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PRE-TRIAL CHAMBER I

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

SITUATION IN DARFUR, SUDAN

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

Public Redacted Version

**Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s
Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”**

Source: The Office of the Prosecutor

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Introduction

1. Pre-Trial Chamber I (the “Pre-Trial Chamber”) unanimously issued a warrant of arrest for Omar Al Bashir for his alleged responsibility for five counts of crimes against humanity and two counts of war crimes. However, the Majority of the Pre-Trial Chamber (the “Majority”), Judge Ušacka dissenting,¹ rejected the Prosecution’s application with respect to three counts of genocide.
2. In respect of those three counts of genocide, the Prosecution submits that the Majority applied the wrong legal test in relation to drawing inferences for the purposes of its “reasonable grounds determination” under Article 58 of the Statute. As a result, the Majority Decision imposes an evidentiary burden that is inappropriate for this early procedural stage. The Prosecution submits that, as noted by the dissenting Judge, the Majority Decision has misunderstood the Prosecution’s arguments pertaining to the test to be applied: the Majority has erroneously taken an argument pertaining to the weight of the evidence as an argument advocating for a higher evidentiary test, and it has done so despite the Prosecution’s clarifications to the contrary.
3. In addition, the Majority (a) considered extraneous factors for the purposes of its determination as to whether the evidence established reasonable grounds to believe that Omar Al Bashir had committed genocide; and (b) failed to properly consider, both separately and collectively, critical evidence adduced by the Prosecution. Thus, the decision contains fundamental errors that not only invalidate it, but will also unavoidably taint any subsequent assessment of fresh evidence brought by the Prosecution, thus affecting the fair and expeditious conduct of the proceedings.

Procedural Background

4. On 14 July 2008, the Prosecution filed the “Prosecution’s Application under Article 58”.²
5. On 1 October 2008, an *ex parte* hearing with the Prosecution was held.³
6. On 17 November 2008, upon request of the Pre-Trial Chamber,⁴ the Prosecution filed additional supporting materials.⁵

¹ Separate and Partly Dissenting Opinion of Judge Anita Ušacka.

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

³ ICC-02/05-T-2-Conf-Exp-FNG ET.

⁴ ICC-02/05-160 and ICC-02/05-160-Conf-Exp-Anxl.

⁵ ICC-02/05-161 and ICC-02/05-161-Conf-AnxA-J.

7. On 3 February 2009, an *ex-parte* hearing was held in closed session with the Prosecution, the Registry and the Victims and Witnesses Unit.⁶ On the same day, upon the request of the Pre-Trial Chamber,⁷ the Prosecution filed additional written submissions.⁸
8. On 4 February 2009, the Prosecution filed the “Provision of Information Pursuant to PTC I Request Made During Hearing on 3 February 2009”.⁹
9. On 6 February 2009, the Prosecution filed the “Prosecution’s Additional Submissions Pursuant to Undertaking made during the Hearing on 3 February 2009”.¹⁰
10. On 13 February 2009, upon request of the Pre-Trial Chamber,¹¹ the Prosecution filed the “Prosecution’s Submission of Information Pursuant to Decision of PTC I of 4 February 2009”.¹²
11. On 4 March 2009, the Chamber issued the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” (“Decision”).¹³
12. The Prosecution hereby seeks leave to appeal certain parts of the Decision pursuant to Article 82(1)(d).¹⁴

The issues for which leave to appeal is sought fulfil the criteria in Article 82(1)(d)

13. The Prosecution seeks leave to appeal three issues in the Decision, namely:
 - Whether the correct standard of proof in the context of Article 58 requires that the only reasonable conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court (“First Issue”).
 - Whether the Majority considered specific extraneous factors in assessing the existence of reasonable grounds to establish genocidal intent (“Second Issue”).
 - Whether the Majority failed to consider both separately and collectively specific critical factors in assessing the existence of reasonable grounds to establish genocidal intent (“Third Issue”).

⁶ ICC-02/05-T-4-Conf-Exp-ENG ET.

⁷ ICC-02/05-176 and ICC-02/05-176-Conf-Exp-Anxl.

⁸ ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxsl-5.

⁹ ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E.

¹⁰ ICC-02/05-186-US-Exp.

