



Original: English

No.: ICC-02/05-01/07

Date: 27 April 2007

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Claude Jorda
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

*IN THE CASE OF
THE PROSECUTOR v.
AHMAD MUHAMMAD HARUN ("AHMAD HARUN") and
ALI MUHAMMAD ALI ABD-AL-RAHMAN ("ALI KUSHAYB")*

Public

Decision on the Prosecution Application under Article 58(7) of the Statute

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mrs Fatou Bensouda, Deputy Prosecutor
Mr Andrew Cayley, Senior Trial Lawyer
Mr Ade Omofade, Trial Lawyer

Table of contents

I. Background	4
II. Whether the case against Ahmad Harun and Ali Kushayb falls within the jurisdiction of the Court and is admissible.....	5
III. Whether the common requirements under article 58(7) of the Statute for the issuance of summonses to appear or, in the alternative, under article 58(1) of the Statute for the issuance of warrants of arrest, have been met	9
A. Whether there are reasonable grounds to believe that the crimes described in the Prosecution Application have been committed.....	10
1. <i>War crimes.....</i>	<i>10</i>
(a) <i>Whether there are reasonable grounds to believe that the contextual element of at least one war crime within the jurisdiction of the Court is present</i>	<i>10</i>
(b) <i>Whether there are reasonable grounds to believe that the criminal acts referred to in the Prosecution Application of at least one war crime within the jurisdiction of the Court are present</i>	<i>15</i>
2. <i>Crimes against humanity</i>	<i>20</i>
(a) <i>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.....</i>	<i>20</i>
(b) <i>Whether there are reasonable grounds to believe that the criminal acts referred to in the Prosecution Application of at least one crime against humanity within the jurisdiction of the Court are present.....</i>	<i>24</i>
B. Whether there are reasonable grounds to believe that Ahmad Harun and Ali Kushayb are criminally responsible for the crimes mentioned above	27
1. <i>Criminal Responsibility of Ahmad Harun</i>	<i>28</i>
2. <i>Criminal responsibility of Ali Kushayb</i>	<i>32</i>
IV. Whether the specific requirements under article 58 of the Statute for the issuance of a summons to appear or, in the alternative, for the issuance of a warrant of arrest, have been met	36
A. The requirements under article 58(7) of the Statute.....	36
B. The requirements under article 58(1)(b) of the Statute	40
V. Transmission of the Warrants of Arrest.....	42

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively) has been seized of the Prosecution’s Application for summonses to appear filed on 27 February 2007 pursuant to article 58(7) of the Statute of the Court (“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 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 situation in Darfur, Sudan 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 Situation in Darfur, Sudan, pursuant to article 53 of the Statute and rule 104 of the *Rules of Procedure and Evidence* ("the Rules").³

4. On 27 February 2007, the Prosecution filed an application under article 58(7) ("the Prosecution Application")⁴ requesting that summonses to appear or, in the alternative, warrants of arrest be issued for Ahmad Muhammad HARUN ("Ahmad Harun")⁵ and Ali Muhammad Ali ABD-AL-RAHMAN ("Ali Kushayb") be issued by the Chamber.⁶

5. On 8 March 2007, an *ex parte* hearing was held with the Prosecution and the Victims and Witnesses Unit in order to address issues pertaining to the Prosecution Application. At the hearing, the Chamber invited the Prosecution to submit evidence in support of the Prosecution Application.

¹ S/RES/1593(2005).

² ICC-02/05-1-Corr.

³ ICC-02/05-2.

⁴ ICC-02/05-55-US-Exp; ICC-02/05-56.

⁵ Whose names are also spelled as Ahmed Haroun, Ahmed Haroon and Mohamed Ahmed Haroun.

⁶ Whose names are also spelled as Ali Kosheib, Ali Kouchib, Ali Mohamed, Ali Kosheb, Koshib and Ali Koship.

6. On 9 March 2007, the Prosecution filed its “Provision of Information Pursuant to Undertakings Made During Hearing on March 8 2007”⁷ providing the Chamber with information about Sudanese law relating to summonses to appear.

7. On 13 March 2007, the Prosecution filed its “Prosecution’s Submission of Further Information and Materials Pursuant to the Invitation of Pre-Trial Chamber I on 8 March 2007”⁸ (“the Prosecution Submission”), in which the Prosecution submits additional material and evidence in support of the Prosecution Application.

8. On 15 March 2007, the Chamber ordered the Prosecution to provide the Chamber with a copy of the warrant of arrest issued by the Sudanese authorities against Ali Kushayb or any other document relating to the national investigation concerning him or any other document specifying the reasons for his arrest by the Sudanese authorities.⁹

9. On 26 March 2007, the Prosecution filed its response to the Order of Pre-Trial Chamber (“the Prosecution Response”) specifying the information it had in its possession.¹⁰

10. On 13 April 2007, the Prosecution filed an “Update to Pre-Trial Chamber I under article 58 on the Prosecutor’s Contact with the Government of the Sudan and Other International Actors,”¹¹ informing the Chamber that it had requested some information from the Government of the Sudan.

II. Whether the case against Ahmad Harun and Ali Kushayb falls within the jurisdiction of the Court and is admissible

11. Article 58 of the Statute contains two substantive prerequisites for the issuance of a summons to appear or an arrest warrant. Firstly, the Chamber must be satisfied

⁷ ICC-02/05-62-US-Exp.

⁸ ICC-02/05-64-US-Exp.

⁹ ICC-02/05-67-US.

¹⁰ ICC-02/05-69-US-Exp.

¹¹ ICC-02/05-72-US-Exp.

that “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.” Secondly, in the case of an arrest warrant, the arrest of the person must appear necessary for at least one of the three reasons enumerated in article 58(1)(b) of the Statute or, in the case of a summons, the Chamber must be satisfied that a summons to appear is sufficient to ensure the person’s appearance.

12. Article 19(1) of the Statute provides that “[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it”.

13. Consequently, an initial determination as to whether the case against Ahmad Harun and Ali Kushayb falls within the jurisdiction of the Court is a prerequisite for the issuance of summonses to appear or warrants of arrest.¹²

14. The Chamber recalls that a case includes “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects”. Therefore, a case arising from the investigation of a situation falls within the jurisdiction of the Court only if the specific crimes of such a case do not exceed the legal parameters envisaged by the Statute.¹³

15. The Chamber recalls that:

- a) the Situation in Darfur, Sudan since 1 July 2002 was referred to the Prosecutor of the International Criminal Court by the United Nations Security Council on 31 March 2005, in accordance with article 13(b) of the Statute;
- b) on 1 June 2005, the Prosecutor decided to initiate an investigation into the situation in Darfur, Sudan.

¹² ICC-01/04-01/06-8-Corr, para. 18, unsealed pursuant to Decision ICC-01/04-01/06-37. See also the practice of Pre-Trial Chamber II in its decisions on the Prosecution requests for warrants of arrest for Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005.

¹³ ICC-01/04-01/06-8-Corr, para. 21; see also articles 5, 11 and 12 of the Statute.

16. Regarding the territorial and personal parameters, the Chamber notes that Sudan is not a State Party to the Statute. However, 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.

17. The Situation under investigation, from which the case against Ahmad Harun and Ali Kushayb arises, has been defined as encompassing the Darfur, Sudan since 1 July 2002. Hence, as the Prosecution Application refers to conduct alleged to have taken place in 2003 and 2004 in certain areas and villages of Darfur, Sudan, the Chamber finds that the case against Ahmad Harun and Ali Kushayb falls within the jurisdiction of the Court.

18. Besides, article 19(1) of the Statute gives the Chamber discretion to make an initial determination of the admissibility of the case before the issuance of a warrant of arrest or a summons to appear. Such discretion should be exercised only if warranted by the circumstances of the case, bearing in mind the interest of the person concerned.

19. In the present case, the Prosecution raised the issue of admissibility because Ali Kushayb appeared to be under investigation for a number of incidents which occurred in Darfur, Sudan. The Prosecution also mentioned that it had followed extremely closely all of the judicial initiatives taken by the Sudanese authorities in connection with the Situation in Darfur, Sudan.¹⁴ It stated that it had received written information on a number of occasions explaining the nature of the Sudanese legal system and that it had also received a large body of documentation on criminal

¹⁴ Prosecution Application, para. 254 and Anx12.

proceedings relating to the events in Darfur from a wide variety of public and confidential sources.¹⁵

20. The Prosecution submitted detailed information regarding Ali Kushayb. The Prosecution notes that, according to the Judicial Investigations Committee, Ali Kushayb was arrested on 28 November 2006, on the basis of an arrest warrant issued against him by the Sudanese authorities in April 2005. The Judicial Investigations Committee indicated that Ali Kushayb was under investigation in relation to five separate incidents which occurred in Shattaya in South Darfur and Nankuseh, Tanako, Arawala and Deleig in West Darfur.¹⁶

21. The Prosecution further submits that while the investigation currently being conducted against Ali Kushayb by the Sudanese authorities refers to the same person as the one referred to in the Prosecution Application, the investigation undertaken by the Sudanese authorities did not encompass the same conduct which is the subject of the application before the Court.¹⁷

22. At the *ex parte* hearing of 8 March 2007, the Chamber sought additional information in this regard and ordered the Prosecutor to provide it with more information about the warrant of arrest issued against Ali Kushayb by the Sudanese authorities or any other document or information relating to the national investigation against him.¹⁸ The Prosecution was unable to provide the warrant of arrest issued by the Sudanese authorities against Ali Kushayb to the Chamber.

23. According to the Prosecution, there was no indication that Ahmad Harun is under investigation nor was there any indication that any prosecution had been

¹⁵ Prosecution Application, paras. 251-267.

¹⁶ Prosecution Application, para. 256 and Anx12, paras. 2-5.

¹⁷ Prosecution Application, paras. 265-267.

¹⁸ ICC-02/05-67-US.

initiated against him before national jurisdictions for any crime relating to the Situation in Darfur, Sudan.¹⁹

24. The Chamber is of the view that for a case to be admissible, it is a condition *sine qua non* that national proceedings do not encompass both the person and the conduct which are the subject of the case before the Court.²⁰

25. On the basis of the evidence and information provided to the Chamber in relation to both Ahmad Harun and Ali Kushayb, without prejudice to any challenge to the admissibility of the case under article 19(2)(a) and (b) of the Statute and without prejudice to any subsequent determination, the Chamber finds that the case against Ahmad Harun and Ali Kushayb falls within the jurisdiction of the Court and appears to be admissible.

III. Whether the common requirements under article 58(7) of the Statute for the issuance of summonses to appear or, in the alternative, under article 58(1) of the Statute for the issuance of warrants of arrest, have been met

26. According to article 58(1) and (7) of the Statute, the Prosecution's request for the issuance of summonses to appear or, in the alternative, for the issuance of warrants of arrest may be granted if the Chamber is satisfied that there are reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed and that there are reasonable grounds to believe that Ali Kushayb and Ahmad Harun are criminally responsible for such crimes.

27. This analysis under article 58 of the Statute is without prejudice to the Chamber's possible reconsideration of the legal characterisation of the facts or of the modes of liability.²¹

28. The Chamber is of the view that, as required by article 21(3) of the Statute, the expression "reasonable grounds to believe" must be interpreted and applied in

¹⁹ Prosecution Application, para. 264.

²⁰ ICC-01/04-01/06-8-Corr, para. 31.

²¹ ICC-01/04-01/06-8-Corr, para. 16.

accordance with internationally recognized human rights. Thus, in interpreting and applying the expression “reasonable grounds to believe”, the Chamber will be guided by the “reasonable suspicion” standard under article 5(1)(c) of the *European Convention on Human Rights* and the jurisprudence of the Inter-American Court of Human Rights on the fundamental right to personal liberty under article 7 of the *American Convention on Human Rights*.²²

A. Whether there are reasonable grounds to believe that the crimes described in the Prosecution Application have been committed

29. The Chamber notes that, according to the Statute and the Elements of Crimes, the material element of every crime within the jurisdiction of the Court includes both a contextual element and individual (or specific) criminal acts. Accordingly, the Chamber will first determine whether there are reasonable grounds to believe that the contextual element is present, before considering whether the relevant criminal acts referred to in the Prosecution Application are also present.

30. The Prosecution refers both to acts that it believes constitute crimes against humanity and war crimes within the meaning of articles 7 and 8 of the Statute, respectively. Accordingly, the Chamber will consider whether there are reasonable grounds to believe that acts constituting war crimes have been committed, before considering whether there are reasonable grounds to believe that crimes against humanity have been committed.

