

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

**SITUATION IN DARFUR, THE SUDAN
IN THE CASE OF THE PROSECUTOR V. ABDEL RAHEEM MUHAMMAD
HUSSEIN**

Public document

**Public redacted version of "Decision on the Prosecutor's application
under article 58 relating to Abdel Raheem Muhammad Hussein"**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

I. Introduction

1. This decision of Pre-Trial Chamber I ("Chamber") of the International Criminal Court ("Court") is with respect to the "Prosecutor's Application under Article 58"¹ ("Prosecutor's Application"), filed on 2 December 2011, whereby the Prosecutor requested that a warrant of arrest be issued for Abdel Raheem Muhammad Hussein ("Mr Hussein") for crimes against humanity and war crimes committed in Darfur from August 2003 to March 2004.

2. The crimes set out in the Prosecutor's Application are identical to those for which the Chamber issued warrants of arrest against Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") on 27 April 2007,² having found reasonable grounds to believe that Ahmad Harun, Minister of State for the Interior at the relevant time, had intentionally contributed to the commission of the crimes and induced the commission of one of the crimes and that Ali Kushayb, a member of the Popular Defence Forces and senior Militia/Janjaweed leader, had intentionally contributed to the commission of certain crimes and committed other crimes jointly with others.

3. The alleged crimes also overlap with those crimes for which the Chamber issued an arrest warrant against the President of the Republic of the Sudan, Omar Hassan Ahmad Al Bashir ("Omar Al Bashir") on 4 March 2009,³ having found reasonable grounds to believe that a common plan was formulated at the highest levels of the Government of the Republic of the Sudan ("GoS"), a core component of which was an unlawful attack on that part of the civilian population of Darfur – belonging largely to

¹ ICC-02/05-237-US-Exp and annexes; Public Redacted version filed on 24 January 2012, ICC-02/05-237-Red; supporting materials filed on 2 February 2012, "Prosecution's Submission of supporting materials for the "Prosecutor's Application under Article 58"" ("Supporting Materials"), ICC-02/05-240 and annexes.

² *The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, Pre-Trial Chamber I, "Decision on the Prosecution Application under Article 58(7) of the Statute" 27 April 2007, ICC-02/05-01/07-1-Corr.

³ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 4 March 2009, ICC-02/05-01/09-3.

the Fur, Masalit and Zaghawa groups – perceived as being close to the rebel groups opposing the GoS in the armed conflict in Darfur.⁴

4. The Prosecutor alleges that Mr Hussein, as Minister of the Interior in the Republic of the Sudan, Special Representative of the President in Darfur and an influential member of the key decision making group within the GoS, at the time relevant to the Prosecutor's Application, played an essential role in the formulation and implementation of the common plan of the GoS, both directly and through Ahmad Harun, then Minister of State for the Interior in Darfur, who was his direct subordinate.⁵

5. The Chamber will analyse the evidence and information relied on by the Prosecutor,⁶ including that provided in the Prosecutor's application for warrants of arrest against Ahmad Harun and Ali Kushayb ("Application of 27 February 2007"),⁷ in order to determine whether there are reasonable grounds to believe that Mr Hussein has committed one or more crimes within the jurisdiction of the Court and that his arrest appears necessary within the meaning of article 58(1) of the Rome Statute ("Statute").

II. Whether the case against Mr Hussein falls within the jurisdiction of the Court and is admissible

6. Pursuant to article 19(1) of the Statute, the Chamber must satisfy itself that it has jurisdiction in any case brought before it. As the Chamber has previously found, "a case arising from the investigation of a situation will fall within the jurisdiction of the

⁴ *Ibid.*, paras 214-215.

⁵ Prosecutor's Application, paras 4-6.

⁶ Prosecutor's Application and annexes; Supporting Materials and annexes; The Prosecutor also relied where relevant on his application for arrest warrant and the Chamber's decision in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir: Situation in Darfur, the Sudan*, "Prosecutor's Application under Article 58", 14 July 2008, ICC-02/05-151-US-Exp; Corrigendum, ICC-02/05-151-US-Exp-Corr; Public redacted version, ICC-02/05-157-AnxA; *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 4 March 2009, ICC-02/05-01/09-3.

⁷ *Situation in Darfur, the Sudan*, "Prosecutor's Application under Article 58 (7)", 27 February 2007, ICC-02/05-56; *Situation in Darfur, the Sudan*, "Prosecution's Submission of Further Information and Materials Pursuant to the Invitation of Pre Trial Chamber I on 8 March 2007" ("Prosecutor's Submission of 12 March 2007"), 12 March 2007, ICC-02/05-64-US-Exp.

Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.”⁸

7. The Chamber notes that (i) regarding personal and territorial jurisdiction, although Mr Hussein is of Sudanese nationality and the events that form the subject of the Prosecutor’s Application took place in the Republic of the Sudan, which is not a state party to the Statute, the situation in Darfur, from 1 July 2002 was referred to the Court by the United Nations Security Council under article 13(b) of the Statute and therefore, article 12(2) of the Statute, which sets out preconditions to the exercise of jurisdiction, does not apply,⁹ (ii) in relation to temporal jurisdiction, the events alleged in the Prosecutor’s Application occurred between August 2003 and March 2004, and, therefore, after 1 July 2002, and (iii) regarding material jurisdiction, the factual allegations contained in the Prosecutor’s Application, if proven, would give rise to criminal responsibility for crimes against humanity and war crimes punishable under articles 7 and 8 of the Statute.

8. The Chamber further notes that, pursuant to article 27 of the Statute, neither the current position of Mr Hussein as Minister of National Defence in the Republic of the Sudan, nor his previous official positions as either the President’s Special Representative in Darfur or Minister of the Interior of the Republic of the Sudan¹⁰ has any effect on the Court’s jurisdiction over the present case.¹¹

⁸ *The Prosecutor v Thomas Lubanga Dyilo*, Pre-Trial Chamber I, “Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo”, 25 February 2006, ICC-01/04-01/06-8-Corr, para. 21.

⁹ UN Security Council, *Security Council Resolution 1593 (2005)*, 31 March 2005, S/RES/1593 (2005).

¹⁰ Prosecutor’s Application, paras 8-9.

¹¹ See *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-3, paras 41-45; See also *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, “Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-139-Corr, paras 22-36.

9. Accordingly, and without prejudice to any subsequent determination under article 19 of the Statute, the Chamber is satisfied that the present case falls within the jurisdiction of the Court.

