the villages, markets and farms and the people there, turning it into a wasteland devoid of any Darfuris.⁸⁶

ii) Evidence of modus operandi

48. The general context of the perpetration may also support an inference that the perpetrator had formulated intent. For example, where it is demonstrated that acts of a consistent character have been systematically directed against a protected group, such acts may support an inference that intent has been formulated.⁸⁷ Such evidence may include, in particular, evidence of killings perpetrated in a systematic manner,⁸⁸ evidence tending to show that types of

⁸⁵ The Islamic Movement and the Fur Tribe (A secret report), DAR-OTP-0095- 0218 at 0223, English translation at DAR-OTP-0148-0101 (Anx H, line 45) at 0103- 0106.

⁸⁶ Book: Darfur Dotting The 'i's And Crossing The 't's by Professor Sulayman Hamid Al Hajj, DAR-OTP-0150-0105 (Anx 82) at 0108 and 0115- 0118 (emphasis added).

⁸⁷ ICTY, *Prosecutor v Jelisić*, Case No. IT-95-10-A, Appeals Judgment, 5 July 2001, para.47; ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 523; ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93, 289, 534, 535, 537; ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 496; Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations, para. 111.

⁸⁸ ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 547. Some evidence presented in relation to this aspect may also be relevant to extermination as a crime against humanity, which requires the Prosecution to demonstrate that "the conduct constituted, or took place as part of, a mass killing of members of a civilian population." Article 7(1)(b), Elements of Crimes.

weapons and methods employed by the attackers were consistent across attacks,⁸⁹ and evidence of a consistent *modus operandi* across attacks.⁹⁰

49. Evidence submitted by the Prosecution in relation to the contextual elements of crimes against humanity, as well as in relation to extermination, is therefore relevant here as evidence of killings perpetrated in a systematic manner.⁹¹ Additionally, the Prosecution submits witness statements which report the use of consistent types of weaponry,⁹² and are also corroborated by the UNCOI report.⁹³

50. The Prosecution further submits evidence tending to show that a consistent *modus operandi*, entailing a joint attack by the GoS and Janjaweed forces accompanied or followed by air support, was used consistently. The following accounts by witnesses are representative of other witness statements submitted as well:⁹⁴

⁸⁹ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 537.

⁹⁰ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 535; ICTY, *Prosecutor v Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 88.

⁹¹ See Majority Decision, paras. 94 and 97; evidence cited in footnotes 111 and 115 of Majority Decision.

⁹² See, e.g., Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0064-0072 at para. 21 (“All the government soldiers arrived in 7 camouflaged-coloured Toyota Land Cruisers. The trucks had ‘Doshkas’ mounted on them.”); Witness Statement, DAR-OTP-0084-0507 (Anx J2) at 0513 at para. 30 (“The troops started shooting, they had Doshka guns on their cars and other big weapons -I do not know the exact type.”).

⁹³ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0070, 0071 at para. 253 (“Ground forces used various weapons including AK47, G3, G4 assault rifles, RPG7, machine guns, and Doshka 12,7mm machine gun mounted on vehicles.”).

⁹⁴ See also Witness Statement, DAR-OTP-0084-0507 (Anx J2) at 0513 at para. 30 (“From the mountain, I could see clearly the Janjaweed with their horses and the government troops behind them. The troops started shooting, they had Doshka guns on their cars and other big weapons -I do not know the exact type. The army vehicles had yellow number plates as all army vehicles do have. I saw the soldiers shooting the people that could not manage to get right up the hill area, the elderly, the people who couldn’t run. They were shooting with doshkas and some of them had shoulder-held guns. The army had been guarding the Janjaweed from the outside of the village while the Janjaweed attacked us. From the mountain, I saw the army’s uniforms and their landcruisers. Most of the cars were the same mixture of colours as the uniforms I already described.”); Witness Statement, DAR-OTP-0094-0091 (Anx H, line 76) at 0100 at para. 37 (“From the mountain, I could see that Arwala was surrounded by some Janjaweed and Asakir, whilst others entered. The Asakir and Janjaweed shot at the villagers; I saw some of them running to nearby mountains and some entered into farms and sugar cane plantation. I heard the cries of people and animals. Some villagers were shot and killed and others died when they were trampled on by horses. The Janjaweed and Asakir slept in Arwala after burning it down. While

All the government soldiers arrived in 7 camouflaged-coloured Toyota Land Cruisers. The trucks had 'Doshkas' mounted on them. The Janjaweed were on horseback and camelback. Some of the Janjaweed were on foot. They started firing randomly. At first, nobody thought it was an attack because of the message the soldiers had delivered about 'Azzakat' earlier that morning. When the attackers got closer to the town, they started killing people and set fire to the huts... 3 combat aircrafts also arrived and started bombing the town. There were 2 Antonovs and 1 Hercules.⁹⁵

"About an hour after hearing the shots, I saw four brown land cruisers approaching from the same direction. . . I first saw three of the four land cruisers in the market on the 14' which was a market day. ... The land cruisers which had about 40 or 50 asakir on them stopped by the high secondary school. ... The four land cruisers had weapons and ammunition tied around the trucks. ... Not long after, I saw a large number of Janjaweed on camels and horses approaching from the East. There were more than 500 of them and they started shooting randomly at people inside the town. . . . As this was going on I heard a loud sound like an explosion. My father told me that this was the sound of Dana and that we should run. . . . Around 1700 hrs I heard the sound of planes. . . I saw two planes approaching from the east of [REDACTED] . . . I know that they called Antinovs and it wasn't the first time they flew over [REDACTED]."⁹⁶

These descriptions are also consistent with reports by NGOs.⁹⁷

iii) Evidence of breadth and scale

51. *Ad hoc* tribunal trial chambers have also considered the breadth and scale of attacks,⁹⁸ as well as whether or not such attacks were widespread, to be relevant to an inference of the formation of intent.⁹⁹ In some instances,

the attack was taking place. I saw two white antinovs and one black helicopter from the East, circle over Arwala and then they went to the direction of Garsila; they went back, circled again and then went to the East from where they had originally come."); Witness Statement, DAR-OTP-0094-0119 (Anx J70), at paras. 60-64: On August 15, 2003, the Kodooms were attacked. . . . the Janjaweed arrived on horses and camels, accompanied by a vehicle which carried Asakir and had a Doshka mounted on it. . . . A group of Janjaweed then came to the forest and started shooting when they saw us. We escaped all the bullets. . . . After that, I saw a vehicle with Doshka on it but could not tell whether there were Janjaweed or Asakir on board. The soldiers started shooting with the Doshka so we ran into a brook and stood under a tree which had many long branches hanging down. After shooting for a while, they left in the direction of Merly. . . .").