1. War crimes

(a) Whether there are reasonable grounds to believe that the contextual element of at least one war crime within the jurisdiction of the Court is present

31. According to the Prosecution Application, Ahmad Harun and Ali Kushayb are criminally responsible for committing acts constituting war crimes under article 8 (2)

²² See for instance, IACHR, Case of Bamaca Velasquez v. Guatemala, “Judgement”, 25 November 2000, Series C No. 70, paras. 138-144, IACHR, Case of Loayza-Tamayo v. Peru, “Judgement”, 17 September 1997, Series C No. 33, paras. 49-55, and IACHR, Case of Gangaram Pandray v. Suriname, “Judgement”, 21 January 1994, Series C, No. 16, paras. 46-51. ICC-01/04-01/06-8-Corr, para. 12.

(c) and 8 (2) (e) of the Statute between August 2003 and March 2004. The Prosecution submits that these conducts took place in the context of an armed conflict not of an international character, which occurred in the region of Darfur, Sudan. In its application, the Prosecution indeed alleges that as a result of the missions conducted in Sudan it has obtained information in respect, inter alia, of events relating to the ongoing conflict in Darfur. The Prosecution further submits that between 2003 and 2006, the Armed Forces and/or the Militia/Janjaweed conducted hundreds of attacks on towns and villages in Darfur, Sudan. In this regard, the Prosecution underlines the fact that the vast majority of the killings which were carried out occurred during the year beginning in April 2003 and ending in April 2004.

32. Article 8 (2) (c) and 8 (2) (e) of the Statute deal with acts which have been committed in the course of a conflict not of an international character.

33. Article 8 (2) (f) of the Statute defines “conflicts not of an international character” for the purpose of article 8 (2) (e) of the Statute, and provides 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 when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.

34. The Chamber recalls 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.

35. The Chamber notes that article 8 (2) (f) of the Statute makes reference to “protracted armed conflict between [...] [organized armed groups]”. In the opinion of the Chamber, this focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time

36. In the present case, the main actors of the conflict were allegedly the Government of the Sudan confronted by an insurgency mounted by armed rebel movements, including the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), which sought political change through military means by launching attacks in Darfur, Sudan. This resulted in a government military campaign against these armed groups.²³ On the side of the Government of the Sudan, the combatants include the Sudan People's Armed Forces ("the Sudanese Armed Forces") and the Popular Defence Forces ("the PDF").²⁴ The Government of the Sudan also relied on militia primarily drawn from Arab tribes, namely the Militia/Janjaweed.²⁵

37. Furthermore, there are reasonable grounds to believe that the SLM/A and the JEM were the two main rebel groups opposing the Khartoum government, who organized themselves between 2001 and 2002 and launched their military activities in 2002. According to the Prosecution Application, the SLM/A is divided into a political wing, the "Movement", and a military wing, the "Army", and its main military leader and Secretary General is Minnie Arkawi Minawi.²⁶ The JEM is also a political movement with military capacity in the form of an organised military wing.

38. The armed rebel groups, notably the SLM/A and the JEM, launched several attacks in Darfur, in particular: in December 2002 in the Jebel Marra locality; in March/April 2003, on government installations in Kutum and Tine; on 25 April 2003, on the Al Fashir airport; in July 2003, on the police station in Bindisi; in August 2003, on a Central reservists office in Mukjar; and in December 2003, on the garrison at Abu Gamara.²⁷

²³ Prosecution Application, paras. 20-22 and 170-172; Prosecution Submission, AnxA2; Prosecution Submission, AnxA18, paras. 127-37; Prosecution Submission, AnxA54; Prosecution Submission, AnxA61; Prosecution Submission, AnxA73; Prosecution Submission, AnxA80; Prosecution Submission, AnxA81, pp. 66-96.

²⁴ Prosecution Application, para. 23; Prosecution Submission, AnxA18, paras. 78-84.

²⁵ Prosecution Application, paras. 24, 81 and 82; Prosecution Submission, AnxA65, p. 36.

²⁶ The Prosecution also calls him "Minni Manawi" in the Prosecution Application, para. 21.

²⁷ Prosecution Application, paras. 44-46, 51 and 184; Prosecution Submission, AnxA39, paras. 36 and 49; Prosecution Submission, AnxA42, paras. 31 and 32; Prosecution Submission, AnxA43, paras. 175 and 176; Prosecution Submission, AnxA46, para. 52; Prosecution Submission, AnxA79, para. 62.

39. There are reasonable grounds to believe that the SLM/A and the JEM entered into several binding agreements with the Government of the Sudan, including the Peace Agreement between the Government of the Sudan and the SLM/A signed on 3 and 4 September 2003 and the Cease fire agreement signed on 8 April 2004 between the Government of the Sudan, and the SLM/A and JEM.²⁸ Accordingly, the Chamber finds that there are reasonable grounds to believe that the presence and representation of the SLM/A and JEM at peace talks shows that the Government of the Sudan considered them to be key actors in the Darfur conflict.

40. For its part, in the context of its counter-insurgency campaign strategy, the government carried out several operations that can be divided into different phases during which attacks were launched by the Sudanese Armed Forces and/or Militia/Janjaweed.²⁹ In this regard, there are reasonable grounds to believe that, in response to the above-mentioned rebel attack on the Al Fashir airport on 25 April 2003, the Government of the Sudan increased its military operations in North and West Darfur. In particular, it launched two military operations in “Dar Zaghawa” in July and August 2003 and proceeded to recruit Militia/Janjaweed.³⁰

41. Also, there are reasonable grounds to believe that the Sudanese Armed Forces and Militia/Janjaweed launched attacks throughout Darfur Sudan, including attacks on the towns of Tawila on or about 5 March 2003 and on 1 July 2004, Furawiya in May and December 2003, Adwa on 23 November 2004.³¹

²⁸ Prosecution Application, para. 57; Prosecution Submission, AnxA56, para. 7 and AnxA48, para.7.

²⁹ Prosecution Application, paras. 38-40, 44-60; Prosecution Submission, AnxA48, p. 1, Footnote 1 and pp. 6-9; Prosecution Submission, AnxA42, paras. 25-51; Prosecution Submission, AnxA46, paras. 51-52; Prosecution Submission, AnxA64, p. 4; Prosecution Submission, AnxA40, para. 42; Prosecution Submission, AnxA24, pp. 1-2; Prosecution Submission, AnxA8, p. 3; Prosecution Submission, AnxA31, p. 7; Prosecution Submission, AnxA47, p. 1; Prosecution Submission, AnxA52; Prosecution Submission, AnxA39, para. 36; Prosecution Submission, AnxA61; Prosecution Submission, AnxA37, p. 8; Prosecution Submission, AnxA67, pp. 5-6; Prosecution Submission, AnxA5, p. 2; Prosecution Submission, AnxA25; Prosecution Submission, AnxA59, pp. 22-23 and 28; Prosecution Submission, AnxA29, p. 2.

³⁰ Prosecution Application, para. 47; Prosecution Submission, AnxA40, para. 42; Prosecution Submission, AnxA24, pp. 1-2; Prosecution Submission, AnxA8, p. 3; Prosecution Submission, AnxA31, p. 7; Prosecution Submission, AnxA64, p. 4.

³¹ Prosecution Application, para. 102; Prosecution Submission, AnxA86; Prosecution Submission, AnxA87; Prosecution Submission, AnxA88; Prosecution Submission, AnxA18, paras. 253, 272, 275 and 297; Prosecution

42. Furthermore, the Chamber finds that there are reasonable grounds to believe that the Sudanese Armed Forces and the Militia/Janjaweed attacked the towns of Kodoom, Bindisi, Mukjar and Arawala and their surrounding areas between August 2003 and March 2004, while these towns were devoid of any rebel activities and while the civilian population was not taking any active part in the hostilities.

43. The Prosecution maintains that, according to the non-international character of the conflict, the allegedly criminal acts referred to in the Prosecution Application constitute war crimes within the meaning of article 8(2)(c) and article 8(2)(e) of the Statute. Accordingly, the Chamber considers that, pursuant to articles 8(2)(c) and 8(2)(e) and the corresponding Elements of Crimes, the alleged criminal acts must be committed in the context of and be associated with an armed conflict not of an international character.

44. In light of the Prosecution Application and its supporting material, the Chamber finds that there are reasonable grounds to believe that the conflict in Darfur, Sudan, which started from about August 2002, was not of an international character. The conflict arose when the Government of the Sudan, in an attempt to curb the rebellion, reacted by using the Sudanese Armed Forces against the above-mentioned armed rebel movements, including the SLM/A and the JEM.³²

45. Moreover, the Chamber notes that, while there have been attempts at peace talks and that peace agreements were signed during the period relevant to the Prosecution Application, the JEM refused to take part in some of the peace talks and that following the peace agreements, other attacks were launched by both parties.³³

46. Accordingly, there are reasonable grounds to believe that during the period relevant to the Prosecution Application, there was a protracted armed conflict within the meaning of article 8(2)(f) of the Statute between the Sudanese Armed Forces

Submission, AnxA60; Prosecution Submission, AnxA32, paras. 21 and 30-31; Prosecution Submission, AnxA35, paras. 85-86.

³² Prosecution Application, para. 44; Prosecution Submission, AnxA-18, para. 63.

³³ Prosecution Application, paras. 50-51.

along with the Militia/Janjaweed against the organised rebel groups, including the SLM/A and the JEM.

47. On the basis of the evidence and information provided, the Chamber is of the view that there are reasonable grounds to believe that the alleged criminal acts were committed in the context of and were associated with the armed conflict in Darfur, Sudan which occurred from about August 2002 until at least the time relevant to the Prosecution Application. Indeed, there are reasonable grounds to believe that the attacks on the towns mentioned in the Prosecution Application were carried out by the Sudanese Armed Forces and the Militia/Janjaweed, acting in concert, in the context of the above-mentioned counter-insurgency campaign conducted in phases marked by rebel activity and broken peace agreements.³⁴

(b) Whether there are reasonable grounds to believe that the criminal acts referred to in the Prosecution Application of at least one war crime within the jurisdiction of the Court are present

48. The Prosecution alleges that the Sudanese Armed Forces and the Militia/Janjaweed murdered civilians primarily from the Fur, Zaghawa and Masalit populations in towns inhabited mainly by the Fur, Zaghawa and Masalit, including:

- Kodoom and surrounding areas, on or about 15 August 2003³⁵ and on or about 31 August 2003;³⁶
- Bindisi and surrounding areas, on or about 15 August 2003;³⁷

³⁴ Prosecution Application paras. 42-60; Prosecution Submission, AnxA67; Prosecution Submission, AnxA48, p. 1, Footnote 1, pp. 6-9; Prosecution Submission, AnxA42, paras. 25-51; Prosecution Submission, AnxA46, paras. 51-52; Prosecution Submission, AnxA64, p. 4; Prosecution Submission, AnxA40, para. 42; Prosecution Submission, AnxA24, pp. 1-2; Prosecution Submission, AnxA8, p. 3; Prosecution Submission, AnxA31, p. 7; Prosecution Submission, AnxA47, p. 1; Prosecution Submission, AnxA52; Prosecution Submission, AnxA39, para. 36; Prosecution Submission, AnxA61; Prosecution Submission, AnxA37, p. 8; Prosecution Submission, AnxA67, pp. 5-6; Prosecution Submission, AnxA5, p. 2; Prosecution Submission, AnxA25; Prosecution Submission, AnxA59, pp. 22-23 and 28; Prosecution Submission, AnxA29, p. 2.

³⁵ Prosecution Application, para. 196; Prosecution Submission, AnxA39, paras. 59 and 66.

³⁶ Prosecution Application, para. 197; Prosecution Submission, AnxA39, paras. 82, 84, 85, 87 and 88.

³⁷ Prosecution Application, para. 205, 209-210; Prosecution Submission, AnxA32, paras. 42-43; Prosecution Submission, AnxA34, para. 105; Prosecution Submission, AnxA35, paras. 57, 73-74; Prosecution Submission, AnxA79, paras. 81 and 85.

- Mukjar and surrounding areas, between September 2003 and October 2003,³⁸ in or around December 2003³⁹ and in or around March 2004;⁴⁰
- Arawala and surrounding areas, in or around December 2003.⁴¹

49. The Prosecution also alleges that members of the Sudanese Armed Forces and the Militia/Janjaweed committed outrages upon the personal dignity of women and girls primarily from the Fur, Zaghawa and Masalit populations in the town of Arawala and surroundings areas in or around December 2003.⁴²

50. The Prosecution again alleges that members of the Sudanese Armed Forces and Militia/Janjaweed raped primarily Fur, Zaghawa and Masalit women and girls in the town of Bindisi and surrounding areas on or about 15 August 2003⁴³ and in the town of Arawala in or around December 2003.⁴⁴

51. The Prosecution further alleges that the Sudanese Armed Forces and the Militia/Janjaweed intentionally directed attacks against the primarily Fur, Zaghawa and Masalit civilian populations not taking direct part in the hostilities, in the towns of:

- Kodoom and surrounding areas, from on or about 15 August 2003 to on or about 31 August 2003;⁴⁵

³⁸ Prosecution Application, para. 228; Prosecution Submission, AnxA34, para. 61.