¹¹ ICC-02/05-184-Conf-Exp.

¹² ICC-02/05-188-US-Exp.

¹³ ICC-02/05-01/09-2-Conf and ICC-02/05-01/09-3.

¹⁴ [FOOTNOTE REDACTED]

14. As established by the jurisprudence of the Court the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.¹⁵ The Prosecution submits that all issues identified above clearly arise out of the Decision.¹⁶

The First Issue arises from the decision

15. With respect to the First Issue, the Majority unequivocally requires that, to establish a suspect's specific intent to commit genocide, the Application must show that the genocidal intent is the only reasonable inference that may be drawn from the evidence. That requirement thus plainly establishes a higher evidentiary standard than "reasonable grounds to believe".¹⁷ But, as observed by Judge Ušacka in her dissenting opinion,¹⁸ if the only reasonable inference available is that the suspect intended to commit genocide, then the mental element has been effectively proved beyond a reasonable doubt. Thus, the Majority in fact applied a standard of beyond reasonable doubt, instead of the appropriate standard of "reasonable grounds to believe" that is applicable to the assessment of warrant applications.

16. That the Majority applied the higher standard is shown by the following factors:

- (i) the Majority expressly ruled that "if the existence of a GoS's genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected";¹⁹
- (ii) the Majority dismissed arguments of the Prosecution in relation to individual indicia intended to establish the genocidal intent on the basis that the conclusions proposed by the Prosecution are not the only reasonable ones available on the evidence;²⁰

¹⁵ *Situation in Uganda*, ICC-02/04-01/05-20-US-Exp 19 August 2005, para. 22.

¹⁶ The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one." *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, paras. 9-10. See also *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song, ICC-01/04-01/06-1433 OA11, 11 July 2008, Diss. Op., para. 4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

¹⁷ Decision, paras. 158 and 203.

¹⁸ Separate and Partly Dissenting Opinion of Judge Anita Ušacka, paras. 31-34. Judge Ušacka suggests that "when the Prosecution alleges that the evidence submitted supports an inference of genocidal intent, in order for there to be reasonable grounds to believe that such an allegation is true, the inference must indeed be a reasonable one. Yet, in light of the differing evidentiary burdens at different phases of the proceedings, the Prosecution need not demonstrate that such an inference is the *only* reasonable one at the arrest warrant stage" (para. 32). She further concluded that "Once sufficient evidence is presented to render an inference of genocidal intent reasonable, one can be satisfied that there are reasonable grounds to believe that genocidal intent exists, unless evidence is also presented which would render an inference of genocidal intent unreasonable" (para. 34).

¹⁹ Decision, para. 159.

- (iii) in setting out the applicable standard of proof for decisions under Article 58, the Majority relied on the jurisprudence of the ICTY and the ICTR regarding the standard of “beyond reasonable doubt” applicable at trial;²¹

17. The Majority based its standard on the Prosecution’s submissions on the applicable evidentiary standard under Article 58 for proof by inference. In so doing, however, it misinterpreted those submissions. Contrary to the Majority’s decision, the Prosecution did not argue that “such a standard would be met only if the materials provided by the Prosecution [...] show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS’s [genocidal intent]”.²² Rather, it stated that the evidence, when properly considered, even met the standard that would be required at trial; by implication, therefore, the evidence clearly met the lower standard applicable at the instant stage.²³ [TEXT REDACTED]²⁴ This position was correctly understood by Judge Ušacka in her dissenting opinion.²⁵

The Second Issue arises from the decision

18. The Prosecution submits that the Majority considered the following factors which were not relevant for the purposes of its determination on genocidal intent:

- (i) in the majority of attacks on villages inhabited by members of the Fur, Massalit and Zaghawa groups the large majority of inhabitants were neither killed nor injured;
- (ii) the OTP did not claim that the GoS had established long-lasting detention camps in Darfur; and

²⁰ Decision paras. 195 and 201; see also paras. 165, 181, 204(i) and 204(iv).