⁹⁵ Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0064-0072 at para. 21.

⁹⁶ Witness Statement DAR-OTP-0088- 0187 (Anx 20) at 0192 - 0197 at paras. 23 - 46.

⁹⁷ Human Rights Watch Report "Terbeba: twenty-six killed, DAR-OTP-0003-0099 (Anx J9) at 0121-0122 ("The attack was done by some 300 Janjaweed on horses and camels, accompanied by four government cars - three Land Cruisers carrying soldiers and a Renault for logistics [ammunition].").

⁹⁸ ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para.35; ICTR, *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, para. 258; ICTR, *Prosecutor v Kamuhanda*, Case No. ICTR-95-54A-T, Trial Judgment, 22 January 2005, para. 629.

⁹⁹ ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 730; ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, paras.

however, a particularly brutal attack targeting several thousand members of a group can indicate the existence of intent.¹⁰⁰ Additionally, the proportion of the group who were victims of genocidal acts may be considered in connection with the scale of the attacks.¹⁰¹

52. In addition to the evidence discussed in connection with crimes against humanity,¹⁰² the Prosecution submits additional evidence which demonstrates the breadth and scale of the attacks. For example, a witness reported that around August 2003, more than 45 villages in the Bendisi area were attacked.¹⁰³ According to one NGO report,

Since April 2003, many cases of killings targeting particularly the Fur tribes have been reported . . . in March 2004, 168 persons belonging to the Fur tribes were arrested in Zaray, Fairgo, Tairgo and Kaskildo and were summarily executed in Delaj, Wadi Salih province; - in April 2004, the bombing of Mahajrea village killed four civilians, belonging to the Zakhawa tribe. Most of these killings have been accompanied by looting and burning of properties. Many cases of torture directed at member of Fur tribes have also been reported, as well as cases of arbitrary arrests....¹⁰⁴

Another NGO reported,

Villagers from the Garsila area . . . woke up on March 5, 2004, to find an area encompassing thirty-two villages surrounded by government troops and Janjaweed. The government and militia forces then entered the villages and began asking men where they came from. One hundred and four individuals - most of them people who had been displaced from villages in the Zara and

496, 498, 516; ICTR, *Prosecutor v. Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T, Trial Judgment, 21 February 2003, para. 785.

¹⁰⁰ ICTR, *Prosecutor v. Nindabahizi*, Case No. ICTR-2001-71-T, Trial Judgment, 15 July 2004, para. 461. Such evidence may also demonstrate that the object of the formulated intent is the destruction of the target group. See para. 68, *infra*.

¹⁰¹ ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 974 (analysing the proportion of the group that were victims under articles 4(2)(a), 4(2)(b) and 4(2)(c) of the Statute).

¹⁰² In this regard, the evidence discussed in connection with crimes against humanity is relevant as well. See *generally* Majority Decision Part IV.A. 2. The evidence submitted by the Prosecution and discussed above in connection with planning is also relevant here.

¹⁰³ Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0064-0072 at para. 18. See also Amnesty International report, DAR-OTP-0002-0207 (Anx J5) at 0243 ("Reports alleged that 300 villages had been attacked or burnt to the ground in the [Kabkabiya] area.").

¹⁰⁴ International Federation for Human Rights and SOAT Report, DAR-OTP-0090-0377 (Anx H, line 90) at 0381.

Kaskildo areas south-east of Deleig, in the hills, and many of them sheikhs and omdas - were taken to the government jail in Deleig. That same night, according to local people, seventy-two of the 104 were loaded into army trucks by government and militia forces, and driven two kilometers to a valley where they were executed.¹⁰⁵

As of 2005, at least 700 villages in Darfur had been completely or partially destroyed, resulting in as many as 1.65 million internally displaced persons, in addition to 200,000 refugees in Chad.¹⁰⁶

iv) Other factors

53. Other relevant "general context" factors considered by the *ad hoc* tribunal trial chambers include, *inter alia*: whether bodily injuries were extensive, whether property belonging to members of the targeted group was targeted, and whether derogatory language was used by an accused or by others against members of the target group.¹⁰⁷

54. The Prosecution submits a variety of evidence of rape as extensive bodily injury. For example, according to the UNCOI Report,

The [...] patterns appear to indicate that rape and sexual violence have been used by the Janjaweed and Government soldiers (or at least with their complicity) as a deliberate strategy with a view to achieve certain objectives, including terrorizing the population, ensuring control over the movement of the IDP population and perpetuating its displacement. Cases like Kailek demonstrate that rape was used as a means to demoralize and humiliate the population.¹⁰⁸

¹⁰⁵ HRW Report, DAR-OTP-0090-0173 (Anx 22) at 0186.

¹⁰⁶ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0066, at paras. 226 and 236.

¹⁰⁷ ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 496; ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 728.

¹⁰⁸ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0095, para. 353. *See also* UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0090, para. 333 ("Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called "slaves" or "Tora Bora.").

One witness explained,

See, they kill our males and then dilute our blood with rape. The Arabs want to finish us as a people, end our history. We are not wanted and here to be unwanted is a crime. . . .¹⁰⁹

55. The Prosecution also submits evidence of derogatory language being used against the target group. The UNCOI reported that even though other types of derogatory language were also used,

[i]n many cases militias attacking "African" villages tend to use derogatory epithets, such as "slaves", "blacks", Nuba", or "Zurga"¹¹⁰

One witness reported that the attackers

would curse and swear at [the victims] saying 'these are animals, these are ignorant, kill them!' They would also say 'clean them from the country, they are like dirt.'¹¹¹

After describing a rape attack, another witness reported that

Those who abducted us told us that "Ibna kelb, al arat ma-hagatkum" which in Arabic means "little dog, this land is not for you"....¹¹²

b) The existence of an intent to destroy (a group)

1) *The extent and nature of the intended destruction*

56. The distinguishing element of the *dolus specialis* of genocide is the intent to *destroy* a protected group. The extent of the destructive intent, however,

¹⁰⁹ Annex to Witness Statement, Annex DAR-OTP-0112-0320 at 0322 to DAR-OTP-0116-1034 (Anx58) (quoted in Prosecution Application, para. 395).

¹¹⁰ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at para. 511; *see also* Witness Transcript, DAR-OTP-0147-0071 at 0103 (explaining that the term 'Zurga' is a derogatory term that is meant as an insult).

¹¹¹ Witness Statement, DAR-OTP-0107-0781 (Anx J16) at 0784 at para. 12.