10. The Chamber will not, at this stage, exercise its discretionary *proprio motu* power to determine the admissibility of the case against Mr Hussein as there is no ostensible cause or self-evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute.¹²

VI. Prosecutor's Allegations

11. In the Prosecutor's Application, the issuance of a warrant of arrest for Mr Hussein is sought for the following alleged crimes:

A. Counts 1, 9, 19 and 31 (Persecution constituting a crime against humanity)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a crime against humanity in violation of articles 7(1)(h) and 25(3)(a) of the Statute, namely (i) the persecution of the primarily Fur population of the Kodoom villages and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur by acts of murder, attacking the civilian population, destruction of property and forcible transfer, from on or about 15 August 2003 to on or about 31 August 2003, (ii) persecution of the primarily Fur population of Bindisi town and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur, by acts of murder, rape, attacking the civilian population, inhumane acts, pillaging, destruction of property and forcible transfer of the population, on or about 15 August 2003, (iii) persecution of the primarily Fur population of Mukjar town and surrounding areas in the Mukjar Locality in West Darfur by acts of murder, attacking the civilian population, imprisonment or severe deprivation of liberty, torture, pillaging and destruction of property, between August 2003 and March 2004, and (iv) persecution of the primarily Fur population of Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur, by acts of murder, rape, attacking the civilian population,

¹² *Situation in the Democratic Republic of the Congo*, Appeals Chamber, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04-169, paras 46-53.

outrages upon personal dignity, inhumane acts, pillaging, destruction of property and forcible transfer of the population, in or around December 2003;

B. Counts 2, 4, 10, 20, 22, 24 and 32 (Murder constituting a crime against humanity)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a crime against humanity in violation of articles 7(1)(a) and 25(3)(a) of the Statute, namely (i) murder of civilians from the primarily Fur population of the Kodoom villages and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur, on or about 15 August 2003¹³ and on or about 31 August 2003,¹⁴ (ii) murder of civilians from the primarily Fur population of Bindisi town and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur, on or about 15 August 2003,¹⁵ (iii) murder of about 20 men from the primarily Fur population of Mukjar town and surrounding areas, near Bedingair Brook to the North East of Mukjar town, between September 2003 and October 2003, about 21 men near Bedingair Brook in or around December 2003, and at least 32 men near Sinnang outside of Mukjar town in or around March 2004,¹⁶ and (iv) murder of civilians from the primarily Fur population of Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur, in or around December 2003¹⁷;

C. Counts 3, 5, 11, 21, 23, 25 and 33 (Murder constituting a war crime)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a war crime in violation of articles 8(2)(c)(i) and 25(3)(a) of the Statute, namely (i) murder of civilians from the primarily Fur population of the Kodoom villages and surrounding areas, in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur, on or about 15 August 2003¹⁸ and on or about 31 August 2003,¹⁹ (ii) murder of civilians from the primarily Fur population of Bindisi town and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur, on or about 15 August 2003,²⁰ (iii) murder of about 20 men from the primarily Fur population of Mukjar town and surrounding areas, near

¹³ Civilians allegedly murdered include [REDACTED].

¹⁴ Civilians allegedly murdered include [REDACTED].

¹⁵ Civilians allegedly murdered include [REDACTED].

¹⁶ Men allegedly murdered include [REDACTED].

¹⁷ Civilians allegedly murdered include [REDACTED].

¹⁸ Civilians allegedly murdered include [REDACTED].

¹⁹ Civilians allegedly murdered include [REDACTED].

²⁰ Civilians allegedly murdered include [REDACTED].

Bedingair Brook to the North East of Mukjar town, between September 2003 and October 2003, about 21 men near Bedingair Brook in or around December 2003, and at least 32 men near Sinnang outside of Mukjar town in or around March 2004,²¹ and (iv) murder of civilians from the primarily Fur population of Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur, in or around December 2003,²² while those civilians were taking no active part in hostilities;

D. Counts 6, 14, 26 and 36 (Attacks against the civilian population constituting a war crime)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a war crime in violation of articles 8(2)(e)(i) and 25(3)(a) of the Statute, namely (i) the intentional directing of attacks against civilians from the primarily Fur population of the Kodoom villages and surrounding areas, in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur from on or about 15 August 2003 to on or about 31 August 2003,²³ (ii) the intentional directing of attacks against civilians from the primarily Fur population of Bindisi town and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur on or about 15 August 2003,²⁴ (iii) the intentional directing of attacks against civilians from the primarily Fur population of Mukjar town and surrounding areas in the Mukjar Locality in West Darfur between August 2003 and March 2004,²⁵ and (iv) the intentional directing of attacks against civilians from the primarily Fur population of Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur in or around December 2003²⁶, while those civilians were taking no direct part in hostilities;²⁷

E. Counts 7, 17, 30 and 40 (Destruction of property constituting a war crime)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a war crime in violation of articles 8(2)(e)(xii) and 25(3)(a) of the Statute, namely (i) from on or about 15 August 2003 to on or about 31 August 2003, the destruction of property belonging to the primarily Fur population of the Kodoom villages and surrounding

²¹ Men allegedly murdered include [REDACTED].

²² Civilians allegedly murdered include [REDACTED].

²³ Civilians allegedly attacked include [REDACTED].

²⁴ Civilians allegedly attacked include [REDACTED].

²⁵ Civilians allegedly attacked include [REDACTED].

²⁶ Civilians allegedly attacked include [REDACTED].

²⁷ The Chamber notes that count 36 as articulated in the Prosecutor's Application erroneously refers to attacks against the civilian population under article 8(2)(c)(i) of the Statute instead of article 8(2)(e)(i) of the Statute.

areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur, including the burning of houses in Kodoom Jureh, Kodoom Tineh, Kodoom Wosta and Kodoom Derliwa, (ii) on or about 15 August 2003, the destruction of property belonging to the primarily Fur population of Bindisi town and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur, including the burning of food storages, the mosque and dwellings in the area, (iii) between August 2003 and March 2004, the destruction of property belonging to the primarily Fur population of Mukjar town and surrounding areas in the Mukjar Locality in West Darfur, including the burning of dwellings and the destruction of crops and farms, and (iv) in or around December 2003, the destruction of property belonging to the primarily Fur population of Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur including the destruction of most of Arawala town;

F. Counts 8, 18 and 41 (Forcible transfer constituting a crime against humanity)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a crime against humanity in violation of articles 7(1)(d) and 25(3)(a) of the Statute, namely (i) from on or about 15 August 2003 to on or about 31 August 2003, the forcible transfer of approximately 20,000 primarily Fur civilians from the Kodoom villages and surrounding areas in the Wadi Salih Locality in West Darfur to Bindisi town and other locations in the Wadi Salih Locality in West Darfur resulting in the desertion of the villages, (ii) on and about 15 August 2003, the forcible transfer of approximately 34,000 primarily Fur civilians from Bindisi town and surrounding areas in the Wadi Salih Locality in West Darfur to Mukjar town and other locations in the Wadi Salih Locality in West Darfur, resulting in the desertion of the town, (iii) in or around December 2003, the forcible transfer of approximately 7,000 primarily Fur civilians from Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur to the towns of Deleig, Garsila and other locations in the Wadi Salih Locality in West Darfur, resulting in the desertion of the town;

G. Counts 12 and 34 (Rape constituting a crime against humanity)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a crime against humanity in violation of articles 7(1)(g) and 25(3)(a) of the Statute, namely (i) on or about 15 August 2003, the rape of women and girls from the primarily Fur population of Bindisi town and surrounding areas, in the Bundis Administrative

Unit of Wadi Salih Locality in West Darfur,²⁸ and (ii) in or around December 2003, the rape of at least 10 women and girls from the primarily Fur population of Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur²⁹;

H. Counts 13 and 35 (Rape constituting a war crime)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a war crime in violation of articles 8(2)(e)(vi) and 25(3)(a) of the Statute, namely (i) on or about 15 August 2003, the rape of women and girls from the primarily Fur population of Bindisi town and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur,³⁰ and (ii) in or around December 2003, the rape of at least 10 women and girls from the primarily Fur population of Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur³¹;

I. Counts 15 and 38 (Inhumane acts constituting a crime against humanity)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a crime against humanity in violation of articles 7(l)(k) and 25(3)(a) of the Statute, namely (i) on or about 15 August 2003, the inflicting of great suffering, serious injury to body or to mental or physical health by means of an inhumane act upon civilians from the primarily Fur population of Bindisi town and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur,³² and (ii) in or around December 2003, the inflicting of 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 in the Wadi Salih Locality in West Darfur³³;

J. Count 16, 29 and 39 (Pillaging constituting a war crime)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a war crime in violation of articles 8(2)(e)(v) and 25(3)(a) of the Statute, namely (i) on or about 15 August 2003, the pillaging of property belonging to the primarily Fur population of Bindisi town and surrounding areas in the Bundis Administrative Unit of Wadi

²⁸ Women and girls allegedly raped include [REDACTED].