³⁹ Prosecution Application, para. 229; Prosecution Submission, AnxA34, paras. 62-65; Prosecution Submission, AnxA58, pp. 3-6.

⁴⁰ Prosecution Application, para. 230; Prosecution Submission, AnxA79, para. 100; Prosecution Submission, AnxA41, paras. 67-71; Prosecution Submission, AnxA39, paras. 143-146 and 148-52.

⁴¹ Prosecution Application, para. 243; Prosecution Submission, AnxA36, paras. 126-128 and 134-138. Prosecution Submission, AnxA33, paras. 32, 39, 41, 52-53, 58-59; Prosecution Submission, AnxA38, para. 38; Prosecution Submission, AnxA63, p. 37.

⁴² Prosecution Application, para. 247; Prosecution Submission, AnxA33, paras. 40-41.

⁴³ Prosecution Application, para. 211; Prosecution Submission, AnxA35, paras. 67-72 and 77-79; Prosecution Submission, AnxA34, p. 10, paras. 41-45.

⁴⁴ Prosecution Application, para. 244-247; Prosecution Submission, AnxA36, paras. 82-116; Prosecution Submission, AnxA33, p. 10, paras. 39-48.

⁴⁵ Prosecution Application, para. 193 and 195; Prosecution Submission, AnxA39, paras. 62-66 and 81-95.

- Bindisi and surrounding areas, on or about 15 August 2003;⁴⁶
- Mukjar and surrounding areas, between August 2003 and March 2004;⁴⁷
- Arawala and surrounding areas, in or around December 2003.⁴⁸

52. The Prosecution further alleges that the Sudanese Armed Forces and the Militia/Janjaweed pillaged property belonging primarily to the Fur, Zaghawa and Masalit populations in the towns of:

- Bindisi and surrounding areas, on or about 15 August 2003;⁴⁹
- Mukjar and surrounding areas, between August 2003 and March 2004;⁵⁰
- Arawala and surrounding areas, in or around December 2003.⁵¹

53. Finally, the Prosecution alleges that the Sudanese Armed Forces and the Militia/Janjaweed destroyed property belonging primarily to the Fur, Zaghawa and Masalit populations in the towns of:

- Kodoom and surrounding areas, from on or about 15 August 2003 to on or about 31 August 2003;⁵²

⁴⁶ Prosecution Application, paras. 204-206; Prosecution Submission, AnxA32, paras. 19-24; Prosecution Submission, AnxA41, paras. 39 and 40; Prosecution Submission, AnxA11, pp. 4-5; Prosecution Submission, AnxA34, paras. 23-25 and 37-38; Prosecution Submission, AnxA39, para. 70; Prosecution Submission, AnxA51, paras. 25-28; Prosecution Submission, Exp-AnxA79, paras. 76-84; Prosecution Submission, AnxA35, paras. 41-61.

⁴⁷ Prosecution Application, paras. 218-221; Prosecution Submission, AnxA41, para. 40; Prosecution Submission, AnxA35, paras. 85 and 86; Prosecution Submission, AnxA20, p. 4.

⁴⁸ Prosecution Application, paras. 239-242; Prosecution Submission, AnxA53, paras. 73-79; Prosecution Submission, AnxA36, paras. 57-59 and 71; and Prosecution Submission, AnxA33, paras. 28-39.

⁴⁹ Prosecution Application, para. 216; Prosecution Submission, AnxA32, para. 23; Prosecution Submission, AnxA34, paras. 29 and 35; Prosecution Submission, AnxA35, para. 53; Prosecution Submission, AnxA79, para. 79; and Prosecution Submission, AnxA20, p. 4.

⁵⁰ Prosecution Application, paras. 233-235; Prosecution Submission AnxA79, paras. 69 and 70; Prosecution Submission, AnxA39, paras. 135-136; and Prosecution Submission, AnxA34, paras. 68-69.

⁵¹ Prosecution Application, paras. 240, 241 and 249; Prosecution Submission AnxA36, paras. 74 and 141-142.

- Bindisi and surrounding areas, on or about 15 August 2003;⁵³
- Mukjar and surrounding areas, between August 2003 and March 2004;⁵⁴
- Arawala and surrounding areas, in or around December 2003.⁵⁵

54. There are reasonable grounds to believe that, acting together as part of the counter-insurgency campaign, the Sudanese Armed Forces and Militia/Janjaweed carried out attacks on the above-mentioned towns.⁵⁶

55. In particular, there are reasonable grounds to believe that during the attack on Kodoom, members of the Sudanese Armed Forces drove around the Kodoom area telling villagers that the Militia/Janjaweed would be going to a nearby village to collect Islamic Tax or “Zakat”. Afterwards, Militia/Janjaweed on horse- and camel-back together with members of the Sudanese Armed Forces in vehicles attacked the Kodoom area.⁵⁷ Militia/Janjaweed and members of the Sudanese Armed Forces surrounded the four Kodoom villages. Members of the Militia/Janjaweed entered the Kodoom villages while others stalked the outskirts and fired upon villagers as they fled.⁵⁸

56. There are also reasonable grounds to believe that in the attack on Bindisi, members of the Sudanese Armed Forces arrived in Land Cruisers, again announcing

⁵² Prosecution Application, para. 199; Prosecution Submission, AnxA39, para. 65.

⁵³ Prosecution Application, paras. 214-215; Prosecution Submission, AnxA32, para. 41; Prosecution Submission, AnxA35, para. 53; and Prosecution Submission, AnxA79, para. 83.

⁵⁴ Prosecution Application, para. 232; Prosecution Submission, AnxA35, paras. 85-86 and Prosecution Submission, AnxA41, para. 52.

⁵⁵ Prosecution Application, paras. 239 and 249; Prosecution Submission, AnxA36, para. 143.

⁵⁶ Prosecution Application paras. 42-60; Prosecution Submission, AnxA67; Prosecution Submission, AnxA42, paras. 25-26, 31, 34 and 51; Prosecution Submission, AnxA46, para. 52; Prosecution Submission, AnxA64, p. 5; Prosecution Submission, AnxA40, para. 42; Prosecution Submission, AnxA31, p. 7; Prosecution Submission, AnxA47, p. 1; Prosecution Submission, AnxA47, pp. 8-9; Prosecution Submission, AnxA86, para. 36.

⁵⁷ Prosecution Application, para. 192; Prosecution Submission, AnxA32, para. 17; Prosecution Submission, AnxA39, para. 39.

⁵⁸ Prosecution Application, para. 195; Prosecution Submission, AnxA39, paras. 81-99.

that Militia/Janjaweed would return later to collect Islamic Tax (Zakat).⁵⁹ The town was attacked by members of the Sudanese Armed Forces travelling in a number of camouflaged coloured Land Cruisers mounted with heavy machine guns together with Militia/Janjaweed on horse- and camel-back and some on foot.⁶⁰ Four Land Cruisers each containing 40/50 members of the Sudanese Armed Forces were used in the attack. The attackers also included more than 500 Militia/Janjaweed. Three Sudanese Air Force planes also dropped bombs. The attack continued with members of the Sudanese Armed Forces and the Militia/Janjaweed going from house to house in search of the remaining residents and killing those they found.⁶¹

57. In addition, there are reasonable grounds to believe that both the Militia/Janjaweed and members of the Sudanese Armed Forces camped outside Mukjar town. After a speech given by Ahmad Harun in Mukjar, the Militia/Janjaweed pillaged the town and its market for several hours, carrying away the looted goods on horse- and camel-back.⁶²

58. Furthermore, there are reasonable grounds to believe that during the attack on the town of Arawala, members of the Sudanese Armed Forces and the Militia/Janjaweed shot and killed civilians and also pillaged the town.⁶³ Soon after the attack, women from the town were raped and civilians were further subjected to

⁵⁹ Prosecution Application, para. 202; Prosecution Submission, AnxA32, para. 20; Prosecution Submission, AnxA41, para. 39; Prosecution Submission, AnxA51, paras. 24-25.

⁶⁰ Prosecution Application, para. 203; Prosecution Submission, AnxA51, para. 30; Prosecution Submission, AnxA80, para. 84.

⁶¹ Prosecution Application, para. 205; Prosecution Submission, AnxA32, paras. 23 and 41; Prosecution Submission, AnxA80, para. 83; Prosecution Submission, AnxA35, para. 66; Prosecution Submission, AnxA80, para. 85.

⁶² Prosecution Application, para. 234; Prosecution Submission, AnxA80, paras. 69-70; Prosecution Submission, AnxA34, paras. 66-69; Prosecution Submission, AnxA39, paras. 124-126.

⁶³ Prosecution Application, para. 239; Prosecution Submission, AnxA33, paras. 29-31 and 33-35; Prosecution Submission, AnxA44, para. 38; Prosecution Submission, AnxA38, para. 16; Prosecution Submission, AnxA35, paras. 27-29 and 38; Prosecution Submission, AnxA53, para. 79; Prosecution Submission, AnxA36, paras. 57, 71 and 61-76.

deprivation of liberty and other inhumane acts coupled with cruel treatment. As a direct result of the attack on Arawala, villagers were forcibly transferred.⁶⁴

59. Having considered and analysed the Prosecution Application and its supporting material, in particular the report of the International Commission of Inquiry on Darfur and the witness statements, the Chamber is of the view that the information contained in the documents leads it to conclude that there are reasonable grounds to believe that, between August 2003 and March 2004, the specific elements of war crimes within the jurisdiction of the Court were met under article 8(2)(c)(i), 8(2)(c)(ii), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi) and 8(2)(e)(xii) of the Statute.

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*

60. The Prosecution alleges that the Sudanese Armed Forces, along with the Militia/Janjaweed, implemented a policy of attacking the civilian population by committing acts including rape, murder or forcible transfer in the towns of Kodoom, Bindisi, Mukjar and Arawala and their surrounding areas between August 2003 and March 2004. The Prosecution further submits that, according to the information in its possession, the Sudanese Armed Forces and the Militia/Janjaweed launched hundreds of attacks between 2003 and 2006 against civilian populations. As a result, the Prosecution concludes that those attacks can be considered to be both geographically widespread and to have been committed over an extensive period of time. The Prosecution further states that the systematic character of those attacks can be inferred from the fact that they were perpetrated in furtherance of a plan or policy consisting in attacking the civilian population.⁶⁵

⁶⁴ Prosecution Application, paras. 248-250; Prosecution Submission, AnxA32, para. 41; Prosecution Submission, AnxA38, para. 39, Prosecution Submission, AnxA36, paras. 14 and 139; Prosecution Submission, AnxA64, p. 37.

⁶⁵ Prosecution Application, para. 168.

61. Pursuant to article 7(1) of the Statute, in order to constitute a crime against humanity, the acts must have been committed as part of a widespread or systematic attack directed against any civilian population. Pursuant to article 7(2)(a) of the Statute, an attack directed against a civilian population is defined as 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 organisational policy to commit such an attack”.

62. The reference to a widespread or systematic attack has been interpreted as excluding random or isolated acts of violence from the notion of crimes against humanity.⁶⁶ Nevertheless, it is still necessary to assess the systematic or widespread nature of the attack. In light of these arguments, the Chamber is of the view that “widespread” refers “to the large-scale nature of the attack and the number of targeted persons”, while “systematic” refers to “the organised nature of the acts of violence and the improbability of their random occurrence.”⁶⁷ The Chamber is also of the view that the existence of a State or organisational policy is an element from which the systematic nature of an attack may be inferred.⁶⁸

63. There are indeed reasonable grounds to believe that the above-mentioned attacks were of a systematic and widespread nature. As described by several documents including the Report of the International Commission of Inquiry on Darfur and witness statements, there are reasonable grounds to believe that the above-mentioned attacks often shared a common pattern. They have been consistently described as coordinated ground attacks where the Militia/Janjaweed, riding on horse- or camel-back, arrived along with members of the Sudanese Armed

⁶⁶ *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Judgement, 6 December 1999, paras. 67-69. See also *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, paras. 122-123.

⁶⁷ *The Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 94. See also, *The Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, paras. 545-546.

⁶⁸ *The Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 98.