¹¹² Witness Statement, DAR-OTP-0088-0150 (Anx H, line 48) at 0158 at paras. 45-46; *see also* Amnesty International Report October 2006, DAR-OTP-0138-0006 (Anx H, line 50) at 0013 ("The Janjawid told me: 'You are a *Nuba woman, daughter of a whore*. You have no right to these cattle and they do not belong to you'") (emphasis added).

should be distinguished from the requisite intent for ethnic cleansing,¹¹³ under which a perpetrator intends to target an ethnic group, such as by expelling the group from an area, yet lacks the intent to *destroy* that ethnic group within the area. The nature of the destructive intent can also be distinguished from the requisite intent for forced displacement as a crime against humanity. Both of the aforementioned crimes lack the element of an intent to destroy.

57. There is a divergence of jurisprudence, however, as to the evidentiary significance of forced displacement with respect to the establishment of genocidal intent. Although the genocidal *actus reus* must consist of one of the listed acts, there has been disagreement over the question of whether, for purposes of demonstrating that an accused possessed genocidal intent, it must be shown that the accused intended to cause the physical or biological destruction of the intended group. Further, there is a lack of consensus regarding what constitutes the physical destruction of the group.

58. Following the approach of the International Law Commission, some *ad hoc* tribunal trial chambers have held that evidence of the perpetrator's intent to destroy must consist of an intent to destroy the group in a biological or physical sense. According to these chambers, such intent must be distinguished from an intent to commit other forms of destruction of the group.¹¹⁴

¹¹³ Ethnic cleansing is often classified as persecution as a crime against humanity. See ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 562 and 578.

¹¹⁴ See, e.g., ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, paras. 976-978, 981-982; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, paras. 553-554; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 315 (citing Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 90, UN Doc. A/51/10 (1996) (“As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.”)).

59. In this regard, the Prosecution submits a variety of evidence which demonstrates an intent to physically destroy. One witness reported,

I heard them [the attackers] say, in Arabic, that they did not want any black person to survive.¹¹⁵

According to a report allegedly circulated within the National Islamic Front,

The Revolution has decided to bypass this tribe, [even though] it occupies a strategic place in dissemination the concepts of the Islamic Movement to Western and Central Africa. It also occupies an area considered to be the Movement's last line of defence in the event of its being cornered. The Movement has thus bypassed this tribe and undertaken to reinforce other powers in the States of Greater Darfur. It has invited heavily armed Chadian tribes into Darfur as well as....promoting divide and rule amongst the elements making up the Fur Sultanate (Fur, Tunjur, etc). *The Movement will not feel safe until this tribe is contained or exterminated and the Western front made secure . . .*¹¹⁶

Another witness corroborated this:

In KORNOI, I heard about what was going on in the rest of the region. People said that all the Government was going to wipe out the rest of the Zaghawas who were still in the area.¹¹⁷

¹¹⁵ Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0065 at para. 21.

¹¹⁶ The Islamic Movement and the Fur Tribe (A secret report), DAR-OTP-0095- 0218 at 0223, English translation at DAR-OTP-0148-0101 (Anx H, line 45) at 0103- 0106 (emphasis added); *see also* Book: Darfur Dotting The 'i's And Crossing The 't's by Professor Sulayman Hamid Al Hajj, DAR-OTP-0150-0105 (Anx 82) at 0108 and 0115- 0118.

¹¹⁷ Witness Statement, DAR-OTP-0079-0244 (Anx H, line 63) at 0253 at para. 48. *See also* Witness Statement, DAR-OTP-0125- 0665 (Anx J47) at 675 at paras. 55, 56 ("The Government believed that the strongest rebel component was the Zaghawa tribe, and that therefore the Zaghawa tribe had to be destroyed. . . in similar fashion the Government believed that the Massalit and Fur supported the rebels and that they therefore had to be driven out of their lands."); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at para. 245 ("In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. When asked why they believed they were attacked, some witnesses stated 'because they want our land and cattle' or '*they want to eliminate us from the area*'. Other witnesses referred to statements made by their aggressors during some of the attacks, such as 'you are Tora Bora, the SLA are your families', 'the Fur are slaves, we will kill them', '*we are here to eradicate blacks (nuba)*', 'we will drive you into poverty', 'this is not your land' or 'you are not from here'. When asked about the presence of armed groups within the villages, most witnesses denied the existence of rebels in their villages at the time they were attacked.") (emphasis added); Physicians for Human Rights Report, 2006, DAR-OTP-0119-0635 (Anx J44) at 0644, 0688 ("The men accused them [the group] of being rebel supporters, demanded to know where the men were, and at least one time threatened to shoot them. "One said, 'We have to kill them, "' she said. "But others said, 'Don't bother, don't waste the bullet, they've got nothing to eat and they'll die from hunger.'").

60. The focus on physical destruction in relation to intent was expressly rejected by Judge Shahabuddeen, however, in his partially dissenting opinion in the *Krstić* Appeal. According to his view, while the terms of the Genocide Convention and the ICTY Statute specify that the “listed act” – or *actus reus* – of the crime of genocide must consist of an act of physical or biological destruction, it is sufficient to demonstrate that the intent with which that act was perpetrated encompassed the destruction of the group, regardless of whether such intended destruction was to be physical, biological, social or cultural.¹¹⁸

61. Another chamber later held that an intent to destroy the group through forcible transfer alone could constitute genocidal intent “when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members.”¹¹⁹

62. In order to preserve the choice for a later Trial Chamber to determine which approach it will follow at trial, I adopt the more expansive approach outlined by Judge Shahabuddeen when considering the relevance of evidence of forced displacement in connection with determining whether or not there are reasonable grounds to believe that genocidal intent existed.

63. In addition to the evidence discussed in connection with crimes against humanity, I highlight the following evidence submitted by the Prosecution. A UN Inter-Agency Fact-Finding and Rapid Assessment Mission in Kailek, South Darfur reported that

¹¹⁸ ICTY, Partial Dissenting Opinion of Judge Shahabuddeen, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, paras. 49-50 (citation omitted). Judge Shahabuddeen explicitly stated that he was not making an argument for the recognition of cultural genocide as a genocidal *actus reus*, as he was drawing a distinction as to the intent of the crime only. Nevertheless, he recognised that “the destruction of culture may serve evidentially to confirm an intent, to be gathered from the circumstances to destroy the group as such.” *Id* at para. 53.

¹¹⁹ ICTY, *Prosecutor v Blagojević*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, para. 666.