²⁹ Women and girls allegedly raped include [REDACTED].

³⁰ Women and girls allegedly raped include [REDACTED].

³¹ Women and girls allegedly raped include [REDACTED].

³² Inhumane acts alleged include the shooting of [REDACTED].

³³ Inhumane acts alleged include the shooting and stabbing of [REDACTED].

Salih Locality in West Darfur, including the pillaging of household property,³⁴ (ii) between August 2003 and March 2004, the pillaging of property belonging to the primarily Fur population of Mukjar town and surrounding areas in the Mukjar Locality in West Darfur, including the pillaging of shops, houses and livestock, (iii) in or around December 2003, the pillaging of property belonging to the primarily Fur population of Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur, including the pillaging of stores, houses and livestock;

K. Count 27 (Imprisonment or severe deprivation of liberty constituting a crime against humanity)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a crime against humanity in violation of articles 7(1)(e) and 25(3)(a) of the Statute, namely the imprisonment or severe deprivation of physical liberty of at least 400 civilians from the primarily Fur population of Mukjar town and surrounding areas in the Mukjar Locality in West Darfur, beginning in or around August 2003³⁵;

L. Count 28 (Torture constituting a crime against humanity)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a crime against humanity in violation of articles 7(1)(f) and 25(3)(a) of the Statute, namely the torture of at least 60 civilians from the primarily Fur population of Mukjar town and surrounding areas in the Mukjar Locality in West Darfur, beginning in or around August 2003³⁶;

M. Count 37 (Outrage upon personal dignity constituting a war crime)

Mr Hussein, acting pursuant to a common plan, as a co-perpetrator or as an indirect co-perpetrator, committed a war crime in violation of articles 8(2)(c)(ii) and 25(3)(a) of the Statute, namely the violation of the dignity of women and girls from the primarily Fur population of

³⁴ The Chamber notes that count 16 as articulated in the Prosecutor's Application erroneously refers to pillaging under article 8(2)(c)(v) of the Statute instead of article 8(2)(e)(v) of the Statute.

³⁵ Civilians allegedly detained include [REDACTED].

³⁶ Torture alleged includes the tying up, suspension by the arms, beating and starvation of [REDACTED].

Arawala town and surrounding areas in the Wadi Salih Locality in West Darfur, in or around December 2003³⁷.

IV. Whether there are reasonable grounds to believe that one or more of the crimes listed in the Prosecutor's Application were committed

12. To the extent that the counts listed above are identical to those contained in the Application of 27 February 2007, the Chamber relies on its findings in the "Decision on the Prosecution Application under Article 58(7) of the Statute"³⁸ ("Decision on Arrest Warrant for Harun and Kushayb") for the purposes of establishing reasonable grounds to believe that the alleged crimes against humanity and war crimes were committed.

13. Accordingly, the Chamber adopts its previous findings that there are reasonable grounds to believe that members of the Sudanese armed forces and the Militia/Janjaweed:

- (i) in violation of articles 7(1)(a) and 8(2)(c)(i) of the Statute, murdered civilians from the primarily Fur population of the Kodoom villages and surrounding areas, on or about 15 August 2003,³⁹ and on or about 31 August 2003;⁴⁰ Bindisi and surrounding areas, on or about 15 August 2003;⁴¹ Mukjar and surrounding areas, between September 2003 and October 2003,⁴² in or around December 2003,⁴³ and in

³⁷ Outrage upon personal dignity alleged includes the humiliation and degradation of [REDACTED] by [REDACTED] during which time she was repeatedly raped.

³⁸ *The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, Pre-Trial Chamber I, "Decision on the Prosecution Application under Article 58(7) of the Statute" 27 April 2007, ICC-02/05-01/07-1-Corr.

³⁹ Decision on Arrest Warrant for Harun and Kushayb, paras 59 and 75; Prosecutor's Submission of 12 March 2007, Annex A39, paras 60 and 66.

⁴⁰ Decision on Arrest Warrant for Harun and Kushayb, paras 59 and 75; Prosecutor's Submission of 12 March 2007, Annex A39, paras 82, 84-85, and 87-88.

⁴¹ Decision on Arrest Warrant for Harun and Kushayb, paras 59 and 75; Prosecutor's Submission of 12 March 2007, Annex A32, paras 42-43; Prosecutor's Submission of 12 March 2007, Annex A34, para. 105; Prosecutor's Submission of 12 March 2007, Annex A35, paras 57 and 73-74; Prosecutor's Submission of 12 March 2007, Annex A79, paras 81 and 85.

⁴² Decision on Arrest Warrant for Harun and Kushayb, paras 59 and 75; Prosecutor's Submission of 12 March 2007, Annex A34, para. 61.

⁴³ Decision on Arrest Warrant for Harun and Kushayb, paras 59 and 75; Prosecutor's Submission of 12 March 2007, Annex A34, paras 62-65.

or around March 2004;⁴⁴ and Arawala and surrounding areas, in or around December 2003;⁴⁵

(ii) in violation of article 8(2)(c)(ii) of the Statute, committed outrages upon the personal dignity of women and girls from the primarily Fur population of the town of Arawala and surrounding areas in or around December 2003;⁴⁶

(iii) in violation of article 8(2)(e)(i) of the Statute, intentionally directed attacks against civilians not taking direct part in hostilities from the primarily Fur population of the Kodoom villages and surrounding areas, from on or about 15 August 2003 to on or about 31 August 2003;⁴⁷ Bindisi and surrounding areas, on or about 15 August 2003;⁴⁸ Mukjar and surrounding areas, between August 2003 and March 2004;⁴⁹ and Arawala and surrounding areas, in or around December 2003;⁵⁰

(iv) in violation of article 8(2)(e)(v) of the Statute, pillaged property belonging to the primarily Fur population of Bindisi and surrounding areas, on or about 15

⁴⁴ Decision on Arrest Warrant for Harun and Kushayb, paras 59 and 75; Prosecutor's Submission of 12 March 2007, Annex A79, para. 100; Prosecutor's Submission of 12 March 2007, Annex A41, paras 67-71; Prosecutor's Submission of 12 March 2007, Annex A39, paras 143-146.

⁴⁵ Decision on Arrest Warrant for Harun and Kushayb, paras 59 and 75; Prosecutor's Submission of 12 March 2007, Annex A36, pp. 17-19, paras 126-128 and 134-138; Prosecutor's Submission of 12 March 2007, Annex A33, paras 32, 39, 41, 52-53, 58-59; Prosecutor's Submission of 12 March 2007, Annex A32, para.40; Prosecutor's Submission of 12 March 2007, Annex A38, para. 37-39; Prosecutor's Submission of 12 March 2007, Annex A63, p. 37.

⁴⁶ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A33, paras 40-41.