²¹ Decision para. 160 and fn 177 and 178. See *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, 22 March 2006, paras. 53 and 55; *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Judgement, 25 February 2004, paras. 120 and 128; *Prosecutor v. Strugar*, IT-01-42-T, Trial Judgement, 31 January 2005, para. 333 (quoting the above paragraph of the Appeals Judgement in *Vasiljević*); *Prosecutor v. Seromba*, ICTR-01-66-A, Appeals Judgement, 12 March 2008, para. 176 (referencing to *Prosecutor v. Nahimana*, ICTR-99-52-A, Appeals Judgement 28 November 2007, paras. 524-525; and *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Appeals Judgement, 7 July 2006, paras. 40 and 41); *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September 1998, paras. 523, 462 and 673; and *Prosecutor v. Kayishema*, ICTR-95-1-T, Trial Judgement, 21 May 1999, paras. 93-94 and 521.

²² Decision, paras. 158 and 203.

²³ [FOOTNOTE REDACTED]

²⁴ [FOOTNOTE REDACTED]

²⁵ Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 29. A legal commentator, addressing the Chamber’s application of the evidentiary standard at the Article 58 stage, also concludes that the Prosecution’s submission with respect to the applicable standard of proof was misinterpreted by the Majority. See commentary by Kevin Jon Heller, *The Majority’s Complete Misunderstanding of “Reasonable Grounds”*, in internet blog “Opinio Juris”: <http://opiniojuris.org/2009/03/05/the-majoritys-complete-misunderstanding-of-reasonable-grounds/>.

- (iii) the OTP had not claimed in its case against Ahmed Harun and Ali Kushayb that the existence of reasonable grounds to believe in a GoS' genocidal intent could be inferred from the facts of that case.

19. Deciding the weight to be given to facts and their significance to the entirety of the Prosecution's case is at the core of the judicial function under Article 58. The Appeals Chamber "may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the *sub judice* issues."²⁶ In this case, the Majority finds that "there are reasonable grounds to believe" that in most of the attacks conducted by GoS forces in villages primarily inhabited by Fur, Masalit and Zaghawa, "the large majority of their inhabitants were neither killed nor injured despite the fact that the attackers, in addition to often counting on aerial support, either had previously encircled the targeted village or came to such village with tens or hundreds of vehicles and camels forming a wide line".²⁷ ".²⁸ As the Prosecution will develop in its appellate submissions, this finding is in error since direct killings, as a matter of law and as a matter of fact, are not the only way to commit genocide. Additionally, a substantial number of members of the group were killed The dissenting opinion critically refers to this finding.²⁹
20. The Majority finds that "the Prosecution does not claim that GoS forces established in Darfur long-lasting detention camps where inmates were systematically mistreated, tortured and executed".³⁰ This finding is erroneous since the place where persons are subjected to bodily or mental harm and conditions of life intended to ensure their destruction is irrelevant; victims can be subjected to such attacks in detention or concentration camps, in ghettos or in IDP's camps surrounded by Al Bashir forces, including Janjaweed militiamen. The dissenting opinion appropriately takes issue with this finding.³¹
21. Finally, the Majority "observes that, in the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*, the Prosecution never claimed that the existence of reasonable grounds to believe in a GoS's genocidal intent could be inferred from the facts of the case, although

²⁶ *Prosecutor v. Katanga & Ngudjolo*, Judgment on Ngudjolo's Interim Release Appeal, ICC-01/04-01/07-572 OA6, 9 June 2008, para. 25

²⁷ Decision, para. 196.

²⁸ Decision, para. 196.

²⁹ Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 78.

³⁰ Decision, para. 197.

³¹ Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 79.

there are reasonable grounds to believe that the crimes that were the subject of such case are allegedly among the gravest that occurred in Darfur in terms of their systematicity and brutality”.³² The Prosecution submits that Harun’s statements acquire genocidal significance in the context of Al Bashir’s use of the entire state apparatus to commit the crimes, including, but not limited, the key role assigned to Harun. The dissenting opinion also appropriately criticizes this finding.³³

22. These three factors are pivotal findings of the Majority supporting its determination that “the existence of reasonable grounds to believe that the GoS acted with genocidal intent is not the only reasonable conclusion” to be drawn from the alleged particularly serious crimes committed by the GoS forces.³⁴ Leaving aside the issue of the correct test to be applied, which is a separate aspect of this application, the Prosecution submits that, as it will demonstrate before the Appeals Chamber if and when leave to appeal is granted, the Majority erred in rejecting the Application because, in its view, the Prosecution failed to prove that during attacks on villages the majority of inhabitants were killed or injured or that detention camps were not established for the systematic mistreatment, torture, and execution of persons. It also erred in seemingly suggesting that the Prosecution is estopped from now asserting that the facts demonstrate genocide if it did not make that same assertion in a previous application.