[t]he 23 Fur villages in the Shattaya Administrative Unit have been completely depopulated, looted and burnt to the ground (the team observed several such sites driving through the area for two days).¹²⁰

During its investigation, the UNCOI found that

Many reports also note that villages were burnt even after these had been abandoned by the inhabitants who fled to IDP camps in larger urban centres in Darfur, or to neighbouring Chad. This has led many observers to fear that this is a part of the policy executed through the Janjaweed to expel the population from the targeted areas and to prevent the immediate or, possibly, long-term return of the inhabitants.¹²¹

2) *The focus of the destructive intent*

64. The focus of the destructive intent required for genocide must also be distinguished from the intent to destroy rebels and sources of support for rebels to the extent that they are considered combatants. Within the framework established by customary international law, however, the suppression and targeting of rebel groups and their supporters is legal only to the extent that the targeted persons are combatants.¹²² Civilians, by contrast, do not lose their protected status and become legitimate targets until they participate in hostilities to the extent that they become combatants.¹²³ For example, it would not be permissible to make a blanket assumption that members of a protected group are, by definition, rebels or rebel supporters and to target or seek to destroy them accordingly.

¹²⁰ DAR-OTP-0030-066 (Anx J63) at 0068.

¹²¹ UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0084 at para. 304; *see also* UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0163 at para. 636 (“It is estimated that more than 1,8 million persons have been forcibly displaced from their homes, and are now hosted in IDP sites throughout Darfur, as well as in refugee camps in Chad. The Commission finds that the forced displacement of the civilian population was both systematic and widespread, and such action would amount to a crime against humanity.”).

¹²² Article 3(1) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

¹²³ Article 51(3) of the Protocol I of 10 June 1977, Additional to the Geneva Conventions of 12 August 1949 (“Additional Protocol I”); Article 13(3) of the Protocol II of 10 June 1977, Additional to the Geneva Conventions of 12 August 1949. Moreover, “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Article 50(1) of Additional Protocol I.

65. Indeed, throughout history, groups who were subjected to genocide were targeted on the basis of an allegation that they posed a threat to the perpetrating group. For example, during the Rwandan genocide, Hutu perpetrators accused members of the Tutsi ethnicity of supporting the RPF, a rebel group. Yet, government-authored execution lists of Tutsi who were “suspected” RPF members and supporters were considered evidence of genocidal intent,¹²⁴ rather than evidence of an intent to target rebels. Similarly, the systematic and indiscriminate targeting of Mayan civilians in Guatemala on the basis of their ethnicity and under the pretext that they were supporting rebels was found to constitute genocide, not an operation to eradicate support for rebel groups.¹²⁵

66. Thus, even if some evidence indicates that some members of the “African tribes” were assisting rebels, as suggested by the Majority,¹²⁶ such evidence would not legitimize an estimation that the entire group of “African tribes” was a lawful target.

c) The existence of an intent to destroy a group *as such*

1) “In part”: the substantial part requirement

67. When evaluating whether an Accused formulated intent to destroy a protected group “in part”, such part has been required to be “substantial”.¹²⁷ While it should be remembered that the *ad hoc* tribunals have held that there is no numeric threshold of victims necessary to establish genocide,¹²⁸

¹²⁴ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 309.

¹²⁵ See e.g. Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations, para. 111.

¹²⁶ Majority Decision, para. 180.

¹²⁷ ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 586; ICTR, *Prosecutor v Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgment, 7 June 2001, para. 64.

¹²⁸ ICTR, *Prosecutor v Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgment, 1 December 2003, para. 809.

substantiality is indeed defined not only in terms of numerosity,¹²⁹ but also in relation to other factors. For example, if only a part of the group is targeted, the proportion of the targeted group in relation to the protected group as a whole, as well as the prominence of the targeted group within the protected group may be relevant to a determination of substantiality.¹³⁰ The perpetrator's zone of control may also be relevant. According to the *Krstić* Appeals Chamber, for example, the destructive intent of the Nazis would be considered in the context of the extent of the Nazi regime's territorial control.¹³¹

68. In this regard, in order to demonstrate numerosity, the Prosecution submits evidence tending to show that (i) between 2705 and 3413 persons were killed directly in connection with nine attacks on predominantly Fur villages;¹³² (ii) approximately 530 persons were killed directly in connection with three attacks on predominantly Masalit villages;¹³³ and (iii) approximately 925 persons were killed during five attacks on predominantly Zaghawa villages.¹³⁴

¹²⁹ ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 97.

¹³⁰ ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para.12-13.

¹³¹ ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para.12-13.

¹³² See Prosecution Application, para. 107 (citing UNCOI Material, DAR-OTP-0011-0077 at 0078-0079; Public Source, DAR-OTP-0002-0207 at 0243; Public Source DAR-OTP-0090-0377; Witness Statement, DAR-OTP-0112-0142 at 0151-0152 paras 45-46; Witness Statement, DAR-OTP-0095-0095 at 0107-0011 paras 73-107; UNCOI Material DAR-OTP-0010-0229 at 0255; UNCOI Material DAR-OTP-0018-0010 at 0077 para. 272; UNCOI Material DAR-OTP-0055-0224 at 0229; Witness Statement, DAR-OTP-0088-0038 at 0042-0046, paras. 18-35; Witness Statement, DAR-OTP-0124-0196 at 0215 para. 116; Witness Statement, DAR-OTP-0112-0175 at 0195-0196; Witness Statement, DAR-OTP-00126-0005; UNCOI Material DAR-OTP-0010-0003 at 0036; UNCOI Material DAR-OTP-0018-0010 at 0078 para. 273; SOAT statement, DAR-OTP-0087-0327; Witness Statement, DAR-OTP-0119-0711 at 0718 para. 37; Witness Statement, DAR-OTP-0119-0711 at 0719 para. 41; Video Material, DAR-OTP-0028-0199).

¹³³ See Prosecution Application, para. 108 (citing Witness Statement, DAR-OTP-0088-0262 at 0275-0276, paras 81-82; Public Source, DAR-OTP-0138-0024, at 0026 and 0028; Public Source, DAR-OTP-0108-0562, at para. 32 Public Source, DAR-OTP-0147-0931 at 0936; Public Source DAR-OTP-0147-1230 at 1271 para 169; Public Source DAR-OTP- 0147-1125 at 1194-1195 paras 240 - 244(a)).