⁴⁷ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A39, paras 60-66 and 81-95.

⁴⁸ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A32, paras 19-24; Prosecutor's Submission of 12 March 2007, Annex A41, paras 39-40; Prosecutor's Submission of 12 March 2007, Annex A11, p. 5; Prosecutor's Submission of 12 March 2007, Annex A34, paras 23-25 and 37-38; Prosecutor's Submission of 12 March 2007, Annex A39, para. 70; Prosecutor's Submission of 12 March 2007, Annex A51, paras 25-28; Prosecutor's Submission of 12 March 2007, Annex A79, paras 76-84; Prosecutor's Submission of 12 March 2007, Annex A35, paras 41-61.

⁴⁹ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A35, paras 85-86; Prosecutor's Submission of 12 March 2007, Annex A20, p. 4.

⁵⁰ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A53, paras 73-79; Prosecutor's Submission of 12 March 2007, Annex A36, paras 57-59 and 71; Prosecutor's Submission of 12 March 2007, Annex A33, paras 28-39.

August 2003;⁵¹ Mukjar and surrounding areas, between August 2003 and March 2004;⁵² and Arawala and surrounding areas, in or around December 2003;⁵³

(v) in violation of article 8(2)(e)(xii) of the Statute, destroyed property belonging to the primarily Fur population of the Kodoom villages and surrounding areas, from on or about 15 August 2003 to on or about 31 August 2003;⁵⁴ Bindisi and surrounding areas, on or about 15 August 2003;⁵⁵ Mukjar and surrounding areas, between August 2003 and March 2004;⁵⁶ and Arawala and surrounding areas, in or around December 2003;⁵⁷

(vi) in violation of article 7(1)(d) of the Statute, forcibly transferred primarily Fur civilians from the Kodoom villages and surrounding areas, from on or about 15 August 2003 to on or about 31 August 2003;⁵⁸ Bindisi and surrounding areas, on or about 15 August 2003;⁵⁹ and Arawala and surrounding areas, in or around December 2003;⁶⁰

⁵¹ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A32, para. 23; Prosecutor's Submission of 12 March 2007, Annex A34, paras 29 and 35; Prosecutor's Submission of 12 March 2007, Annex A35, para. 53; Prosecutor's Submission of 12 March 2007, Annex A79, para. 79; Prosecutor's Submission of 12 March 2007, Annex A20, p. 4.

⁵² Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A79, paras 69-70; Prosecutor's Submission of 12 March 2007, Annex A39, paras 135-136; Prosecutor's Submission of 12 March 2007, Annex A34, paras 68-69.

⁵³ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A36, paras 74 and 141-142.

⁵⁴ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A39, paras 65 and 86.

⁵⁵ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A32, para. 41; Prosecutor's Submission of 12 March 2007, Annex A35, para. 53; Prosecutor's Submission of 12 March 2007, Annex A79, para. 83.

⁵⁶ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A35, paras 85-86; Prosecutor's Submission of 12 March 2007, Annex A41, para. 52.

⁵⁷ Decision on Arrest Warrant for Harun and Kushayb, para. 59; Prosecutor's Submission of 12 March 2007, Annex A36, para. 143.

⁵⁸ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A39, para. 65 and 103; Prosecutor's Submission of 12 March 2007, Annex A35, paras 41-43.

⁵⁹ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A32, paras 23 and 41; Prosecutor's Submission of 12 March 2007, Annex A79, paras 57, 83 and 87; Prosecutor's Submission of 12 March 2007, Annex A20, p. 4; Prosecutor's Submission of 12 March 2007, Annex A39, para. 103; Prosecutor's Submission of 12 March 2007, Annex A41, para. 40.

⁶⁰ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A36, para. 134 and 139; Prosecutor's Submission of 12 March 2007, Annex A63, pp. 37-38.

(vii) in violation of article 7(1)(e) of the Statute, imprisoned or severely deprived of their physical liberty civilians from the primarily Fur population of the town of Mukjar and surrounding areas beginning in or around August 2003;⁶¹

(viii) in violation of article 7(1)(f) of the Statute, tortured civilians from the primarily Fur population of Mukjar beginning in or around August 2003;⁶²

(ix) in violation of articles 7(1)(g) and 8(2)(e)(vi) of the Statute, raped women and girls from the primarily Fur population of the town of Bindisi and surrounding areas on or about 15 August 2003;⁶³ and in the town of Arawala in or around December 2003;⁶⁴

(x) in violation of article 7(1)(k) of the Statute, inflicted inhumane acts causing great suffering, or serious injury to body or to mental or physical health upon civilians from the primarily Fur population of Arawala and surrounding areas in or around December 2003;⁶⁵ and

(xi) in violation of article 7(1)(h) of the Statute, persecuted the primarily Fur population of the Kodoom villages and surrounding areas, from on or about 15 August 2003 to on or about 31 August 2003;⁶⁶ Bindisi and surrounding areas, on or

⁶¹ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A41, paras 46-51; Prosecutor's Submission of 12 March 2007, Annex A34, paras 52-53 and 88; Prosecutor's Submission of 12 March 2007, Annex A39, paras 102-112.

⁶² Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A34, paras 53-60; Prosecutor's Submission of 12 March 2007, Annex A39, paras 111-112; Prosecutor's Submission of 12 March 2007, Annex A35, para. 84; Prosecutor's Submission of 12 March 2007, Annex A41, paras 46-49.

⁶³ Decision on Arrest Warrant for Harun and Kushayb, paras 59 and 75; Prosecutor's Submission of 12 March 2007, Annex A35, paras 67-72 and 77-79; Prosecutor's Submission of 12 March 2007, Annex A34, p. 10, paras 41-43.

⁶⁴ Decision on Arrest Warrant for Harun and Kushayb, paras 59 and 75; Prosecutor's Submission of 12 March 2007, Annex A36, pp. 12-16, paras 82-116; Prosecutor's Submission of 12 March 2007, Annex A33, pp. 8-10, paras 39-48.

⁶⁵ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A32, para. 40.

⁶⁶ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A39, paras 13 and 28.

about 15 August 2003;⁶⁷ Mukjar and surrounding areas, between August 2003 and March 2004;⁶⁸ and Arawala and surrounding areas, in or around December 2003.⁶⁹

14. In relation to count 15 of the Prosecutor's Application, the Chamber notes that the Prosecutor has changed, without explanation, the incidents relied on as establishing the crime of inhumane acts under article 7(1)(k) of the Statute from the two incidents cited in the corresponding count of the Application of 27 February 2007⁷⁰ and now relies on the alleged shooting of two victims in the town Bindisi on or about 15 August 2003.⁷¹ The Chamber notes that, in relation to the first incident referred to by the Prosecutor, no evidence is advanced to show that the victim was shot at all, while in relation to the second incident cited, the evidence shows that the victim was shot dead as opposed to seriously injured. This second incident, in the view of the Chamber, is appropriately characterised as the crime of murder under article 7(1)(a) of the Statute, and has been so characterised under count 10 of the Prosecutor's Application.⁷² Nevertheless, on the basis of the information and evidence relating to the two incidents cited in the Application of 27 February 2007 and the Prosecutor's Submission,⁷³ the Chamber finds reasonable grounds to believe that members of the Sudanese armed forces and the Militia/Janjaweed, in violation of article 7(1)(k) of the Statute, inflicted inhumane acts causing great suffering, or serious injury to body or to

⁶⁷ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A35, paras 65-66; Prosecutor's Submission of 12 March 2007, Annex A34, para. 47; Prosecutor's Submission of 12 March 2007, Annex A32, para. 21; Prosecutor's Submission of 12 March 2007, Annex A79, para. 79.