Forces travelling in motor vehicles such as Land Cruisers.⁶⁹ Moreover, according to the same documents and witness statements, there are reasonable grounds to believe that, on several occasions, the ground attacks were preceded by aerial bombardments by the Sudanese Air Force.⁷⁰

64. There are also reasonable grounds to believe that the above-mentioned attacks were of a large scale nature and targeted a large number of persons. According to the Prosecution Application and its supporting material, between 2003 and 2006, the Sudanese Armed Forces and/or the Militia/Janjaweed launched hundreds of military attacks in Darfur targeting a large number of persons.⁷¹ Moreover, regarding the attacks on the towns of Kodoom, Bindisi, Mukjar and Arawala between August 2003 and March 2004 as referred to in the Prosecution Application, there are reasonable grounds to believe that they were launched by the Sudanese Armed Forces and the Militia/Janjaweed acting in concert⁷² and that they caused approximately 1000 civilian victims.⁷³

65. There are reasonable grounds to believe that the Government of the Sudan, in a bid to fight the rebels, followed a “unified strategy”. At the national level, there was a “Darfur Security Desk”, also known as the “Darfur Security file”. At the state level, State Security Committees were used to organise the actions of the Sudanese Armed Forces, the police, the PDF, the police reservist force known as the Popular Police Force (“the PPF”), the National Security and Intelligence Service and the Militia/Janjaweed. The Militia/Janjaweed acted in concert with the Sudanese Armed

⁶⁹ Prosecution Application, paras. 102 and 104; Prosecution Submission, AnxA18, paras. 186, 239 and 242.

⁷⁰ Prosecution Application, paras. 103-104; Prosecution Submission, AnxA18, paras. 186 and 243.

⁷¹ Prosecution Application, paras. 27-28 and 101; Prosecution Submission, AnxA74; Prosecution Submission, AnxA1, Prosecution Submission AnxA18, para. 301.

⁷² Prosecution Application, paras. 26, 102, 162 and 182; Prosecution Submission, AnxA86; Prosecution Submission, AnxA87; Prosecution Submission, AnxA85; Prosecution Submission, AnxA18, paras. 253, 275, 297 and 272; Prosecution Submission, AnxA32, paras. 21 and 30-31; Prosecution Submission, AnxA35, paras. 27-28, 67-72 and 85-86.

⁷³ Prosecution Application, paras. 26, 189, 190, 225, 228-232, 243-244, 247 and 250; Prosecution Submission, AnxA35, paras. 43 and 85-86; Prosecution Submission, AnxA32, paras. 17, 20-21 and 23; Prosecution Submission, AnxA37, p. 10; Prosecution Submission, AnxA34, paras. 52-65; Prosecution Submission, AnxA58; Prosecution Submission, AnxA79, paras. 93-94 and 100-101; Prosecution Submission, AnxA41, paras. 52, 65-67, 69-71; Prosecution Submission, AnxA39, paras. 70 and 143-146.

Forces and were generally integrated into the PDF or the PPF⁷⁴ and acted under their command.⁷⁵ There are also reasonable grounds to believe that the Militia/Janjaweed received training at PDF and PPF training centres,⁷⁶ were paid and armed by the Sudanese authorities⁷⁷ and their leaders often wore the uniforms of the Sudanese Armed Forces, the PDF and PPF.⁷⁸

66. At the local level, there were locality committees also composed of representatives of the Government of the Sudan, the Sudanese Armed Forces, the Police, and the National Security and Intelligence Service as well as a representative of the PPF and the PDF. There are reasonable grounds to believe that the role of the PDF representative was to coordinate militia activities with the relevant tribal leaders.⁷⁹

67. Moreover, there are reasonable grounds to believe that the acts referred to in the Prosecution Application were committed pursuant to or in furtherance of a State or organisational policy to commit such attacks against the civilian population of Darfur. In this regard, there are reasonable grounds to believe that these acts were committed as part of a policy designed to attack the civilian population who were perceived as being associated with the rebels, namely civilians primarily from the Fur, Zaghawa and Masalit tribes in the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding areas.

⁷⁴ Prosecution Application, paras. 90, 92-96. These State Security Committees were given a key role, such as ordering reconnaissance missions, creating reserve forces, monitoring weapons supplies to rebels, ensuring sufficient levels of patrol activities, mobilising PDF, increasing the police presence in a town, and creating joint forces comprised of army, police and security services. Each State Security Committee was composed of representatives of the different governmental bodies involved in the counterinsurgency campaign, therefore it included the Governor of the State, the Area Military Leader (a representative of the Armed Forces), the Police Commander of the State, the Director of the State Legal Directorate, and the Commissioners of the State's localities.

⁷⁵ Prosecution Application, para. 77; Prosecution Submission, AnxA12, p. 2.

⁷⁶ Prosecution Application, paras. 78, 153; Prosecution Submission, AnxA43, para. 95; Prosecution Submission, AnxA46, para. 67; Prosecution Submission, AnxA77.

⁷⁷ Prosecution Application, para. 80; Prosecution Submission, AnxA50, para. 112; Prosecution Submission, AnxA45, para. 108; Prosecution Submission, AnxA43, para. 110; Prosecution Submission, AnxA79, para. 58.

⁷⁸ Prosecution Application, para. 81; Prosecution Submission, AnxA40, para. 38.

⁷⁹ Prosecution Application, para. 95; Prosecution Submission, AnxA69, p. 13; Prosecution Submission, AnxA21, pp. 13-14; Prosecution Submission, AnxA42, para. 128; Prosecution Submission, AnxA12, p. 2.

(b) *Whether there are reasonable grounds to believe that the criminal acts referred to in the Prosecution Application of at least one crime against humanity within the jurisdiction of the Court are present*

68. The Prosecution alleges that, from in or about 15 August 2003 to in or around March 2004, the Sudanese Armed Forces and the Militia/Janjaweed murdered civilians primarily from the Fur, Zaghawa and Masalit populations in the predominantly Fur towns of:

- Kodoom and surrounding areas, on or about 15 August 2003⁸⁰ and on or about 31 August 2003;⁸¹
- Bindisi and surrounding areas, on or about 15 August 2003;⁸²
- Mukjar and surrounding areas, between September 2003 and October 2003,⁸³ in or about December 2003⁸⁴ and in or around March 2004;⁸⁵
- Arawala and surrounding areas, in or around December 2003.⁸⁶

69. The Prosecution also alleges that the Sudanese Armed Forces and the Militia/Janjaweed forcibly transferred primarily Fur, Zaghawa and Masalit civilians in the predominantly Fur towns of:

- Kodoom and surrounding areas, on or about 15 August 2003 to on or about 31 August 2003;⁸⁷

⁸⁰ Prosecution Application, para. 196; Prosecution Submission, AnxA39, paras. 59 and 66.

⁸¹ Prosecution Application, para. 197; Prosecution Submission, AnxA39, paras. 82, 84, 85, 87 and 88.

⁸² Prosecution Application, para. 205, 209-210; Prosecution Submission, AnxA32, paras. 42-43; Prosecution Submission, AnxA34, para. 105; Prosecution Submission, AnxA35, paras. 57, 73-74; Prosecution Submission, AnxA79, paras. 81 and 85.

⁸³ Prosecution Application, para. 228; Prosecution Submission, AnxA34, para. 61.

⁸⁴ Prosecution Application, para. 229; Prosecution Submission, AnxA34, paras. 62-65; Prosecution Submission, AnxA58, pp. 3-6.

⁸⁵ Prosecution Application, para. 230; Prosecution Submission, AnxA79, para. 100; Prosecution Submission, AnxA41, paras. 67-71; Prosecution Submission, AnxA39, paras. 143-146.

⁸⁶ Prosecution Application, para. 243; Prosecution Submission, AnxA36, p. 17-19, paras. 126-128 and 134-138. Prosecution Submission, AnxA33, paras. 32, 39, 41, 52-53, 58-59; Prosecution Submission, AnxA32, para. 40; Prosecution Submission, AnxA38, para. 38; Prosecution Submission, AnxA63, p. 37.

- Bindisi and surrounding areas, on or about 15 August 2003;⁸⁸
- Arawala and surrounding areas, in or around December 2003.⁸⁹

70. The Prosecution further alleges that the Sudanese Armed Forces and Militia/Janjaweed imprisoned or severely deprived the primarily Fur, Zaghawa and Masalit civilians of their physical liberty in the town of Mukjar and surrounding areas in or about August 2003.⁹⁰

71. The Prosecution alleges that the Sudanese Armed Forces and the Militia/Janjaweed tortured civilians from the primarily Fur, Zaghawa and Masalit populations in Mukjar in or about August 2003.⁹¹

72. The Prosecution further alleges that members of the Sudanese Armed Forces and Militia/Janjaweed raped primarily Fur women and girls in the town of Bindisi and surrounding areas on or about 15 August 2003⁹² and in the town of Arawala in or around December 2003.⁹³

73. The Prosecution again alleges that the Sudanese Armed Forces and the Militia/Janjaweed inflicted inhumane acts causing great suffering, or serious injury to body or to mental or physical health upon the primarily Fur, Zaghawa and Masalit populations in the town of Bindisi and surrounding areas on or about 15 August

⁸⁷ Prosecution Application, para. 199; Prosecution Submission, AnxA39, para. 65; Prosecution Submission, AnxA32, para. 17; Prosecution Submission, AnxA35, paras. 41-42.

⁸⁸ Prosecution Application, paras. 214-215; Prosecution Submission, AnxA32, para. 23, and 41; Prosecution Submission, AnxA35, paras. 50-61; Prosecution Submission, AnxA79, paras. 57, 83 and 87; Prosecution Submission, AnxA20, p. 4; Prosecution Submission, AnxA39, para. 103; Prosecution Submission, AnxA41, para. 40.

⁸⁹ Prosecution Application, para. 250; Prosecution Submission, AnxA36, paras. 134 and 139; Prosecution Submission, AnxA63, pp. 37-38.

⁹⁰ Prosecution Application, paras. 223 and 225; Prosecution Submission, AnxA41, paras. 46-51; Prosecution Submission, AnxA34, paras. 52-53 and 88; Prosecution Submission, AnxA39, paras. 102-112.

⁹¹ Prosecution Application, paras. 223, 225-227; Prosecution Submission, AnxA34, paras. 53-60; Prosecution Submission, AnxA39, paras. 111-112; Prosecution Submission, AnxA35, para. 84; Prosecution Submission, AnxA41, paras. 46-47

⁹² Prosecution Application, para. 211; Prosecution Submission, AnxA35, paras. 67-72 and 77-79; Prosecution Submission, AnxA34, p. 10, paras. 41-43.

⁹³ Prosecution Application, para. 244; Prosecution Submission, AnxA36, pp. 12-16, paras. 82-116; Prosecution Submission, AnxA33, p. 10, paras. 39-48.

2003⁹⁴ and in the town of Arawala and surrounding areas in or around December 2003.⁹⁵

74. Finally, the Prosecution alleges that the Sudanese Armed Forces and the Militia/Janjaweed launched attacks against specific localities believing that they were predominantly inhabited by the Fur population.⁹⁶ The Prosecution is thus of the view that those acts may constitute persecution of the primarily Fur population of the towns of:

- Kodoom and surrounding areas, from on or about 15 August 2003 to on or about 31 August 2003 through murder, attacks upon the civilian population, destruction of property and forcible transfer of the population;⁹⁷
- Bindisi and surrounding areas, on or about 15 August 2003 through murder, rape, attacks upon the civilian population, inhumane acts, pillaging, destruction of property and forcible transfer of the population;⁹⁸
- Mukjar and surrounding areas, between August 2003 and March 2004 through murder, attacks upon the civilian population, imprisonment or severe deprivation of physical liberty, torture, pillaging and destruction of property;⁹⁹
- Arawala and surrounding areas, in or around December 2003 through murder, rape, attacks upon the civilian population,

⁹⁴ Prosecution Application, para. 213; Prosecution Submission, AnxA32, para. 22; Prosecution Submission, AnxA35, paras. 58-59, 66 and 68-69.

⁹⁵ Prosecution Application, para. 248; Prosecution Submission, AnxA32, para. 40.

⁹⁶ Prosecution Application, paras. 123, 146, 182, 184, 191, 200, 217 and 236.

⁹⁷ See supra.

⁹⁸ See supra.