¹³⁴ See Prosecution Application, para. 109 (citing Witness Statement, DAR-OTP-0107-0473 at 0487-0488 para. 64, Public Source DAR-OTP-0121-0084; Public Source DAR-OTP-0121-0078; Public Source, DAR-OTP-0121-0086; Witness Statement, DAR-OTP-0095-0660 at 0669 paras 37, 38 and 40 and Witness Statement, DAR-OTP-0094-0668; Witness Statement, DAR-OTP- 0094-0064 at 0075-

69. In relation to the proportion of the protected group that has been targeted, the Prosecution submits its own calculation based on primary source data contained in a UNHCR report.¹³⁵ According to the Prosecution, 97% of predominantly Fur and 85% of predominantly Masalit villages within the area of three administrative units, Habila, Wadi Saleh and Mukjar, were attacked.¹³⁶

2) *The term as such*

70. The inclusion of the term *as such* reemphasises the focus of the prohibition of genocide: the destruction of the protected group itself, rather than the destruction of its individual members. As the *Akayesu* Trial Chamber put it, “[t]he victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual”.¹³⁷ As a result, in order to consider whether there are reasonable grounds to believe that an alleged perpetrator intended to destroy the group *as such*, the Prosecution must submit evidence showing that the victims were targeted by reason of their membership in the protected group.¹³⁸

71. In this respect, the crimes of genocide and persecution as a crime against humanity can seem similar, as both contain an element of discriminatory targeting. Genocidal intent is distinguishable from persecutorial intent,

0079; Public Source, DAR-OTP-0121-0014; Public Source, DAR-OTP 0121-0036 at 0037; Public Source, DAR-OTP-0121-0039; Public Source, DAR-OTP-0138-0024, at 0026 and 0028; Public Source, DAR-OTP-0108-0562, at para. 32. Public Source, DAR-OTP-0147-0931 at 0936; Public Source DAR-OTP-0147-1230 at 1271 para. 169; Public Source DAR-OTP-0147-1125 at 1194-1195 paras 240 - 244(a)).

¹³⁵ UNCHR Report, “Monitoring of Returns in Southern West Darfur”, DAR-OTP-0145-0237 (Anx J2). In order to preserve flexibility for a future Trial Chamber to select an approach to the evidence, I follow the approach of the *Brđanin* Trial Chamber, which considered the proportion of the protected group that were victims of all genocidal acts within the scope of the ICTY Statute. See Prosecutor v. Brđanin, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 974.

¹³⁶ Prosecution Application, para. 94.

¹³⁷ ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, paras. 521 – 522.

¹³⁸ ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 561.

however, because the former encompasses both an intent to target the group itself and the intent to destroy the group:

Even though they both have discriminatory elements, some of which are common to both crimes, in the case of persecution, the perpetrator commits crimes against individuals, on political, racial or religious grounds. It is this factor that establishes a demarcation between genocide and most cases of ethnic cleansing.¹³⁹

72. Nevertheless, the victims' membership in the protected group need not be the only reason for which they were targeted. As stated by the *Niyitegeka* Appeals Chamber, the term *as such*

has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term "as such" clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting "as such" to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership.¹⁴⁰

For example, a certain group may be targeted not solely because of its ethnicity, but also because of a perceived support for rebel groups. Such a perception, however, does not legitimize the targeting of a protected group as such.

73. Various types of evidence support an inference that an intent to destroy the group as such existed. Direct evidence could include statements by the perpetrator implying an intent to destroy,¹⁴¹ while circumstantial evidence might include, *inter alia*: (i) evidence of widespread systematic violence

¹³⁹ ICTY, *Prosecutor v. Sikirica et al*, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, 3 September 2001, para. 89; *see also* ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 67 – 68, 79.

¹⁴⁰ ICTR, *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Appeals Judgment, 9 July 2004, para. 53.

¹⁴¹ ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 73, 75; ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 563; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 517.

against the targeted group;¹⁴² (ii) evidence of a general campaign of persecution against the targeted group;¹⁴³ and (iii) evidence of members of the targeted group being separated or classified according to their membership in the targeted group prior to the commission of the crime.¹⁴⁴

74. In this connection, I recall the discussion regarding the widespread and systematic pattern in the context of crimes against humanity.¹⁴⁵ More specifically, the following evidence demonstrates a general campaign of persecution against the targeted group. First, regarding the existence of a discriminatory document circulated within the National Islamic Front, one witness related,

After a historical introduction on the Fur the document indicated that they were to be excluded from key positions in the intelligence service, military, or the police administration and secondly, the Fur areas were to be destabilized in order to instigate the moving out of the Fur from Darfur.¹⁴⁶

Further, according to the UNCOI report,

In a vast majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masalit and Zaghawa tribes, who were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion appears to have been directed to bring about the destruction of livelihoods and the means of survival of these populations. The Commission also considers that the killing, displacement, torture, rape and other sexual violence against civilians was of such a discriminatory character and may constitute persecution as a crime against humanity.¹⁴⁷

¹⁴² ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 73; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Judgment, 6 December 1999, para. 400.

¹⁴³ ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 312.

¹⁴⁴ ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 429; ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 287; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 515.

¹⁴⁵ Majority Decision at paras. 83-89.

¹⁴⁶ Witness Statement, DAR-OTP-0095-0002 (Anx J95) at 0007 at para. 20.

¹⁴⁷ DAR-OTP-0018-0010 (Anx 17) at 0163, para. 638. See also Short-Cut to Decay, The Case of the Sudan, DAR-OTP-0024-0200 (Anx H, line 41) at 0204-0205 (“The dirty war that has been imposed upon us [i.e. the Fur], began as an economic war but soon it assumed a genocidal course aiming at driving us out of our ancestral land in order to achieve certain political goals. We have followed, with dismay, all the different phases of this war from the time its took the innocent appearance of unrelated incidents of theft until it developed into armed robbery that targeted Fur individuals only. At a later

75. Additionally, the Prosecution submits some evidence of the “African tribes” being classified according to their membership in the group, prior to the commission of a crime. One witness reported,

I had a shop in the market of New BENDISI, and the men destroyed ten barrels of oil and looted kebkebay from it. They also took sugar and tea and other things from my shop. The looting took place right in front of us, so I could see everything. When the Fursan were looting, some other people were assisting them to identify the shops which had something to loot. They had placed in advance some special marking on the shop doors to identify the ones which were not to be looted. Our shops were in one line and there was one man from the Mararit tribe whose shop had a piece of green cloth hanging from the door hinge. The shop was not looted. I saw later that all other shops which were not looted had similar signs. The collaborators were from the Mararit and the Tama tribes.¹⁴⁸

76. The evidence submitted in relation to sections (a), (b) and (c) is sufficient to satisfy me that it would be reasonable to infer – among other things – that Omar Al Bashir possessed the intent to destroy the ethnic group of the “African tribes” as such.

iii. Whether any of the evidence provided by the Prosecution renders an inference of genocidal intent unreasonable

77. As outlined above, once it can be determined that the Prosecution submits sufficient evidence to render an inference of genocidal intent reasonable, the question then becomes whether any evidence submitted by the Prosecution renders such an inference unreasonable. In their review of the evidence, the Majority reached the opposite conclusion regarding the existence of

stage it aimed at the destruction of our economic base and the lifeline of our survival by making it impossible to practise agricultural activities by the constant and brutal attacks on farmers and farming communities. We watched with the greatest degree of alarm the sinister development which aimed at full economic siege of our communities by making the movement of commodities impossible through robbing markets and isolating urban areas from the rural hinterland. At the present time we are witnessing yet another and yet more sinister phase of this dirty war: the aim is a total holocaust and no less than the complete annihilation of the Fur people and all things Fur. How are we to understand the brutal mutilation of Fur victims and the burning alive of residents of Fur villages? The message is quite clear: empty the land and do not allow any Fur survivors to come back and re-establish their villages.”).