⁶⁸ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A39, paras 102-103; Prosecutor's Submission of 12 March 2007, Annex A34, paras 52, 55 and 68.

⁶⁹ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A63, p. 37.

⁷⁰ Application of 27 February 2007, para. 213.

⁷¹ Prosecutor's Application, pp. 12-13.

⁷² *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* Pre-Trial Chamber I, Decision on the confirmation of charges 1 October 2008, ICC-01/04-01/07-717, para 452; *The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 269.

⁷³ Inhumane acts alleged included the shooting of [REDACTED] resulting in serious injury and the cutting off of a woman's arm using a sword after the woman resisted handing over the gold bangles which she was wearing on that arm.

mental or physical health upon the primarily Fur population of the town of Bindisi on or about 15 August 2003.⁷⁴

15. In relation to the contextual elements of war crimes, the Chamber recalls its previous findings that there are reasonable grounds to believe that a protracted armed conflict within the meaning of article 8(2)(f) of the Statute was being waged between the Sudanese armed forces, along with the Militia/Janjaweed, and rebel groups including the Sudan Liberation Movement/Army ("SLM/A") and the Justice and Equality Movement ("JEM") from about August 2002 and at all times relevant to the Prosecutor's Application.⁷⁵

16. In this regard, the Chamber relies on its previous findings that: (i) in 2002, rebel groups including the SLM/A and JEM, resorted to armed violence against the Government in Khartoum and, from December 2002, launched several attacks in Darfur,⁷⁶ (ii) the SLM/A and JEM were organised movements with political and military wings,⁷⁷ and (iii) throughout 2003 and 2004, the GoS increased its military operations and launched attacks in North and West Darfur in an attempt to curb the rebellion.⁷⁸

17. The Chamber further finds reasonable grounds to believe that the alleged criminal acts were carried out in the context of and were associated with the armed conflict in Darfur and that the attacks on the towns mentioned in the Prosecutor's Application were carried out by troops of the Sudanese armed forces and the Militia/Janjaweed, acting in concert, in the context of a counter-insurgency campaign conducted in phases marked by rebel activity and broken peace agreements.⁷⁹

18. In relation to the contextual elements of crimes against humanity, the Chamber recalls its previous findings that there are reasonable grounds to believe that the crimes

⁷⁴ Decision on Arrest Warrant for Harun and Kushayb, para. 75; Prosecutor's Submission of 12 March 2007, Annex A32, para. 22; Prosecutor's Submission of 12 March 2007, Annex A35, paras 58-59, 66 and 68.

⁷⁵ Decision on Arrest Warrant for Harun and Kushayb, paras 46-47.

⁷⁶ *Ibid.*, paras 36-38.

⁷⁷ *Ibid.*, para. 37.

⁷⁸ *Ibid.*, paras 40-44.

⁷⁹ *Ibid.*, para. 47.

alleged in the Prosecutor's Application were committed in the context of a systematic and widespread attack on the civilian population- belonging largely to the Fur, Masalit and Zaghawa groups- and pursuant to a State or organizational policy to attack the civilian population perceived as being associated with the rebels.⁸⁰

19. In this regard, the Chamber reiterates its previous findings that there are reasonable grounds to believe that the attacks, which are the subject of the Prosecutor's Application, were (i) co-ordinated ground attacks, sharing a common pattern,⁸¹ (ii) of a large-scale nature, targeting a large number of persons,⁸² and (iii) carried out pursuant to a unified local and national strategy on the part of the GoS.⁸³

V. Whether there are reasonable grounds to believe that Mr Hussein is criminally responsible for the crimes listed above

20. Relying on the Chamber's findings made in the Decision on Arrest Warrant for Harun and Kushayb, the Prosecutor submits that there was a common plan of the GoS to launch a counter-insurgency campaign against the rebels by using security committees to coordinate the actions of the Armed Forces, the Police, the National Security and Intelligence Service (NISS) and the Militia/Janjaweed.⁸⁴ The Prosecutor submits "[w]ithout excluding any other applicable mode of liability", that Mr Hussein is individually criminally responsible as an indirect co-perpetrator or as a co-perpetrator under article 25(3)(a) of the Statute for the alleged crimes against humanity and war crimes, which, it is submitted, he committed jointly with other alleged participants in the above-mentioned common plan, through Harun, and through the various entities under Mr Hussein's command and control.⁸⁵

⁸⁰ *Ibid.*, paras 63-67.

⁸¹ *Ibid.*, para. 63.

⁸² *Ibid.*, para. 64.

⁸³ *Ibid.*, paras 65-66.

⁸⁴ Prosecutor's Application, para. 12.

⁸⁵ *Ibid.*, para. 34.

Common plan

21. The Chamber found in the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” (“Decision on Arrest Warrant for Al Bashir”) that there are reasonable grounds to believe that “soon after the April 2003 attack on the El Fasher airport, a common plan to carry out a counter-insurgency campaign against the SLM/A, the JEM and other armed groups opposing the GoS in Darfur, was agreed upon at the highest level of the GoS by Omar Al Bashir and other high-ranking Sudanese political and military leaders”.⁸⁶ The Chamber also found reasonable grounds to believe that “a core component of such common plan was the unlawful attack on that part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur.”⁸⁷

22. The Chamber found in the Al Bashir case that there are reasonable grounds to believe that the “high-ranking Sudanese political and military leaders”, including Mr Hussein,⁸⁸ directed the branches of the ‘apparatus’ of the State of the Republic of the Sudan that they led, in a coordinated manner, in order to jointly implement the common plan”.⁸⁹

23. According to the material provided by the Prosecutor, in the period of time relevant to the crimes alleged in the Prosecutor’s Application, Mr Hussein was the Minister of the Interior⁹⁰ and during at least part of that period,⁹¹ the President’s Special Representative with responsibility for security policy with respect to Darfur.⁹² The evidence also shows that Mr Hussein was an influential member of the core group of

⁸⁶ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, 4 March 2009, ICC-02/05-01/09-3, para. 214 (citations omitted). See also Decision on Arrest Warrant for Harun and Kushayb, paras 88, 106, 107.

⁸⁷ Decision on Arrest Warrant for Al Bashir, para. 215.

⁸⁸ Decision on Arrest Warrant for Al Bashir (Confidential version, ICC-02/05-01/09-Conf), para. 214.

⁸⁹ Decision on Arrest Warrant for Al Bashir, para. 216.

⁹⁰ Prosecutor’s Application, Annex 3.41, para. 121; Prosecutor’s Application, Annex 3.40, para. 52.

⁹¹ Prosecutor’s Application, Annex 3.41, para. 121; Prosecutor’s Application, Annex 3.21, para. 147.

⁹² Prosecutor’s Application, Annex 3.21, para. 147.

decision makers in the GoS responsible for the formulation of the common plan.⁹³ The Chamber therefore reiterates its previous findings .