⁹⁹ See supra.

outrages upon personal dignity, inhumane acts, pillaging, destruction of property and forcible transfer of the population.¹⁰⁰

75. Having considered and analysed the Prosecution Application and its supporting material, in particular the report of the International Commission of Inquiry on Darfur and the witness statements, the Chamber is of the view that the information contained in the documents leads it to conclude that there are reasonable grounds to believe that during the period relevant to the Prosecution Application, the specific elements of crimes against humanity within the jurisdiction of the Court were met under article 7(1)(a), 7(1)(d), 7(1)(e), 7(1)(f), 7(1)(g), 7(1)(h) and 7(1)(k) of the Statute.

B. Whether there are reasonable grounds to believe that Ahmad Harun and Ali Kushayb are criminally responsible for the crimes mentioned above

76. The Prosecution alleges that Ahmad Harun and Ali Kushayb personally contributed to “a common plan to pursue a shared and illegal objective of attacking civilian populations in Darfur,” and are therefore together responsible under article 25(3)(d) of the Statute for war crimes and crimes against humanity as referred to in counts 1-6, 8-15, 17-24, 26, 28, 30, 32, 34-36, 38-44, 46, 48-51 of the Prosecution Application.

77. With regard to the criminal responsibility of Ali Kushayb, the Prosecution further alleges that, “in addition” to his responsibility for having contributed to the common plan, he is criminally responsible under article 25(3)(a) of the Statute for having personally committed the crimes against humanity and war crimes as referred to in counts 7, 16, 25, 27, 29, 31, 33, 45 and 47 of the Prosecution Application.¹⁰¹

¹⁰⁰ See *supra*.

¹⁰¹ In this regard, the Chamber recalls that the Statute clearly distinguishes between the following forms of liability: (i) as a perpetrator (or co-perpetrator), i.e., according to article 25(3)(a), the person who committed the crime as an individual, jointly with another or through another person; (ii) as an accomplice, i.e., the person who contributed to the commission of the crime pursuant to article 25(3)(b) to (d); and (iii) as a superior pursuant to

78. With regard to the criminal responsibility of Ahmad Harun, the Prosecution also alleges that he is criminally responsible under article 25(3)(b) of the Statute for having induced the commission of the war crime referred to in count 37 of the Prosecution Application.

79. The Chamber will therefore separately analyse whether there are reasonable grounds to believe that Ahmad Harun and Ali Kushayb are criminally responsible for the above-mentioned crimes under article 25(3)(d) and 25(3)(b) and under article 25(3)(a) and 25(3)(d) of the Statute, respectively.

1. *Criminal Responsibility of Ahmad Harun*

80. The Chamber is of the view that there are reasonable grounds to believe that, from in or about April 2003 until in or about September 2005, Ahmad Harun served as Minister of State for the Interior of the Government of the Sudan. There are reasonable grounds to believe that the Ministry of Interior worked jointly with the Ministry of Defence and the National Security Apparatus in order to respond to the rebellion in Darfur.¹⁰²

81. There are reasonable grounds to believe that, by virtue of his ministerial capacity, the management of the “Darfur Security desk” was assigned to Ahmad Harun and that, as such, he oversaw the activities of the Security Committees responsible for coordinating the counter-insurgency in Darfur.¹⁰³ The Locality Security Committees reported to the State Security Committees which, in turn, reported to the Security Desk headed by Ahmad Harun.¹⁰⁴

article 28 of the Statute. Therefore, as was already affirmed by this Chamber, a person cannot be held responsible for the same facts under two different modes of liability, i.e., as a perpetrator or a co-perpetrator, pursuant to article 25(3)(a), and as an accomplice, pursuant to article 25(3)(b) to (d), or a superior, pursuant to article 28 of the Statute. See, ICC-01/04-01/06-796-Conf-tEN, paras. 320-321; ICC-01/04-01/06-2-US, p. 4.

¹⁰² Prosecution Application, paras. 30-31; Prosecution Submission, AnxA42, para. 65; Prosecution Submission, AnxA71, para. 91; Prosecution Submission, AnxA43, paras. 65 and 128.

¹⁰³ Prosecution Application, paras. 112-113.

¹⁰⁴ Prosecution Application, para. 96; Prosecution Submission, AnxA43, paras. 40 and 49; Prosecution Submission, AnxA7, p. 2; Prosecution Submission, AnxA3, p. 2.

82. Accordingly, there are reasonable grounds to believe that Ahmad Harun coordinated the efforts of various Government bodies involved in the counter-insurgency, including the Police, the Sudanese Armed Forces, the National Security and Intelligence Service and the Militia/Janjaweed, and monitored the work of the Locality and State Security Committees in Darfur.¹⁰⁵ There are reasonable grounds to believe that, in respect of their counter-insurgency activities in Darfur, both State and Locality Security Committees reported to Ahmad Harun, who thus in effect participated directly in and coordinated the work of these Committees.¹⁰⁶

83. In addition, there are reasonable grounds to believe that, due to Ahmad Harun's position at the "Darfur Security desk," he was able to participate personally in key activities of the Security Committees, namely the recruiting, arming and funding of Militia/Janjaweed in Darfur.

84. There are reasonable grounds to believe that Ahmad Harun personally and actively recruited Militia/Janjaweed in Darfur as a "new strategy"¹⁰⁷ of the counter-insurgency in order to "reinforce its human resources."¹⁰⁸ Moreover, there are reasonable grounds to believe that Ahmad Harun ordered the recruitment of Militia/Janjaweed by announcing that "300 knights" were to be recruited during an inspection and recruitment visit to a camp in Qardud village, South Darfur. His orders were executed by the Commissioners of the localities of Nyala and Kass.¹⁰⁹

85. Furthermore, there are reasonable grounds to believe that Ahmad Harun promised to deliver, and did deliver arms to the Militia/Janjaweed in Darfur.¹¹⁰ There are reasonable grounds to believe that Ahmad Harun, after meeting with a group of Militia/Janjaweed in the town of Al Geneina, promised to provide them with

¹⁰⁵ Prosecution Application, para. 83.

¹⁰⁶ Prosecution Application, paras. 96-97; Prosecution Submission, AnxA69.

¹⁰⁷ Prosecution Application, para. 47; Prosecution Submission, AnxA40, para. 42; Prosecution Submission, AnxA31; Prosecution Submission, AnxA8; Prosecution Submission, AnxA64.

¹⁰⁸ Prosecution Application, para. 122; Prosecution Submission, AnxA12.

¹⁰⁹ Prosecution Application, para. 125; Prosecution Submission, AnxA78.

¹¹⁰ Prosecution Application, paras. 131-137; Prosecution Submission, AnxA43, paras. 105, 122-130 and 141; Prosecution Submission, AnxA40, para. 44; Prosecution Submission, AnxA66; Prosecution Submission, AnxA40, paras. 62-80; Prosecution Submission, AnxA42, paras. 73-76.

weapons.¹¹¹ Moreover, there are reasonable grounds to believe that on several occasions, Ahmad Harun was present at the deliveries of arms and ammunition to the Militia/Janjaweed and participated in the distribution of the “quota of firearms”.¹¹²

86. Moreover, there are reasonable grounds to believe that Ahmad Harun funded the Militia/Janjaweed and that between 3 August 2003 and 10 August 2003, he appeared in Mukjar town where he “addressed the tribes” and promised a sum of money to the Militia/Janjaweed and the continuous support of the government, just before an attack on the same town occurred.¹¹³

87. There are reasonable grounds to believe that the Governors, State and Locality Security Committees, who either directly or indirectly reported to Ahmad Harun, were primarily responsible for distributing the salaries of the Militia/Janjaweed to the tribal leaders (Umdahs), “Emirs and Oqada”¹¹⁴ who then paid the Militia/Janjaweed. There are reasonable grounds to believe that the Militia/Janjaweed was paid upon registration by PDF coordinators.

88. Having considered all the foregoing information, the Chamber finds that there are reasonable grounds to believe that, by reason of his position on the Darfur Security desk and through his overall coordination of and personal participation in key activities of the Security Committees, Ahmad Harun intentionally contributed to the commission of the above-mentioned crimes, knowing that his contribution would further the common plan carried out by the Sudanese Armed Forces and the Militia/Janjaweed, which consisted in attacking the civilian populations in Darfur.

¹¹¹ Prosecution Application, para. 132; Prosecution Submission, AnxA43, paras. 122-130 and 141.

¹¹² Prosecution Application, paras. 133-137; Prosecution Submission, AnxA43, para. 105; Prosecution Submission, AnxA39, paras. 44 and 62-68; Prosecution Submission, AnxA42, paras. 73-76.

¹¹³ Prosecution Application, paras. 123 and 127; Prosecution Submission, AnxA79, paras. 62-67 and 69; Prosecution Submission, AnxA34, paras. 66-69; Prosecution Submission, AnxA39, paras. 124-126; Prosecution Submission, AnxA5; Prosecution Submission, AnxA40, para. 49; Prosecution Submission, AnxA50, para. 112.

¹¹⁴ Prosecution Application, para. 129; Prosecution Submission, AnxA40, para. 49; Prosecution Submission, AnxA50, para. 112.

89. Accordingly, the Chamber finds that there are reasonable grounds to believe that, in light of the available information, Ahmad Harun is criminally responsible under article 25(3)(d) of the Statute for war crimes and crimes against humanity as referred to in counts 1-6, 8-15, 17-24, 26, 28, 30, 32, 34-36, 38-44, 46, 48-51 of the Prosecution Application.

90. Moreover, there are reasonable grounds to believe that Ahmad Harun personally incited Militia/Janjaweed to attack the civilian populations on several occasions.¹¹⁵ In particular, just prior to the attack on Mukjar town at the beginning of August 2003, he gave a speech in which he stated that “since the children of the Fur had become rebels, all the Fur and what they had had become booty for the Mujahidin”¹¹⁶ and he promised a large amount of money to the Militia/Janjaweed and the continuous support of the government.

91. With regard to this specific episode, there are reasonable grounds to believe that, as a consequence of the above-mentioned speech,¹¹⁷ the Militia/Janjaweed looted Mukjar town and its market immediately after Ahmad Harun’s departure.

92. There are reasonable grounds to believe that Ahmad Harun had knowledge of the crimes committed against the civilian population by the Militia/Janjaweed by virtue of his responsibility for the “Darfur Security desk” and his participation in the Security Committees,¹¹⁸ as he periodically received reports on rebel activities and the counter-insurgency. Besides, both at the international and national levels, political bodies such as the United Nations and its agencies, and the Sudanese National

¹¹⁵ Prosecution Application, paras. 138-142; Prosecution Submission, AnxA7; Prosecution Submission, AnxA11; Prosecution Submission, AnxA32, paras. 20-21 and 30-31; Prosecution Submission, AnxA34, paras. 66-69; Prosecution Submission, AnxA39, paras. 60 and 124-126; Prosecution Submission, AnxA42, paras. 69-71; Prosecution Submission, AnxA43, paras. 128-138; Prosecution Submission, AnxA53, para. 79; Prosecution Submission, AnxA79, paras. 65-66, 69-70 and 72.

¹¹⁶ Prosecution Application, para. 123; Prosecution Submission, AnxA7; Prosecution Submission, AnxA34, paras. 66-69; Prosecution Submission, AnxA79, paras. 62-67 and 69.

¹¹⁷ Prosecution Application, paras. 123-124; Prosecution Submission, AnxA79, paras. 65-70.

¹¹⁸ *Supra* paras. 81-83; Prosecution Application, paras. 150 and 156.

Assembly confronted the Government of the Sudan on fact that civilian populations were being victimised by the Militia/Janjaweed.¹¹⁹

93. Furthermore, there are reasonable grounds to believe that, in his public speeches, Ahmad Harun not only demonstrated knowledge of the methods used by the Militia/Janjaweed, which attacked civilians and pillaged villages, but also personally encouraged the commission of such illegal acts,¹²⁰ which he considered “justified or excusable”.¹²¹

94. Accordingly, the Chamber finds that there are reasonable grounds to believe that Ahmad Harun is criminally responsible under article 25(3)(b) of the Statute for inducing the commission of the war crimes referred to in count 37 of the Prosecution Application.

2. *Criminal responsibility of Ali Kushayb*

95. The Chamber finds that there are reasonable grounds to believe that Ali Kushayb was one of the most senior and best known leaders in the tribal hierarchy in the Wadi Salih Locality. By reason of his position as a tribal leader, he decided to join the Sudanese Armed Forces together with his tribesmen.¹²² Around August 2003, he was formally “appointed to a position” within the Sudanese Armed Forces. More specifically, there are reasonable grounds to believe that Ali Kushayb was part of the PDF structure within the Sudanese Armed Forces.¹²³

¹¹⁹ Prosecution Application para. 157; Prosecution Submission AnxA12, Prosecution Submission AnxA75

¹²⁰ Prosecution Application, para. 145-149; Prosecution Submission, AnxA12; Prosecution Submission, AnxA64.