¹⁴⁸ Witness Statement, DAR-OTP-0119-0503 (Anx 65) at 0520 -0523 at paras. 76- 87.

reasonable grounds to believe that Omar Al Bashir possessed genocidal intent. I will therefore examine their analysis in order to determine whether an inference of genocidal intent is unreasonable.

78. The Majority notes that in the majority of attacks on villages inhabited by the “African” tribes, the “large majority” of inhabitants were neither killed nor injured. Yet, the means of genocidal destruction need not be the most efficient,¹⁴⁹ and the Majority does not consider the proportion of villagers who were forced to flee into the harsh, Darfurian terrain.¹⁵⁰

79. The Majority also relies on the fact that the Prosecution does not claim that the GoS established long-lasting detention camps in Darfur.¹⁵¹ While the existence of such camps would certainly be relevant to support an inference of genocidal intent, proof of such camps is not a required element of any of the counts of genocide alleged.¹⁵² Furthermore, the Prosecution alleges and provided evidence of the existence of detention centres, at which there are reasonable grounds to believe that victims were detained under the apparent custody and control of GoS forces.¹⁵³

80. The Majority suggests that the evidence submitted by the Prosecution reflects a significantly different reality than that outlined in the Prosecution Application regarding the alleged GoS’ hindrance of medical and humanitarian assistance to persons in IDP camps. While the Prosecution’s

¹⁴⁹ ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para. 32.

¹⁵⁰ See discussion at paras. 97-102, *infra*.

¹⁵¹ Majority Decision, para. 197.

¹⁵² Elements of Crimes, Articles 6(a), 6(b) and 6(c).

¹⁵³ See, e.g. Prosecution Application, para. 146 (“In its Final Report to the Security Council, the UNCOI found that ‘torture has been carried out on such a large scale and in such widespread and systematic manner not only during attacks on the civilian population, where it was inextricably linked with these attacks, *but also in detention centres under the authority of the NISS and the Military Intelligence.*”) (emphasis added); Witness Statement, DAR-OTP-0097-0292 (Anx J36) at 0295-0300, paras. 20-31; Witness Statement, DAR-OTP-0094-0423 (Anx24) at 0434, paras. 46-51.

allegations indeed focus on the role of Omar Al Bashir and the GoS,¹⁵⁴ and the evidence cited by the Majority indeed illuminates the effect of additional factors on the situation, in my view, the presence of such additional factors does not negate the role of Omar Al Bashir and the GoS.

81. Moreover, the Majority suggests that the evidence submitted by the Prosecution reflects a significantly different reality than that outlined in the Prosecution Application regarding the conditions of life within the IDP camps. As an example, the Majority refers to a report by the United Nations High Commissioner for Human Rights, which suggests, *inter alia*, that (i) rebel supporters may live within the camp and (ii) that there may be criminal elements operating within the camps.¹⁵⁵ I note that such allegations are unproven; indeed, a search warrant issued on suspicion of unlawful possession of weapons did not name specific individuals, but rather, “appeared to be a blanket warrant to search the entire camp”.¹⁵⁶ According to the same report, information regarding the presence of light and heavy arms within the camps remains unverified by UNAMID.¹⁵⁷ However, even if such allegations were true, such assistance or criminality would not justify targeting the entire camp on the basis of its ethnic affiliation by preventing the distribution of humanitarian assistance.

82. Finally, I note that the Majority has taken into consideration the fact that the Prosecution now suggests that certain evidence, which was also submitted in connection with the case against Ahmad Harun, is indicative of genocidal intent in connection with the present Application, even though it did not so

¹⁵⁴ See generally Prosecution Application, paras. 185-198.

¹⁵⁵ Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan. *Killing and injuring of civilians on 25 August 2008 by government security forces. Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union, ICC-02-05-179-Conf-Exp-Anx2, section on “Background and Context”, pp. 3-5.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

suggest in its application for an arrest warrant for Ahmad Harun himself. In my view, this fact has no effect upon the significance of such evidence, as there are significant differences between this case and the case against Ahmad Harun. For example, in contrast to the Application for an arrest warrant for Ahmad Harun, the present Application covers a time period between 2003 and 2008. The Prosecution also explains that, in examining whether there was sufficient evidence to include allegations of genocidal intent, the Prosecution placed particular emphasis on the implications of evidence of forcible displacement into harsh terrain, on evidence of conditions in the IDP camps and on evidence of efforts by the GoS to block humanitarian assistance.¹⁵⁸ Accordingly, I do not consider the different characterisation of such evidence to be relevant to its probative value.

83. For these reasons, I do not consider that any evidence submitted by the Prosecution renders an inference of genocidal intent unreasonable.

iv. Whether or not there are reasonable grounds to believe that the mental element of the crime of genocide has been fulfilled

84. In my view, the evidence discussed above demonstrates that the possession of genocidal intent is one reasonable inference to be drawn from the available evidence. As previously explained, this inference need not be the only reasonable one at this stage. Indeed, as noted by the Majority, there are also reasonable grounds to believe that the evidence presented supports various alternative conclusions.¹⁵⁹

85. Indeed, it is possible that, at a later stage, evidence might be presented such that the Chamber could later determine that there are not substantial

¹⁵⁸ ICC-02/05-T-2-Conf-Exp-Eng, page 20, lines 5-14. Additionally, [REDACTED]. ICC-02/05-T-2-Conf-Exp-Eng, page 21, lines 5-9.

¹⁵⁹ Majority Decision, para. 205.

grounds to believe that Omar Al Bashir possessed genocidal intent. A Trial Chamber might later conclude that some evidence would not permit it to find, beyond a reasonable doubt, that Omar Al Bashir possessed genocidal intent. However, this is not the task of the Pre Trial Chamber at the arrest warrant stage.

86. Rather, once there is sufficient evidence to support *a* reasonable inference that genocidal intent exists, the Chamber need only examine whether there is also evidence that would conclusively disprove the existence of genocidal intent. In my view, no evidence presented by the Prosecution conclusively precludes the reasonable inference that Omar Al Bashir possessed genocidal intent. Thus, I am satisfied that there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent.