Essential contribution

24. There is evidence that Mr Hussein played an important role in bringing together the Sudanese armed forces with the forces under the Ministry of the Interior, such as the police and the PPF, in relation to the operations in Darfur.⁹⁴ The evidence shows that Mr Hussein frequently participated in meetings with representatives of state entities, governors, commissioners and other local government representatives to coordinate actions in relation to the Darfur operations.⁹⁵ The evidence also shows that Mr Hussein visited the region where the crimes occurred, sometimes with other government and military officials responsible for operations in Darfur.⁹⁶

25. Further, the evidence shows that Mr Hussein provided money to the army and police, and to the Militia/Janjaweed⁹⁷ and that he was in charge of providing ammunition, horses and camels.⁹⁸ There is evidence that Mr Hussein conveyed orders to the Militia/Janjaweed, when they participated in joint operations with GoS forces in Darfur.⁹⁹

26. The evidence shows that Mr Hussein (i) issued decrees to deploy extra police forces in Darfur,¹⁰⁰ (ii) directly participated in recruitment to the military and the

⁹³ Prosecutor's Application, Annex 3.41, paras 121-122, 139-141; Prosecutor's Application, Annex 3.40, para. 152; Prosecutor's Application, Annex 3.21, para. 137; Prosecutor's Application, Annex 3.38, paras 138-140, 218.

⁹⁴ Prosecutor's Application, Annex 3.40, para. 58.

⁹⁵ Prosecutor's Application, Annex 3.35, para. 81; Supporting Materials, Annex B21, p. 53.

⁹⁶ Prosecutor's Application, Annex 3.39, paras 101-102; Prosecutor's Application, Annex 3.37, para. 47; Prosecutor's Application, Annex 3.11, paras 56-58, 147; Prosecutor's Application, Annex 3.35, para. 155; Prosecutor's Application, Annex 3.10, paras 36-41.

⁹⁷ Prosecutor's Application, Annex 3.10, para. 41.

⁹⁸ Prosecutor's Application, Annex 3.10, para. 34.

⁹⁹ Prosecutor's Application, Annex 3.36, paras 40-41.

¹⁰⁰ Prosecutor's Application, Annex 3.6, p. 5; Prosecutor's Application, Annex 3.39, para. 80.

police¹⁰¹ and (iii) was in charge of the organization of training for, *inter alia*, the PDF and the Militia/Janjaweed.¹⁰²

27. The Chamber further takes note of the evidence suggesting that, during the period relevant to the Prosecutor's Application, the police deliberately failed to intervene to protect civilians from the Government forces and Militia/Janjaweed and failed to investigate crimes committed by the counter-insurgency forces,¹⁰³ as well as the evidence showing that Mr Hussein endorsed such a policy of non-intervention.¹⁰⁴

28. The evidence also shows that Mr Hussein issued misleading and disingenuous statements, distorting the reality of the situation on the ground in Darfur in the face of reports to the contrary from UN bodies and aid agencies,¹⁰⁵ while shifting the blame for crimes imputed to government forces to rebels in the region.¹⁰⁶

29. Based on the evidence presented by the Prosecutor, the Chamber finds reasonable grounds to believe that Mr Hussein made an essential contribution to the common plan of the GoS by, *inter alia*, coordinating the activities of various entities implementing the plan, providing the necessary means for and physically overseeing its implementation on the ground.

Control over parts of the organisation

30. The Prosecutor alleges that as Minister of the Interior and the President's Special Representative in Darfur, Mr Hussein had authority and control over the Police, the Popular Police Force ("PPF"), the Nomad Police, the Central Reserve Force ("CRF")

¹⁰¹ Prosecutor's Application, Annex 3.4, para. 2.

¹⁰² Prosecutor's Application, Annex 3.20, paras 112-113.

¹⁰³ Prosecutor's Application, Annex 3.15, paras 11-12 and 20; Prosecutor's Application, Annex 3.37, para. 37; Supporting Materials, Annex B3, para. 68; Supporting Materials, Annex B12, para. 13; Supporting Materials, Annex B.14, p.28; Supporting Materials, Annex B15, para. 73.

¹⁰⁴ Prosecutor's Application, Annex 3.9, paras 124-126; Prosecutor's Application, Annex 3.10, paras 31-41.

¹⁰⁵ Supporting Materials, Annex B16, p. 6; Supporting Materials, Annex B18, p. 2; Prosecutor's Application, Annex 3.32, p. 2; Prosecutor's Application, Annex 3.39, paras 76-84.

¹⁰⁶ Prosecutor's Application, Annex 3.35, para. 172; Prosecutor's Application, Annex 3.9, paras 124-126.

and the armed forces, and that “[a]ll these forces participated (...) in carrying out attacks against the civilian population in Darfur”.¹⁰⁷

31. The evidence further shows that in his role as the President’s Special Representative in Darfur, Mr Hussein exercised both *de jure* authority and a degree of *de facto* power over security bodies in the region, namely the Popular Defence Force (“PDF”) and the Border Intelligence Unit.¹⁰⁸ Mr Hussein’s authority over the PPF and the CRF was derived from his position as Minister of the Interior.¹⁰⁹ Moreover, the Chamber finds reasonable grounds to believe that Mr Hussein was Ahmad Harun’s direct superior¹¹⁰ and that, with the approval of Omar Al Bashir, Mr Hussein delegated some of his responsibilities in relation to the security situation in Darfur to Ahmad Harun.¹¹¹

32. Further evidence of a hierarchical relationship is the fact that Locality Security Committees reported to State Security Committees, which reported to Harun,¹¹² who as noted above reported to Mr Hussein.

33. In the Decision on Arrest Warrant for Harun and Kushayb the Chamber found that there are reasonable grounds to believe that:

- (i) the attacks on the towns of Kodoom, Bindisi, Mukjar and Arawala between August 2003 and March 2004 were launched by the Sudanese armed forces and the Militia/Janjaweed acting in concert;¹¹³
- (ii) the Militia/Janjaweed were generally integrated into the PDF and the PPF and acted under their command;¹¹⁴
- (iii) at the national level there was a “Darfur Security Desk”, also known as the “Darfur Security file”;¹¹⁵

¹⁰⁷ Prosecutor’s Application, para. 54.

¹⁰⁸ Prosecutor’s Application, Annex 3.40, paras 52-58 and 215; Prosecutor’s Application, Annex 3.21, para. 147; Annex 3.41, para. 122; Prosecutor’s Application, Annex 3.3, p. 5.

¹⁰⁹ Prosecutor’s Application, Annex 3.34, pp. 8, 11.

¹¹⁰ Prosecutor’s Application, Annex 3.35, para. 88.

¹¹¹ Prosecutor’s Application, Annex 3.40, para. 55; Prosecutor’s Application, Annex 3.41, para. 121.

¹¹² Prosecutor’s Application, Annex 3.18, para. 66; Prosecutor’s Application, Annex 3.6, pp. 2-3.

¹¹³ Decision on Arrest Warrant for Harun and Kushayb, para. 64.

¹¹⁴ *Ibid.*, para. 65.