¹²¹ Prosecution Application, para. 145. Prosecution Submission AnxA12 and 64.

¹²² Prosecution Application, para. 36; Prosecution Submission, AnxA24; Prosecution Submission, AnxA26; Prosecution Submission, AnxA44, para. 19; Prosecution Submission, AnxA51, para. 43; Prosecution Submission, AnxA53, para. 63; Prosecution Submission, AnxA79, paras. 33 and 83.

¹²³ Ali Kushayb obtained a PDF appointment, introduced himself as being a member of the PDF, and was known to wear a PDF uniform. Prosecution Application, paras. 37 and 79; Prosecution Submission, AnxA24; Prosecution Submission, AnxA26; Prosecution Submission, AnxA27; Prosecution Submission, AnxA42, para. 63; Prosecution Submission, AnxA52.

96. There are reasonable grounds to believe that, by virtue of the fact that he was a senior tribal leader and a member of the PDF, Ali Kushayb commanded thousands of Militia/Janjaweed.¹²⁴

97. Hence, there are reasonable grounds to believe that Ali Kushayb, as PDF member and a senior Militia/Janjaweed leader representing the core Militia/Janjaweed leadership, implemented the counter-insurgency strategy that resulted in the commission of war crimes and crimes against humanity such as the persecution, rape and killing of civilians and attacks of towns and villages in Darfur, Sudan.¹²⁵

98. Moreover, there are reasonable grounds to believe that from August 2003 until in or about March 2004, Ali Kushayb participated with the Militia/Janjaweed under his command in the attacks against civilians in Darfur and the attacks upon villages and towns in the Wadi Salih area.¹²⁶

99. There are reasonable grounds to believe that, together with the Sudanese Armed Forces and Militia/Janjaweed, Ali Kushayb assigned the Militia/Janjaweed and members of the Sudanese Armed Forces to different parts of Kodoom¹²⁷ where civilians were killed and thousands were forced to flee.¹²⁸

100. Furthermore, there are reasonable grounds to believe that, on or about 15 August 2003, under the direction and supervision of Ali Kushayb,¹²⁹ the Militia/Janjaweed attacked the town of Bindisi, shooting and killing civilians,

¹²⁴ Prosecution Application, para. 36; Prosecution Submission, AnxA24; Prosecution Submission, AnxA26; Prosecution Submission, AnxA44, para. 19; Prosecution Submission, AnxA51, para. 43; Prosecution Submission, AnxA53, para. 63; Prosecution Submission, AnxA79, paras. 33 and 83.

¹²⁵ Prosecution Application, paras. 161-164; Prosecution Submission, AnxA24; Prosecution Submission, AnxA26; Prosecution Submission, AnxA33, para. 40; Prosecution Submission, AnxA35, paras. 67-72; Prosecution Submission, AnxA42, para. 63; Prosecution Submission, AnxA53, para. 36; Prosecution Submission, AnxA79, paras. 33-37 and 53.

¹²⁶ Prosecution Application, para. 161; Prosecution Submission, AnxA79, paras. 33 and 37.

¹²⁷ Prosecution Application, para. 192; Prosecution Submission, AnxA32, para.17; Prosecution Submission, AnxA39, paras. 57 and 61.

¹²⁸ Prosecution Application, paras. 189 and 196-198; Prosecution Submission, AnxA35, para. 43; Prosecution Submission, AnxA32, paras. 20-21; Prosecution Submission, AnxA37; Prosecution Submission, AnxA39, paras. 60-66, 84-85, 88, and 95-97.

¹²⁹ Prosecution Application, paras. 201-208; Prosecution Submission, AnxA35, paras. 94-96.

pillaging and destroying property, and burning huts and forcing civilians to flee.¹³⁰ There are reasonable grounds to believe that the militia/Janjaweed repeatedly raped women and girls from the town of Bindisi and perpetrated other inhumane acts.¹³¹

101. Moreover, there are reasonable grounds to believe that on or about 17 August 2003, Ali Kushayb was present during the attack on the town of Mukjar where, together with the Sudanese Armed Forces, the Militia/Janjaweed detained, tortured and killed civilians and raped women after the town had been attacked and pillaged.¹³²

102. There are reasonable grounds to believe that, in or around December 2003, Ali Kushayb, together with the Sudanese Armed Forces and Militia/Janjaweed, attacked Arawala town, perpetrating inhumane acts and inflicting cruel treatment, killing civilians, setting alight huts and pillaging the town. There are reasonable grounds to believe that, in the presence of Ali Kushayb, the Militia/Janjaweed raped and stripped women naked.¹³³

103. Having considered all the foregoing information, the Chamber finds that there are reasonable grounds to believe that Ali Kushayb, being at the head of the Militia/Janjaweed during the above-mentioned attacks during which the alleged crimes were committed, was not only fully aware of the occurrence of such illegal acts, but also committed them jointly with others.

104. Accordingly, in light of the available information, the Chamber finds that there are reasonable grounds to believe that Ali Kushayb is criminally responsible

¹³⁰ Prosecution Submission, AnxA35, paras. 41-61 and 80; Prosecution Submission, AnxA64, p. 5; Prosecution Submission, AnxA42, paras. 25-51; Prosecution Submission, AnxA46, paras. 51-52; Prosecution Submission, AnxA40, para. 40; Prosecution Submission, AnxA39, para. 36; Prosecution Submission, AnxA31, p. 7; Prosecution submission, AnxA61; Prosecution Submission, AnxA52, p. 7; Prosecution Submission, AnxA37, p. 8; Prosecution Submission, AnxA5, p. 2; Prosecution Submission, AnxA25, p. 1; Prosecution Submission, AnxA16, p. 1; Prosecution Submission, AnxA12, p. 1; Prosecution Submission, AnxA501, para. 112; Prosecution Submission, AnxA45, para. 108; Prosecution Submission, AnxA43, para. 110; Prosecution Submission, AnxA79, para. 58.

¹³¹ Prosecution Application paras. 211-213; Prosecution Submission, AnxA35, paras. 62-81.

¹³² Prosecution Application, paras. 162, 218-231 and 233-235; Prosecution Submission, AnxA35, paras. 67-72.

¹³³ Prosecution Application, paras. 242 and 244-247; Prosecution Submission, AnxA35, paras. 67-72.

under article 25(3)(a) of the Statute for committing jointly with others the crimes against humanity and war crimes as referred to in counts 7, 16, 25, 27, 29, 31, 33, 45 and 47 of the Prosecution Application.

105. Furthermore, the Chamber is of the view that there are reasonable grounds to believe that, in the period from mid 2003 to early 2004, Ali Kushayb, perceived as “the mediator” between the leaders of the Militia/Janjaweed in Wadi Salih and the Government of the Sudan,¹³⁴ also mobilised, recruited, armed, and provided supplies to the Militia/Janjaweed under his command.¹³⁵ Also, there are reasonable grounds to believe that he ensured the enlistment of those tribesmen mobilised by him as PDF fighters.¹³⁶ There are reasonable grounds to believe that Ali Kushayb provided funds, equipment, food, and other supplies from the Government of the Sudan to members of the Militia/Janjaweed under his command.¹³⁷

106. Having considered all the foregoing information, the Chamber finds that there are reasonable grounds to believe that, by reason of his position as a PDF member and as a senior Militia/Janjaweed leader who enlisted fighters, mobilised, recruited, armed, funded the Militia/Janjaweed under his command and provided food, equipment and other supplies to them, Ali Kushayb intentionally contributed to the commission of the above-mentioned crimes, knowing that his contribution would further the common plan carried out by the Sudanese Armed Forces and the Militia/Janjaweed, which consisted in attacking the civilian populations in Darfur.

107. The Chamber therefore finds that there are reasonable grounds to believe that Ali Kushayb is criminally responsible under article 25(3)(d) of the Statute for the war crimes and crimes against humanity as referred to in counts 1-6, 8-15, 17-24, 26, 28,

¹³⁴ Prosecution Application, para. 163; Prosecution Submission, AnxA24; Prosecution Submission, AnxA26; Prosecution Submission, AnxA33, para. 40; Prosecution Submission, AnxA79, para. 45.

¹³⁵ Prosecution Application, para. 163; Prosecution Submission, AnxA24; Prosecution Submission, AnxA26; Prosecution Submission, AnxA33, para. 40; Prosecution Submission, AnxA79, para. 45.

¹³⁶ Prosecution Application, para. 163; Prosecution Submission, AnxA24; Prosecution Submission, AnxA26; Prosecution Submission, AnxA33, para. 40; Prosecution Submission, AnxA79, para. 45.

¹³⁷ Prosecution Application, para. 164; Prosecution Submission, AnxA26; Prosecution Submission; AnxA42, para. 63; Prosecution Submission, AnxA79, paras. 33-34 and 53.

30, 32, 34-36, 38-44, 46, 48-51 of the Prosecution Application, having personally contributed to the common plan which had the illegal objective of attacking civilian populations in Darfur.

IV. Whether the specific requirements under article 58 of the Statute for the issuance of a summons to appear or, in the alternative, for the issuance of a warrant of arrest, have been met

A. The requirements under article 58(7) of the Statute

108. Upon the application of the Prosecution, the Chamber shall, if satisfied that there are reasonable grounds to believe that a person has committed crimes within the jurisdiction of the Court as provided for in article 58 of the Statute, issue either a warrant for his or her arrest or a summons for his or her appearance.

109. The Chamber will now turn its attention to the existence of the specific requirements under article 58 of the Statute for the issuance of summonses to appear or warrants of arrest against the two persons concerned by the Prosecution Application.

110. The Prosecution submits that at this stage a summons to appear should be the Court's first alternative and that the issuance of two summonses to appear for Ali Kushayb and Ahmad Harun would be sufficient to ensure their appearance before the Court.¹³⁸

111. In this regard, the Prosecution alleges that "the Government of the Sudan, which would serve the summons, and would have to facilitate and follow up on the summons, thus far has in practice provided a degree of cooperation in response to the Prosecution's requests".¹³⁹ The Prosecution added that the Government of the Sudan provided information required by the Prosecution in respect of particular documents from the National Commission of Inquiry, facilitated four missions to

¹³⁸ Prosecution Application, para. 273.

¹³⁹ Prosecution Application, para. 274.

Khartoum during 2005 and 2006, facilitated interviews including that of a senior official under the procedures set out in article 55(2) of the Statute and organised a fifth mission to Khartoum in January 2007.

112. The Prosecution further submits that Ahmad Harun has, moreover, previously shown willingness to cooperate with the International Commission of Inquiry and the National Commission of Inquiry.¹⁴⁰ It also alleges that Ali Kushayb, reportedly detained in Sudan pursuant to a warrant of arrest issued by the Sudanese authorities, could appear before the Court under a summons to appear while remaining in custody in the context of the Sudanese legal proceedings.¹⁴¹

113. Nevertheless, in its “Provision of Information Pursuant to Undertakings Made During Hearing on 8 March 2007”, the Prosecution notes that Sudan does not have domestic legislation implementing either the Statute or addressing the issue of cooperation with the Court. It also submits that it “has not yet discussed with the Sudanese authorities the modalities of Ali Kushayb’s response to a potential summons to appear under article 58(7) of the Statute while he is in detention and being tried in Sudan for other matters”.¹⁴²

114. Finally, the Prosecution states that the Pre-Trial Chamber will weigh the record independently on this issue and submits that a number of circumstances could lead it to modify its assessment of the likelihood that a summons to appear would prove sufficient in ensuring the appearance of Ahmad Harun and Ali Kushayb before the Court. The Prosecution further states that any official response of the Government of the Sudan or of Ahmad Harun or Ali Kushayb showing that they would resist or fail to comply with the decision of the Pre-Trial Chamber, would modify this assessment and would justify the issuance of warrants of arrest.¹⁴³

¹⁴⁰ Prosecution Application, para. 275.

¹⁴¹ Prosecution Application, para. 276.

¹⁴² ICC-02/05-62-US-Exp, para. 2.

¹⁴³ Prosecution Application, paras. 277 and 278.

115. Article 58(7) of the Statute stipulates that the Chamber shall issue a summons to appear as an alternative to a warrant of arrest under specific circumstances, that is, if it is satisfied that a summons is sufficient to ensure the person's appearance.

116. The Chamber shall therefore consider whether, based on the Prosecution Application and its supporting material, the issuance of a summons to appear is sufficient to ensure the person's appearance. For this purpose, the Chamber shall be satisfied that a summons to appear would be equally effective as a warrant of arrest to ensure the person's appearance before the Court.