D. *Actus Reus*

87. Having examined whether there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent, I will now turn to the question of whether the Prosecution submitted sufficient evidence to establish reasonable grounds to believe that the *actus reus* element of the crime of genocide is also fulfilled. I note that because the Majority did not find sufficient evidence to establish reasonable grounds to infer genocidal intent, the Majority did not reach the question of whether the Prosecution provides sufficient evidence to establish the *actus reus* elements of counts 1, 2, and 3.

88. The Prosecution's Application contains allegations supporting three counts of genocide:

- (i) genocide by killing under article 6(a) of the Statute;

- (ii) genocide by causing serious bodily or mental harm under article 6(b) of the Statute; and
- (iii) genocide by deliberate infliction on each target group conditions of life calculated to bring about the physical destruction of the group under article 6(c) of the Statute.¹⁶⁰

89. Once again, I note that a perpetrator may employ various means in the course of implementing a genocidal plan. For example, in one area, there may be many killings, while in another, there may be massive forced displacement into inhospitable terrain. Particularly in a context like Darfur, where causing persons to flee their villages may result in an acute lack of access to water supply and therefore almost certain death, it will be for future trial chambers to determine whether such acts of forced displacement fall under article 6(a) or article 6(c) of the Statute.

90. I will now examine the allegations and evidence submitted by the Prosecution with respect to each count in turn.

i. Genocide by killing – Article 6(a) of the Statute

91. Read together, the terms of article 58 and article 6(a) of the Statute require the Prosecution to provide sufficient evidence to demonstrate that there are reasonable grounds to believe that members of the “African tribes” were killed.¹⁶¹

92. As described by the Majority, the Chamber is of the view that there are reasonable grounds to believe that mass killings took place in the context of a widespread and systematic attack on the Fur, Masalit and Zaghawa of

¹⁶⁰ Prosecution Application, paras. 104, 119, 172.

¹⁶¹ Elements of Crimes, article 6(a)(1).

Darfur.¹⁶² The Chamber has also found that there are reasonable grounds to believe that murders took place in the context of the same widespread and systematic attack.¹⁶³

93. On the basis of this evidence, as well as the evidence discussed *supra* in connection with the targeting of the “African tribes”,¹⁶⁴ I am satisfied that there are reasonable grounds to believe that members of the “African tribes” were killed as part of the manifest pattern of conduct outlined in the Majority Decision within the meaning of article 6(a) of the Statute.¹⁶⁵

**ii. Genocide by causing serious bodily or mental harm –
Article 6(b) of the Statute**

94. In its Application, the Prosecution alleges that members of the target group were subjected to serious bodily or mental harm,¹⁶⁶ including acts of rape,¹⁶⁷ torture¹⁶⁸ and forcible displacement¹⁶⁹ that have occurred within the same context of the manifest pattern of conduct. The Prosecution also states that the jurisprudence of the *ad hoc* tribunals reveals that cruel treatment, torture, rape and forcible deportation may constitute serious bodily or mental harm,¹⁷⁰ although such harm “must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a

¹⁶² Majority Decision, para. 97.

¹⁶³ Majority Decision, para. 94.

¹⁶⁴ See discussion at Part III.B, *supra*.

¹⁶⁵ See discussion at Part III.A, *supra*.

¹⁶⁶ Prosecution Application, para. 119.

¹⁶⁷ Prosecution Application, para. 121.

¹⁶⁸ Prosecution Application, para. 146.

¹⁶⁹ Prosecution Application, para. 156.

¹⁷⁰ ICTR. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 504.

grave and long term disadvantage to a person's ability to lead a normal and constructive life."¹⁷¹

95. In this regard, I note that the Chamber has held that there are reasonable grounds to believe that acts of torture,¹⁷² forcible transfer,¹⁷³ and rape occurred in the context of a widespread and systematic attack on the Fur, Masalit and Zaghawa of Darfur.¹⁷⁴

96. On the basis of this evidence, as well as that discussed supra in connection with the targeting of "African tribes", I am satisfied that there are reasonable grounds to believe that members of the "African tribes" were subjected to serious bodily and mental harm as a part of the manifest pattern of conduct outlined in the Majority Decision within the meaning of article 6(b) of the Statute.

**iii. Genocide by deliberate infliction on the group
conditions of life calculated to bring about the physical
destruction of the group – Article 6(c) of the Statute**

97. The Prosecution further alleges that a substantial part of the target group was systematically expelled from their land and displaced into inhospitable terrain, where some members succumbed to dehydration, thirst and disease.¹⁷⁵ The Application states that the group's means of survival, including food and water supplies, as well as shelter from the inhospitable Darfurian terrain, were systematically destroyed.¹⁷⁶ According to the Prosecution, while some members found their way to IDP camps, the GoS

¹⁷¹ Prosecution Application, para. 119 (citing Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 513).

¹⁷² Majority Decision, para. 104.

¹⁷³ Majority Decision, para. 100.

¹⁷⁴ Majority Decision, para. 108.

¹⁷⁵ Prosecution Application, para. 172.

¹⁷⁶ Prosecution Application, para. 174.

denied and hindered the delivery of medical and humanitarian assistance which were necessary to survive in the camps.¹⁷⁷

98. First, in my view, such an allegation must be analysed in the context of Darfur's harsh terrain, in which water and food sources are naturally scarce, and shelter is of utmost importance.¹⁷⁸ Second, I note that, in contrast to the Majority's characterisation thereof,¹⁷⁹ the Prosecution's allegations refer not only to the destruction of water sources, but more generally to the destruction of "means of survival", which includes food supplies, food sources, and shelter, in addition to water supplies and sources.¹⁸⁰

99. Moreover, in my view, the same NGO report cited by the Majority adequately corroborates the allegations made by the Prosecution with respect to the destruction of the victims' means of survival.¹⁸¹ The report explains that many families depended on farming as a major food source, yet photographs of areas attacked by the Janjaweed revealed burned tree stumps and "no visible signs of vegetation".¹⁸² Further, the report states that, "villagers interviewed by [the NGO] reported witnessing widespread destruction of

¹⁷⁷ Prosecution Application, paras. 185 to 198.

¹⁷⁸ Physicians for Human Rights, Report *Darfur: Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0644 ("It is also important to understand that outside of village life, Darfur is an extremely difficult place to survive. At the foot of the expanding Sahara desert, it is known for its searing heat, recurrent drought and minimal infrastructure. While Darfurians have developed complex coping mechanisms enabling them to thrive within their villages, when people are herded from their homes and chased into a land that offers little shelter from the forbidding sun and penetrating winds, no potable water and no animals for food, milk and transport, they succumb to starvation, dehydration and disease.").