(iv) at the State level, State Security Committees were used to organize the actions of the Sudanese armed forces, the police, the PDF, the PPF, the National Security and Intelligence Service and the Militia/Janjaweed;¹¹⁶

(v) at the local level, there were locality committees composed of representatives of GoS, the Sudanese armed forces, the police, and the National Security and Intelligence Service as well as representatives of the PPF and PDF.¹¹⁷

34. In the case of Omar Al Bashir, the Chamber also found reasonable grounds to believe that Omar Al Bashir, who is alleged to be a co-perpetrator in the same common plan, was “in full control of all branches of the “apparatus” of the State” and used such control to secure the implementation of the common plan.¹¹⁸

35. On the basis of the evidence presented by the Prosecutor and having regard to its findings in the cases of Ahmad Harun and of Omar Al Bashir, the Chamber is satisfied that there are reasonable grounds to believe that there was an organised and hierarchical apparatus of power, over which Omar Al Bashir and, to some extent, Mr Hussein, among others, had control, and that the execution of the crimes was secured by almost automatic compliance with the orders of some or all of the co-perpetrators.¹¹⁹

Subjective elements of criminal responsibility

36. The Chamber finds reasonable grounds to believe that Mr Hussein knew of the alleged crimes being committed in Darfur based on: (i) his positions of authority as the Special Representative of the President in Darfur and the Minister of the Interior,¹²⁰ (ii) reports on the situation in Darfur, which were provided to Mr Hussein from the entities involved in the counter-insurgency campaign as well as from members of the

¹¹⁵ *Ibid.*, para. 65.

¹¹⁶ *Ibid.*, para. 65.

¹¹⁷ *Ibid.*, para. 65.

¹¹⁸ Decision on Arrest Warrant for Al Bashir, para. 222.

¹¹⁹ See, on the elements of commission through another person by means of control over an organisation: Pre-Trial Chamber I, *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717 (“Katanga Confirmation Decision”), paras 500-518.

¹²⁰ See *supra* para. 23.

international community,¹²¹ and (iii) his personal visits to the ground in Darfur.¹²² The Chamber further finds reasonable grounds to believe that Mr Hussein intended that the alleged crimes be committed based on (i) his continued implementation of the common plan notwithstanding his knowledge of the continuous commission of the alleged crimes,¹²³ (ii) his responsibility for the recruitment, training, funding and deployment of the Militia/Janjaweed in Darfur,¹²⁴ and (iii) his appointment of Ahmad Harun as Minister of State for the Interior and delegation of responsibility for the security situation in Darfur to Ahmad Harun.¹²⁵

37. Given that a core component of the common plan was an unlawful attack on the part of the civilian population perceived as being close to the rebel groups opposing the GoS,¹²⁶ the Chamber finds reasonable grounds to believe that Mr Hussein and the other alleged participants in the common plan were mutually aware and mutually accepted that implementation of the common plan would result in the fulfilment of the material elements of the crimes. The Chamber further finds reasonable grounds to believe that, given his *de jure* and *de facto* positions of authority,¹²⁷ Mr Hussein was aware of the factual circumstances enabling the members of the group acting with the common plan to exercise joint control over the commission of the crimes through other persons.

38. Finally, the Chamber finds reasonable grounds to believe that Mr Hussein, by virtue of his role and responsibilities as Minister of the Interior and Special Representative of the President in Darfur,¹²⁸ was aware of the factual circumstances establishing the existence of the armed conflict in Darfur and knew that the crimes

¹²¹ Prosecutor's Application, Annex 3.38, para. 218; Supporting Materials, Annex B23, para. 35; Supporting Materials, Annex B14, para. 6; Prosecutor's Application, Annex 3.41, paras 135-137.

¹²² See *supra* para. 24.

¹²³ Supporting Materials, Annex B21, p. 53; Prosecutor's Application, Annex 3.39, paras 76-87; Prosecutor's Application, Annex 3.20, paras 112-113; Prosecutor's Application, Annex 3.9, paras 125-126.

¹²⁴ See *supra* paras 25-26; Prosecutor's Application, Annex 3.39, para. 28; Prosecutor's Application, Annex 3.36, para. 40; Prosecutor's Application, Annex 3.20, paras 112-113.

¹²⁵ Prosecutor's Application, Annex 3.35, paras 86-87; Prosecutor's Application, Annex 3.12, paras 65-66; Prosecutor's Application, Annex 3.41, paras 121-122.

¹²⁶ See *supra* para. 21.

¹²⁷ See *supra* para. 31.

¹²⁸ See *supra* para. 23.

allegedly committed in the Kodoom villages, Bindisi, Mukjar and Arawala and surrounding areas between August 2003 and March 2004 were part of a widespread or systematic attack against the civilian population and intended that they be part of such attack.

Conclusion

39. In view of the foregoing, the Chamber finds reasonable grounds to believe that Mr Hussein is criminally responsible for the crimes listed earlier in this decision, as an indirect co-perpetrator, under article 25(3)(a) of the Statute. The Prosecutor also alleges that he is responsible as a direct co-perpetrator.¹²⁹ However, the Prosecutor provided no information or evidence that any of the members of the group acting with the above-mentioned common plan personally executed portions of the alleged crimes, which could give rise to Mr Hussein's liability as a direct co-perpetrator.¹³⁰ For this reason and without prejudice to findings that may be made with respect to this mode of liability in the future, the Chamber will not at this stage examine whether there are reasonable grounds to believe that Mr Hussein committed the alleged crimes as a direct co-perpetrator.

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

40. Article 58 of the Statute empowers the Chamber to, upon review of the Prosecutor's application and if satisfied that there are reasonable grounds to believe that a person has committed crimes within the jurisdiction of the Court, issue a warrant of arrest for that person, provided that at least one of the three necessary conditions laid out in article 58(1)(b) are present in the case before it.

¹²⁹ Prosecutor's Application, para. 34.

¹³⁰ See Katanga Confirmation Decision, para. 492.

The requirements of article 58(1)(b) of the Statute

41. Under article 58(1)(b), the Chamber shall issue an arrest warrant 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.

42. The Appeals Chamber has determined that in order to "justify arrest [...] under article 58(1)(b) of the Statute [...] it must 'appear' to be necessary. The question revolves around the possibility, not the inevitability, of a future occurrence.¹³¹ The Chamber will address in turn whether the three conditions listed in Article 58(1)(b) are present in the instant case to necessitate the issuing of an arrest warrant against Mr Hussein.

(i) To ensure the person's appearance at trial

43. The Prosecutor submits that there are reasonable grounds to believe that Mr Hussein 'will not appear for trial unless compelled to do so by arrest.'¹³² In this respect, the Prosecutor refers to the seriousness of the charges and the potential for a lengthy imprisonment in the event of a conviction.¹³³ Moreover, the Prosecutor asserts that there is no indication that either Mr Hussein or the GoS will cooperate in facilitating

¹³¹ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, "Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572, ("Katanga Decision"), para. 21; *Prosecutor v Jean-Pierre Bemba Gombo*, Appeals Chamber, "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"", 16 December 2008, ICC-01/05-01/08-323, ("Bemba Decision"), paras 55 and 67.

¹³² Prosecutor's Application, para. 92.

¹³³ Prosecutor's Application, para. 92.

his appearance before this Court'.¹³⁴ Reference is made to the fact that the Chamber has previously issued warrants of arrest against Omar Al Bashir, Ahmad Harun, and Ali Kushayb, none of whom have been surrendered to the Court.¹³⁵

44. The Chamber notes the history of non-cooperation by the Republic of the Sudan in executing warrants of arrest of suspects within its territory and transferring them to the seat of the Court.¹³⁶ To date, warrants of arrest have been issued against three Sudanese suspects, namely Omar Al-Bashir, Ahmad Harun and Ali Kushayb.¹³⁷ None of these individuals have been surrendered to the Court and, according to material provided by the Prosecutor, they continue to carry out administrative and military functions for the GoS.¹³⁸ The Chamber notes that Mr Hussein currently serves as Minister of National Defence for the GoS¹³⁹ and the Chamber considers it to be unlikely that the GoS will cooperate.