117. In the Chamber's view, the issue raised by article 58 of the Statute is whether or not the arrests of these persons appear to be necessary. The application of article 58(7) of the Statute is restricted to cases in which the person can and will appear voluntarily before the Court without the necessity of presenting a request for arrest and surrender as provided for in articles 89 and 91 of the Statute.

118. The Chamber can only issue a summons to appear if the Prosecution Application and its supporting material provide sufficient guarantees that the person will appear before the Court.

119. Regarding Ali Kushayb, the Chamber notes that he is reported to be in prison upon a warrant of arrest issued by the Sudanese authorities and that the Prosecution has not presented any information that would lead to the conclusion that Ali Kushayb would appear voluntarily before the Court while being detained by the Sudanese authorities.

120. Moreover, the Chamber is of the view that issuing a summons to appear for a person currently detained by national authorities would be contrary to the object and purpose of article 58(7) of the Statute. Indeed, the possibility provided for in article 58(7) of the Statute to issue a summons to appear with conditions restricting liberty (other than detention), and the list of those conditions provided for in rule 119 of the

Rules, clearly indicate that a summons to appear is intended to apply only to persons who are not already being detained.

121. In addition, although the Prosecution alleges in its application¹⁴⁴ that Ali Kushayb could appear before the Court under a summons to appear while remaining in custody in the context of the Sudanese legal proceedings, it does not indicate how this would be possible under the legal framework provided for by the Statute and the Rules. Under this framework,¹⁴⁵ it is not possible to envisage a surrender, even a temporary surrender as provided for in rule 183 of the Rules and which seems to be referred to implicitly in the Prosecution Application, without the prior issuance of a warrant of arrest.

122. Regarding the situation of Ahmad Harun, the Prosecution submits that he has in the past shown willingness to cooperate with the International Commission of Inquiry and National Commission of Inquiry. Nevertheless, according to the Prosecution Application, Ahmad Harun has a previous record of concealing evidence in this case.¹⁴⁶

123. Furthermore, according to the “Update on the Prosecutor’s contact with the Government and Other International Actors”, the Sudanese Ministry of Foreign Affairs recently stated in a public document that Sudan will not cooperate with the Court and “maintain[s] that [it] has no right to extend its powers over Sudanese territory or its jurisdiction over Sudanese citizens”.¹⁴⁷

124. Therefore, considering the information provided by the Prosecution, the Chamber is not satisfied that the requirement under article 58(7) of the Statute, i.e. that Ahmad Harun and Ali Kushayb will appear voluntarily before the Court, is met.

¹⁴⁴ Prosecution Application, para. 276.

¹⁴⁵ See articles 58(5), 89 and 91 of the Statute.

¹⁴⁶ Prosecution Application, para. 272, footnote 161; ICC-02-05-T-1-CONF-EXP-EN[8March2007Edited], p.25-26.

¹⁴⁷ ICC-02/05-72-US-Exp-Anx A, p. 5.

125. Having concluded that it is not satisfied that the requirements of article 58(7) of the Statute are met, the Chamber will now consider whether the arrests of Ahmad Harun and Ali Kushayb appear necessary under article 58(1)(b) of the Statute.

B. The requirements under article 58(1)(b) of the Statute

126. Under article 58(1)(b) of the Statute, the Chamber may issue a warrant of arrest only if it is satisfied that 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.

127. According to the supporting material provided by the Prosecution,¹⁴⁸ Ahmad Harun is part of the "inner circle of power" within the Government of the Sudan. Accordingly, this "inner circle of power" holds the actual reins of power and control over Government assets.

128. The Chamber is satisfied that there are reasonable grounds to believe that, in addition to being a member of the "inner circle of power", Ahmad Harun, who was the Head of the Darfur Security desk from April 2003 to April 2004 and is currently Minister of Humanitarian Affairs, still wields enough power to influence decision-making regarding the Darfur conflict. Secondly, the Chamber notes that, because of his current position, Ahmad Harun might benefit from a certain guarantee that he will not face justice. Thirdly, in the Chamber's view, the highest authorities of Sudan

¹⁴⁸ Prosecution Submission, AnxA17, p.1-2.

may have a protective attitude towards members of government/military structures, such as Ahmad Harun.

129. Furthermore, in its supporting material, the Prosecution presented a report¹⁴⁹ showing that Ahmad Harun has been concealing evidence contained in the minutes of the various Security Committee meetings relating to the implementation of the Government's counter-insurgency policy while he was Minister of State for the Interior. It appears that in response to a request for access to these minutes by the National Commission of Inquiry, Ahmad Harun issued a decree ordering that the minutes be collected and sent to Khartoum. Furthermore, it is reported that Ahmad Harun directed that the minutes not be transmitted to the International Commission of Inquiry.¹⁵⁰

130. Finally, the Chamber notes that the International Commission of Inquiry stressed in its report that "there have been episodes indicative of pressure put by some regional or local authorities on prospective witnesses or on witnesses already interviewed by the Commission [...] [and] that the Sudanese authorities had deployed infiltrators posing as internally displaced persons into some camps such as Abushouk".¹⁵¹

131. In the view of the Chamber, it appears that Ahmad Harun may have concealed evidence in a bid to protect the government counter-insurgency policy. Accordingly, the Chamber considers that his arrest appears necessary, under article 58(1)(b)(ii) of the Statute, to ensure that he will not obstruct or endanger the investigation.

132. Furthermore, according to the Prosecution's supporting material, Ali Kushayb, is currently "in the custody of the Sudanese police". The Chamber has no

¹⁴⁹ Prosecution Submission, AnxA9.

¹⁵⁰ Ibid, p. 6.

¹⁵¹ Prosecution Submission, AnxA18, para. 35.

information as to the absence of contact between Ali Kushayb and external actors outside the custody of the Sudanese police.

133. In the view of the Chamber, the detention of Ali Kushayb prevents him from willingly and voluntarily appearing before the Court. Therefore, his arrest appears necessary at this stage to ensure his appearance at trial.

134. Accordingly, on the basis of the Prosecution Application and its supporting material, the Chamber considers that the arrests of Ali Kushayb and Ahmad Harun appear to be necessary at this stage pursuant to article 58(1)(b) of the Statute.

V. Transmission of the Warrants of Arrest

135. The Pre-Trial Chamber is the only competent organ of the Court which may: (1) issue and amend a warrant of arrest; (2) 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 (3) thoroughly follow up on the execution of cooperation requests for both arrest and surrender of the relevant person. Hence, the Pre-Trial Chamber, assisted by the Registry, in accordance with rules 176(2) and 184 of the Rules, must be regarded as the only organ of the Court competent to make and transmit a cooperation request for arrest and surrender.¹⁵²

136. The Chamber 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 practicable any information related to the potential risks that the transmission of the cooperation requests for the arrest and surrender of Ahmad Harun and Ali Kushayb may cause to victims and witnesses.

¹⁵² ICC-02/04-01/05-1-US-Exp, p. 6. See *supra* footnote 12.

137. Furthermore, the Chamber considers that it would be beneficial for the expeditious execution of the cooperation requests for arrest and surrender of Ahmad Harun and Ali Kushayb that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit as soon as practicable 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.

FOR THESE REASONS

DECIDES to issue warrants of arrest for Ahmad Harun and Ali Kushayb for their alleged responsibility for crimes against humanity and/or war crimes under article 25 of the Statute for:

Count 1

(Persecution in the Kodoom villages and surrounding areas constituting a crime against humanity)

From on or about 15 August 2003 to on or about 31 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the persecution of the primarily Fur population of the Kodoom villages and surrounding areas by acts of murder, attack of the civilian population, destruction of property and forcible transfer (articles 7(l)(h) and 25(3)(d) of the Statute);

Count 2

(Murder of civilians in the Kodoom villages and surrounding areas constituting a crime against humanity)

On or about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of civilians from the primarily Fur population of the Kodoom villages and surrounding areas (articles 7(1)(a) and 25(3)(d) of the Statute);

Count 3

(Murder of civilians in the Kodoom villages and surrounding areas constituting a war crime)

On or about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of civilians from the primarily Fur population of the Kodoom villages and surrounding areas, while those civilians were taking no active part in hostilities (articles 8(2)(c)(i) and 25(3)(d) of the Statute);

Count 4

(Murder of civilians in the Kodoom villages and surrounding areas constituting a crime against humanity)

On or about 31 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of civilians from the primarily Fur population of the Kodoom villages and surrounding areas (articles 7(1)(a) and 25(3)(d) of the Statute);

Count 5

(Murder of civilians in the Kodoom villages and surrounding areas constituting a war crime)

On or about 31 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of civilians from the primarily Fur population of the Kodoom villages and surrounding areas, while those civilians were taking no active part in hostilities (articles 8(2)(c)(i) and 25(3)(d) of the Statute);

Count 6

(Attacks against the civilian population in the Kodoom villages and surrounding areas constituting a war crime)

From on or about 15 August 2003 to on or about 31 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the commission of attacks against civilians from the primarily Fur population of the Kodoom villages and surrounding areas, and against civilians not taking direct part in hostilities (articles 8(2)(e)(i) and 25(3)(d) of the Statute);

Count 7

(Attacks against the civilian population in the Kodoom villages and surrounding areas constituting a war crime)

From on or about 15 August 2003 to on or about 31 August 2003, **Ali Kushayb** committed, jointly with others, attacks against civilians from the primarily Fur population of the Kodoom villages and surrounding areas, and against civilians not taking direct part in hostilities (articles 8(2)(e)(i) and 25(3)(a) of the Statute);

Count 8

(Destruction of property in the Kodoom villages and surrounding areas constituting a war crime)

From on or about 15 August 2003 to on or about 31 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the destruction of property belonging to the primarily Fur population of the Kodoom villages and surrounding areas, including the burning of houses (articles 8(2)(e)(xii) and 25(3)(d) of the Statute);

Count 9

(Forcible transfer from the Kodoom villages and surrounding areas constituting a crime against humanity)

From on or about 15 August 2003 to on or about 31 August 2003 **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the forcible transfer of approximately 20,000 primarily Fur civilians from the Kodoom villages and surrounding areas, resulting in the desertion of the villages (articles 7(1)(d) and 25(3)(d) of the Statute);

Count 10

(Persecution in Bindisi town and surrounding areas constituting a crime against humanity)

On or about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the persecution of the primarily Fur population of Bindisi town and surrounding areas, by acts of murder, rape, attack of the civilian population, inhumane acts, pillaging, destruction of property and forcible transfer of the population (articles 7(1)(h) and 25(3)(d) of the Statute);

Count 11

(Murder of civilians in Bindisi town and surrounding areas constituting a crime against humanity)

On or about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of over 100 civilians from the primarily Fur population of Bindisi town and surrounding areas (articles 7(1)(a) and 25(3)(d) of the Statute);

Count 12

(Murder of civilians in Bindisi town and surrounding areas constituting a war crime)

On or about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of over 100 civilians from the primarily Fur population of Bindisi town and surrounding areas, while those civilians were taking no active part in hostilities (articles 8(2)(c)(i) and 25(3)(d) of the Statute);

Count 13

(Rape in Bindisi town and surrounding areas constituting a crime against humanity)

On or about 15 August 2003. **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the rape of women and girls from the primarily Fur population of Bindisi town and surrounding areas (articles 7(1)(g) and 25(3)(d) of the Statute);

Count 14

(Rape in Bindisi town and surrounding areas constituting a war crime)

On or about 15 August 2003. **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the rape of women and girls

from the primarily Fur population of Bindisi town and surrounding areas (articles 8(2)(e)(vi) and 25(3)(d) of the Statute);

Count 15

(Attacks against the civilian population in Bindisi town and surrounding areas constituting a war crime)

On or about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the commission of attacks against civilians from the primarily Fur population of Bindisi town and surrounding areas, while those civilians were not taking direct part in hostilities (articles 8(2)(e)(i) and 25(3)(d) of the Statute);

Count 16

(Attacks against the civilian population in Bindisi town and surrounding areas constituting a war crime)

On or about 15 August 2003, **Ali Kushayb** committed, jointly with others, attacks against civilians from the primarily Fur population of Bindisi town and surrounding areas, while those civilians were not taking direct part in hostilities (articles 8(2)(e)(i) and 25(3)(a) of the Statute);

Count 17

(Inhumane acts in Bindisi town constituting a crime against humanity)

On or about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the infliction of great suffering, serious injury to body or to mental or physical health by means of inhumane acts upon civilians from the primarily Fur population of Bindisi town and surrounding areas including the inhumane act of shooting, resulting in serious injury (articles 7(1)(k) and 25(3)(d) of the Statute);