¹⁷⁹ Majority Decision, para. 93.

¹⁸⁰ See Prosecution Application, paras. 174-176. Accordingly, in my view, the Majority's characterisation results in a misconstruction of the evidence. See Majority Decision, para. 93 (finding that "there are no reasonable grounds to believe that such a contamination [of the water sources] was a core feature" of the attacks).

¹⁸¹ This report was written on the basis of field research carried out during three separate trips to the region over a 15 month period, which included interviews with survivors of attacks on three villages and surrounding areas with a total population of 30,000 to 40,000 persons. Physicians for Human Rights, Report *Darfur: Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0644.

¹⁸² Physicians for Human Rights, Report *Darfur: Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0675.

water sources",¹⁸³ and notes that generally, attackers torched family compounds, thereby destroying the shelter provided.¹⁸⁴ Especially in light of the harshness of the surrounding terrain, I am satisfied that this evidence provides reasonable grounds to believe that the group's means of survival were systematically destroyed.

100. The harshness of the terrain also informs my view of the significance of the alleged GoS obstruction of access for humanitarian aid workers. The Prosecution submits that those displaced by the attacks on their villages cannot survive without assistance, and that Omar Al Bashir has significantly hindered humanitarian access to the region.¹⁸⁵ Thus, even if the level of obstruction differed over time, as suggested by the Majority,¹⁸⁶ the periods during which the obstruction was high would have significant consequences on the ability of the population to survive.

101. Even though, as the Majority implies, instability and fighting between GoS and rebel forces may also affect the degree to which certain areas are accessible to humanitarian workers, according to an NGO report, humanitarian agencies have faced obstruction even in secure areas, despite the introduction of special administrative procedures aimed at facilitating access in 2004.¹⁸⁷ According to this report, in 2006, the GoS passed a new law further regulating the operation of non-governmental organisations.¹⁸⁸ Indeed, a November 2007 report of the Human Rights Council stated that even though an agreement to allow access for humanitarian aid workers had

¹⁸³ Physicians for Human Rights, Report *Darfur. Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0679.

¹⁸⁴ Physicians for Human Rights, Report *Darfur. Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0678.

¹⁸⁵ ICC-02/05-T-2-Conf-Exp-Eng at p. 5, lines 2-3.

¹⁸⁶ Majority Decision, para. 189.

¹⁸⁷ HRW Report, *Darfur Humanitarian Aid under Siege*, May 2006 (Anx J55) DAR-OTP-0107-1076 at 1077.

¹⁸⁸ HRW Report, *Darfur Humanitarian Aid under Siege*, May 2006 (Anx J55) DAR-OTP-0107-1076 at 1077.

been signed between Sudanese officials and the United Nations in March 2007, the UN received complaints alleging that the letter and spirit of the agreement had been violated.¹⁸⁹ The same report detailed a number of instances in which officials of the GoS denied access to certain areas to humanitarian aid workers.¹⁹⁰

102. On the basis of this evidence, as well as that discussed *supra* in connection with the targeting of “African tribes”, I am satisfied that there are reasonable grounds to believe that members of the “African tribes” were subjected to conditions calculated to bring about the destruction of the group.

IV. Mode of liability: co-perpetration under article 25(3)(a) of the Statute

103. In addition, I respectfully disagree with the Majority’s assessment of the evidence submitted by the Prosecution in connection with the mode of liability.¹⁹¹ As the Majority acknowledges, in order to substantiate an allegation that a crime was committed through co-perpetration under article 25(3)(a) of the Statute, the Prosecution must demonstrate that the co-perpetrators shared control over the crime; and each co-perpetrator must have played an essential role in the commission of the crime.¹⁹²

104. In my review of the evidence, I agree that there is sufficient evidence to establish reasonable grounds to believe that there was a common plan,¹⁹³ although in my view, the objective of the plan was to target the “African tribes”, who were perceived by the GoS as being close to rebel groups, such as

¹⁸⁹ Human Rights Council, Human Rights Situations that Require the Council’s Attention (Anx 76), DAR-OTP-0138-0116 at 0193.

¹⁹⁰ Human Rights Council, Human Rights Situations that Require the Council’s Attention (Anx 76), DAR-OTP-0138-0116 at 0193-0194.

¹⁹¹ See footnotes 229-242 in Majority Decision.

¹⁹² ICC-01/04-01/06-803-tEN, para. 342. See also ICC-01/04-01/07-717, para. 521.

¹⁹³ Majority Decision, paras. 214-215.

the SLM/A and the JEM. I also agree that the Prosecution has submitted evidence demonstrating the official capacity of various individuals within the government,¹⁹⁴ and that some members of the government sometimes acted with Omar Al Bashir.¹⁹⁵ I also agree that it can be inferred that, as members of the highest level of the GoS, these persons played an essential role in the commission of the crime. However, I do not find any evidence which addresses the issue of the locus of control; it is unclear whether such control indeed rested fully with Omar Al Bashir, or whether it was shared by others such that each person had the power to frustrate the commission of the crime.¹⁹⁶ For this reason, I would decline to find reasonable grounds to believe that Omar Al Bashir was responsible through co-perpetration and instead issue an arrest warrant based only on the mode of liability alleged by the Prosecution, indirect perpetration.

V. Conclusion

105. On the basis of the foregoing evidence, I am satisfied that there are reasonable grounds to issue an arrest warrant on the basis of the existence of reasonable grounds to believe that Omar Al Bashir has committed the crime of genocide. Accordingly, I respectfully dissent from the Majority's decision not to issue an arrest warrant on the basis of genocide.

¹⁹⁴ Witness Statement (Anx. J95) DAR-OTP-0095-0002 at 0016-0017, para. 55; and at 0024, para. 88; at 0025, paras. 89 and 92; and at 0029, para. 112; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0016-0017, paras. 70-74; Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0610, para. 144

¹⁹⁵ Witness Statement (Anx. J95) DAR-OTP-0095-0002 at 0013, para. 41; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, paras. 47 and 48.

¹⁹⁶ See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-716-Conf, para. 525. In fact, [REDACTED]. ICC-02/05-T-2-Conf-Exp-Eng at p. 61, lines 6-10.

106. Additionally, I respectfully dissent from the Majority's finding that there are reasonable grounds to believe that Omar Al Bashir is responsible as a co-perpetrator under article 25(3)(a) of the Statute.

Done in both English and French, the English version being authoritative.



Judge Anita Ušacka

Dated this Wednesday 4 March 2009

At The Hague, The Netherlands