45. The crimes, which the Chamber has found reasonable grounds to believe have been committed by Mr Hussein, are of a very serious nature. The potential for lengthy imprisonment if conviction were to result increases the incentive to evade justice,¹⁴⁰ thereby further strengthening the case to issue an arrest warrant against Mr Hussein. The Chamber thus finds that a warrant of arrest appears necessary to ensure the appearance of Mr Hussein at trial.

¹³⁴ Prosecutor's Application, para. 92.

¹³⁵ Prosecutor's Application, para. 92.

¹³⁶ See, e.g., *Prosecutor v Ahmad Harun and Ali Kushayb*, Pre-Trial Chamber I, "Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan", 25 May 2010, ICC-02/05-01/07-57; Decision on Arrest Warrant for Al Bashir, paras 229-230.

¹³⁷ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, "Warrant of Arrest for Omar Hassan Ahmad Al Bashir", 4 March 2009, ICC-02/05-01/09-1; "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir", 12 July 2010, ICC-02/05-01/09-95; *Prosecutor v Ahmad Harun and Ali Kushayb*, Pre-Trial Chamber I, "Warrant of Arrest for Ahmad Harun", 27 April 2007, ICC-02/05-01/07-2; *Prosecutor v Ahmad Harun and Ali Kushayb*, Pre-Trial Chamber I, "Warrant of Arrest for Ali Kushayb", 27 April 2007, ICC-02/05-01/07-3-Corr.

¹³⁸ Omar Al-Bashir continues to hold the Office of President of the Republic of Sudan, while Harun is currently the Governor of the State of South Kordofan, See Supporting Materials, Annex B.10, at 0037; Kushayb continues to serve in the military in Darfur, see Supporting Materials, Annex B.11.

¹³⁹ Prosecutor's Application, Annex 3.42, paras 32, 69; Prosecutor's Application, Annex 3.40, para. 215.

¹⁴⁰ Katanga Decision, para. 21; Bemba Decision, para. 55.

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings

46. The Prosecutor submits that as Minister of National Defence, Mr Hussein has the 'means and opportunity to obstruct and endanger the investigations and court proceedings', and that 'many victims reside in areas of Darfur that are under the control of the GoS and have continued to report victimization by the GoS.'¹⁴¹

47. According to the Prosecutor, at the time of the alleged incidents, Mr Hussein held high level positions of authority both in the region of Darfur and in the national administration of the GoS¹⁴² and, as already noted above, he currently serves as Minister of National Defence. The Chamber considers that, given Mr Hussein's past and present high-level position of power and influence within the administration of the GoS, there is a risk that Mr Hussein may use his position of power and influence to obstruct or endanger any investigation into the alleged crimes thereby preventing examination into any role he may have played.

48. Based on the foregoing, the Chamber is of the view that an arrest warrant appears necessary to ensure that Mr Hussein does not obstruct or endanger the investigation or the court proceedings.

(iii) 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

49. According to the Prosecutor, a warrant of arrest is necessary to prevent Mr Hussein from 'continuing with the commission of crimes within the jurisdiction of the Court.'¹⁴³

50. The Chamber is of the view that the Prosecutor has failed to support this contention. No evidence has been adduced which indicates that Mr Hussein is continuing with the commission of crimes within the jurisdiction of the

¹⁴¹ Prosecutor's Application, para. 90.

¹⁴² See *supra* para. 23.

¹⁴³ Prosecutor's Application, para. 91.

Court or with respect to crimes which are related or arise out of the same circumstances.

51. Nonetheless, the Chamber notes that the conditions set forth in article 58(1)(b) of the Statute are presented in the alternative,¹⁴⁴ with it being sufficient that only one of the conditions set forth in article 58(1)(b) of the Statute be satisfied in order to issue a warrant of arrest.¹⁴⁵

Conclusion

52. On the basis of the Prosecutor's Application and the supporting material, and for the reasons outlined above, the Chamber considers that the arrest of Mr Hussein appears to be necessary pursuant to article 58(1)(b)(i) and (ii) of the Statute.

FOR THESE REASONS, the Chamber

DECIDES that the case against Abdel Raheem Muhammad Hussein falls within the jurisdiction of the Court;

DECIDES to issue a warrant of arrest for Abdel Raheem Muhammad Hussein for his alleged responsibility under article 25(3)(a) of the Statute, as an indirect co-perpetrator, for the following crimes against humanity and war crimes committed in Darfur between August 2003 and March 2004 at the locations specified in this Decision:

¹⁴⁴ *Prosecutor v Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824, para. 139.

¹⁴⁵ *Prosecutor v Callixte Mbarushimana*, Pre-Trial Chamber I, "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana", 28 September 2010, ICC-01/04-01/10-1, para. 50; *Prosecutor v. Germain Katanga*, Pre-Trial Chamber I, "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", 6 July 2007, ICC-01/04-01/07-4, para. 63.

- i. attack against the civilian population as a war crime under article 8(2)(e)(i) of the Statute;
- ii. destruction of property as a war crime under article 8(2)(e)(xii) of the Statute;
- iii. murder as a war crime under article 8(2)(c)(i) of the Statute;
- iv. murder as a crime against humanity under article 7(1)(a) of the Statute;
- v. forcible transfer as a crime against humanity under article 7(1)(d) of the Statute;
- vi. torture as a crime against humanity under article 7(1)(f) of the Statute;
- vii. rape as a war crime under article 8(2)(e)(vi) of the Statute;
- viii. rape as a crime against humanity under article 7(1)(g) of the Statute;
- ix. inhumane acts as a crime against humanity under article 7(1)(k) of the Statute;
- x. persecution as a crime against humanity under article 7(1)(h) of the Statute;
- xi. pillaging as a war crime under article 8(2)(e)(v) of the Statute;
- xii. imprisonment or severe deprivation of liberty constituting a crime against humanity under article 7(1)(e) of the Statute; and
- xiii. outrages upon personal dignity constituting a war crime under article 8(2)(c)(ii) of the Statute;

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

DECIDES that, as soon as practicable, the Registry: (a) shall prepare a request for cooperation seeking the arrest and surrender of Abdel Raheem Muhammad Hussein and containing the information and documents required by articles 89(1) and 91 of the Statute, and by rule 187 of the Rules of Procedure and Evidence; and (b) shall transmit

such request, in accordance with rule 176(2) of the Rules of Procedure and Evidence, to:

- (i) the competent Sudanese authorities;
- (ii) all States Parties to the Statute;
- (iii) all United Nations Security Council members that are not States Parties to the Statute;

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

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

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

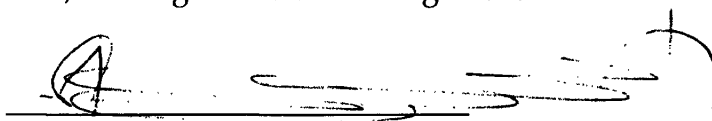
ORDERS the Prosecutor to transmit to the Chamber and to the Registry, as far as his confidentiality obligations allow, all information available to him that, in his view, would facilitate the transmission and execution of the above-mentioned cooperation requests;

RECALLS that:

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

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

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



Judge Sanji Mmasenono Monageng

Presiding Judge



Judge Sylvia Steiner



Judge Cuno Tarfusser

Dated this Thursday, 1 March 2012

At The Hague, The Netherlands