Count 18

(Pillaging in Bindisi town and surrounding areas constituting a war crime)

On or about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the pillaging of property belonging to the primarily Fur population of Bindisi town and surrounding areas,

including the pillaging of household property (articles 8(2)(e)(v) and 25(3)(d) of the Statute);

Count 19

(Destruction of property in Bindisi town and surrounding areas constituting a war crime)

On or about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the destruction of property belonging to the primarily Fur population of Bindisi town and surrounding areas, including the burning of food storages, the mosque and dwellings in the area (articles 8(2)(e)(xii) and 25(3)(d) of the Statute);

Count 20

(Forcible transfer from Bindisi town and surrounding areas constituting a crime against humanity)

On and about 15 August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the forcible transfer of approximately 34,000 primarily Fur civilians from Bindisi town and surrounding areas, resulting in the desertion of the town (articles 7(1)(d) and 25(3)(d) of the Statute);

Count 21

(Persecution in Mukjar town and surrounding areas constituting a crime against humanity)

Between August 2003 and March 2004, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the persecution of the primarily Fur population of Mukjar town and surrounding areas by acts of murder, attack of the civilian population, imprisonment or severe deprivation of liberty, torture, pillaging and destruction of property (articles 7(1)(h) and 25(3)(d) of the Statute);

Count 22

(Murder of men in Mukjar town and surrounding areas constituting a crime against humanity)

Between September 2003 and October 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of at least 20 men from the primarily Fur population of Mukjar town and surrounding areas (articles 7(1)(a) and 25(3)(d) of the Statute);

Count 23

(Murder of men in Mukjar town and surrounding areas constituting a war crime)

Between September 2003 and October 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of at least 20 men from the primarily Fur population of Mukjar town and surrounding areas, while those men were taking no active part in hostilities (articles 8(2)(c)(i) and 25(3)(d) of the Statute);

Count 24

(Murder of men in Mukjar town and surrounding areas constituting a crime against humanity)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of at least 21 men from the primarily Fur population of Mukjar town and surrounding areas (articles 7(1)(a) and 25(3)(d) of the Statute);

Count 25

(Murder of men in Mukjar town and surrounding areas constituting a crime against humanity)

In or around December 2003, **Ali Kushayb** committed, jointly with others, the murder of at least 21 men from the primarily Fur population of Mukjar town and surrounding areas by transporting them under armed guard to their place of execution (articles 7(1)(a) and 25(3)(a) of the Statute);

Count 26

(Murder of men in Mukjar town and surrounding areas constituting a war crime)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of at least 21 men from the primarily Fur population of Mukjar town and surrounding areas, while

those men were taking no active part in hostilities (articles 8(2)(c)(i) and 25(3)(d) of the Statute);

Count 27

(Murder of men in Mukjar town and surrounding areas constituting a war crime)

In or around December 2003, **Ali Kushayb** committed, jointly with others, the murder of at least 21 men from the primarily Fur population of Mukjar town and surrounding areas, while those men were taking no active part in hostilities, by transporting them under armed guard to their place of execution (articles 8(2)(c)(i) and 25(3)(a) of the Statute);

Count 28

(Murder of men in Mukjar town and surrounding areas constituting a crime against humanity)

In or around March 2004, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of at least 32 men from the primarily Fur population of Mukjar town and surrounding areas (articles 7(1)(a) and 25(3)(d) of the Statute);

Count 29

(Murder of men in Mukjar town and surrounding areas constituting a crime against humanity)

In or around March 2004, **Ali Kushayb** committed, jointly with others, the murder of at least 32 men from the primarily Fur population of Mukjar town and surrounding areas by transporting them under armed guard to their place of execution (articles 7(1)(a) and 25(3)(a) of the Statute);

Count 30

(Murder of men in Mukjar town and surrounding areas constituting a war crime)

In or around March 2004, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of at least 32 men from the primarily Fur population of Mukjar town and surrounding areas, while those men were taking no active part in hostilities (articles 8(2)(c)(i) and 25(3)(d) of the Statute);

Count 31

(Murder of men in Mukjar town and surrounding areas constituting a war crime)

In or around March 2004, **Ali Kushayb** committed, jointly with others, the murder of at least 32 men from the primarily Fur population of Mukjar town and surrounding areas, while those men were taking no active part in hostilities, by transporting them under armed guard to their place of execution (articles 8(2)(c)(i) and 25(3)(a) of the Statute);

Count 32

(Attacks against the civilian population in Mukjar town and surrounding areas constituting a war crime)

Between August 2003 and March 2004, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the commission of attacks against civilians from the primarily Fur population of Mukjar town and surrounding areas and against civilians not taking direct part in hostilities (articles 8(2)(e)(i) and 25(3)(d) of the Statute);

Count 33

(Attacks against the civilian population in Mukjar town and surrounding areas constituting a war crime)

Between August 2003 and March 2004, **Ali Kushayb** committed, jointly with others, attacks against civilians from the primarily Fur population of Mukjar town and surrounding areas and against civilians not taking direct part in hostilities (Articles 8(2)(e)(i) and 25(3)(a) of the Statute);

Count 34

(Imprisonment or severe deprivation of liberty in Mukjar town and surrounding areas constituting a crime against humanity)

Beginning in or about August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the imprisonment or severe deprivation of the physical liberty of at least 400 civilians from the primarily Fur population of Mukjar town and surrounding areas (articles 7(1)(e) and 25(3)(d) of the Statute);

Count 35

(Torture in Mukjar town and surrounding areas constituting a crime against humanity)

Beginning in or about August 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the torture of at least 60 civilians from the primarily Fur population of Mukjar town and surrounding areas (article 7(1)(f) and 25(3)(d) of the Statute);

Count 36

(Pillaging in Mukjar town and surrounding areas constituting a war crime)

Between August 2003 and March 2004, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the pillaging of property belonging to the primarily Fur population of Mukjar town and surrounding areas including the pillaging of shops, houses and livestock (articles 8(2)(e)(v) and 25(3)(d) of the Statute);

Count 37

(Pillaging in Mukjar town and surrounding areas constituting a war crime)

Between on or about 3 August 2003 and 10 August 2003, **Ahmad Harun** induced the commission of the pillaging of property belonging to the primarily Fur population of Mukjar town and surrounding areas including the pillaging of shops, houses and livestock (articles 8(2)(c)(v) and 25(3) (b) of the Statute);

Count 38

(Destruction of property in Mukjar town and surrounding areas constituting a war crime)

Between August 2003 and March 2004, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the destruction of property belonging to the primarily Fur population of Mukjar town and surrounding areas, including the burning of dwellings and the destruction of crops and farms (articles 8(2)(e)(xii) and 25(3)(d) of the Statute);

Count 39

(Persecution in Arawala town and surrounding areas constituting a crime against humanity)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the persecution of the primarily Fur population of Arawala town and surrounding areas, by acts of murder, rape, attack of the civilian population, outrages upon personal dignity, inhumane acts, pillaging, destruction of property and forcible transfer of the population (articles 7(1)(h) and 25(3)(d) of the Statute);

Count 40

(Murder of civilians in Arawala town and surrounding areas constituting a crime against humanity)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of at least 26 civilians from the primarily Fur population of Arawala town and surrounding areas (articles 7(1)(a) and 25(3)(d) of the Statute);

Count 41

(Murder of civilians in Arawala town and surrounding areas constituting a war crime)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the murder of at least 26 civilians from the primarily Fur population of Arawala town and surrounding areas, while those civilians were taking no active part in hostilities (articles 8(2)(c)(i) and 25(3)(d) of the Statute);

Count 42

(Rape in Arawala town and surrounding areas constituting a crime against humanity)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the rape of at least 10 women and girls from the primarily Fur population of Arawala town and surrounding areas (articles 7(1)(g) and 25(3)(d) of the Statute);

Count 43

(Rape in Arawala town and surrounding areas constituting a war crime)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the rape of at least 10 women and girls from the primarily Fur population of Arawala town and surrounding areas (articles 8(2)(e) (vi) and 25(3)(d) of the Statute);

Count 44

(Attacks against the civilian population in Arawala town and surrounding areas constituting a war crime)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the commission of attacks against civilians from the primarily Fur population of Arawala town and surrounding areas and against civilians not taking direct part in hostilities (articles 8(2)(e)(i) and 25(3)(d) of the Statute);

Count 45

(Attacks against the civilian population in Arawala town and surrounding areas constituting a war crime)

In or around December 2003, **Ali Kushayb** committed, jointly with others, attacks against civilians from the primarily Fur population of Arawala town and surrounding areas and against civilians not taking direct part in hostilities (articles 8(2)(e)(i) and 25(3)(a) of the Statute);

Count 46

(Outrage upon personal dignity in Arawala town and surrounding areas constituting a war crime)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to outrage upon personal dignity of at least 10 women and girls from the primarily Fur population of Arawala town and surrounding areas (articles 8(2)(c) (ii) and 25(3)(d) of the Statute);

Count 47

(Outrage upon personal dignity in Arawala town and surrounding areas constituting a war crime)

In or around December 2003, **Ali Kushayb** committed, jointly with others, outrage upon personal dignity of at least 10 women and girls from the primarily Fur population of Arawala town and surroundings areas (articles 8(2)(c) (ii) and 25(3)(a) of the Statute);

Count 48

(Inhumane acts in Arawala constituting a crime against humanity)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the infliction great suffering, or serious injury to body or to mental or physical health by means of an inhumane act upon civilians from the primarily Fur population of Arawala town and surrounding areas (articles 7(1)(k) and 25(3)(d) of the Statute);

Count 49

(Pillaging in Arawala town and surrounding areas constituting a war crime)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the pillaging of property belonging to the primarily Fur population of Arawala town and surrounding areas, including the pillaging of stores, houses and livestock (articles 8(2)(e)(v) and 25(3)(d) of the Statute);

Count 50

(Destruction of property in Arawala town and surrounding areas constituting a war crime)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the destruction of property belonging to the primarily Fur population of Arawala town and surrounding areas, including the destruction of most of Arawala town (articles 8(2)(e)(xii) and 25(3)(d) of the Statute);

Count 51

(Forcible transfer from Arawala town and surrounding areas constituting a crime against humanity)

In or around December 2003, **Ahmad Harun** and **Ali Kushayb**, as part of a group of persons acting with a common purpose, contributed to the forcible transfer of approximately 7,000 primarily Fur civilians from Arawala town and surrounding areas to the towns of Deleig, Garsila and other locations, resulting in the desertion of the town (articles 7(1)(d) and 25(3)(d) of the Statute).

DECIDES that the warrants of arrest for Ahmad Harun and Ali Kushayb shall be included in a separate self-executing document containing the information required by article 58(3) of the Statute;

RECALLS the United Nations Security Council resolution 1593, acting pursuant to Chapter VII of the Charter of the United Nations, in which the Security Council decided that the Government of the Sudan and all other parties to the Darfur conflict, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to the resolution and, while recognizing that States not party to the Statute have no obligation under the Statute, urged all States and concerned regional and other international organizations to cooperate fully;

DECIDES that, as soon as practicable, the Registry: (i) shall prepare two requests for cooperation seeking the arrest and surrender of Ahmad Harun and Ali Kushayb and containing the information and documents required by article 91 of the Statute; and (ii) shall transmit such requests 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; and

(iii) Egypt, Eritrea, Ethiopia and Libya.

ORDERS the Registry to comply with its obligations under rule 187 of the Rules;

FURTHER DIRECTS the Registrar, as appropriate, to prepare and to transmit to any other State any additional request for arrest and surrender which may be necessary for the arrest and surrender of Ahmad Harun and Ali Kushayb to the Court pursuant to articles 89 and 91 of the Statute;

DIRECTS the Registrar to prepare and transmit to any State any request for provisional arrest which may be necessary for the surrender of the persons concerned to the Court pursuant to article 92 of the Statute;

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 the persons concerned to the Court;

RECALLS the possibility for Sudan to temporarily surrender Ali Kushayb as provided for in article 89(4) of the Statute and rule 183 of the Rules;

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 any of the above-mentioned cooperation requests;

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 any of the above-mentioned cooperation requests;

DECIDES to lift the seal on the existence and content of the following documents only to the extent to which they are referred to in the present decision:

- (i) ICC-02/05-62-US-Exp;
- (ii) ICC-02/05-64-US-Exp;
- (iii) ICC-02/05-67-US;
- (iv) ICC-02/05-69-US-Exp; and
- (v) ICC-02/05-72-US-Exp.

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

Judge Akua Kuenyehia

Presiding Judge

Judge Claude Jorda

Judge Sylvia Steiner

Dated this Friday 27 April 2007

At The Hague, The Netherlands