The Third Issue arises from the decision

23. In its Application the Prosecution argued that Al Bashir’s intent to destroy the target groups as such in substantial part could be inferred from a comprehensive consideration of nine factors and looking at the evidence all together. The methodology applied by the Majority failed to properly weigh both separately and collectively a number of critical features of the Prosecution’s case. It misapprehended the significance of individual factors and then declined to view the separate factors as part of a single continuum. The Prosecution presented a sequence of events that, when viewed as part of a single plan, reflected the suspect’s effort to destroy the targeted groups through killings (exterminations), rapes, destruction of the groups’ means of livelihood, and their forcible displacements into hostile terrain and the survivors to camps lacking essential food and water and protection. Judge Ušacka in her dissenting opinion considered all the materials separately and together, and consequently came to a different conclusion as to the

³² Decision, para. 200.

³³ Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 82.

³⁴ Decision, para. 201.

significance of the GoS policy of marginalization and discrimination against the three target groups.

24. The Prosecution submits that in particular, the Majority Decision has failed to consider and give appropriate weight to the following separate relevant factors:³⁵

- (i) The imposition of bodily and mental harm on the group, in particular through massive rapes during the attacks on the villages and in and around the IDP's camps.
- (ii) the deliberate infliction on the group of conditions of life calculated to bring about the physical destruction of the group;
- (iii) Al Bashir's and Ahmad Harun's statements, which evidence a deliberate goal to destroy the groups;
- (iv) the genocidal policies of the Government that were manifested, *inter alia*, in a policy document entitled "The Islamic Movement and the Fur Tribe"; the Prosecution referred to this document in its Application and provided the Chamber with [TEXT REDACTED] that explained the document's significance in reflecting Al Bashir's genocidal intent.³⁶

25. The Majority failed to consider in its totality the evidence showing that rape – causing mental and body harm - was used as a weapon of genocide during the attacks on the villages and in and around the IDP's camps. The genocidal intention of Al Bashir can properly be inferred by inter-connecting the evidence establishing his control over the state apparatus, including the Army, the Militia/Janjaweed incorporated as reserve force, and the Humanitarian Aid Commission (HAC). [TEXT REDACTED]³⁷)

26. The Majority Decision failed to properly apprehend that the Prosecution's charge of imposition of conditions of life under Article 6(c) encompassed allegations of (a) violent attacks on the villages of the three ethnic groups; (b) destruction of those groups' means of livelihood; (c) the chasing of civilians from the three groups into the hostile terrain of Darfur, (d) followed by deliberate restriction of access of humanitarian aid to the IDP camps, leading to starvation and slow death of, and continuing crimes against, displaced members of the three groups in the camps. Indeed, the mass displacement operations in Darfur were conducted under precisely the same sorts of conditions which, during the

³⁵ As already noted (see para. 19, *supra*), a challenge to findings of the Pre-Trial Chamber as flawed because the Chamber disregarded relevant facts may constitute an appealable issue *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-572 OA6, 9 June 2008, para. 25

³⁶ ICC-02/05-161-Conf-AnxE, pages 3-4; ICC-02/05-161-Conf-AnxE1; ICC-02/05-151-US-Exp-Anx82; ICC-02/05-161-Conf-AnxH, pages 19-21.

³⁷ [FOOTNOTE REDACTED]

deliberations preceding adoption of the Genocide Convention, were found to constitute genocide.³⁸ The Prosecution had further explained that the current situation distinguished itself from that at the time of the UNCOI report, stressing that whereas, as stated by UNCOI in January 2005 there would be no policy of genocide if “*the populations surviving attacks on villages ... live together in areas selected by the government...where they are assisted*”, the evidence adduced showed that the target groups, far from being assisted, were also attacked in the camps.³⁹

27. In particular, the Prosecution agrees with the dissenting Judge that the Majority has failed to consider (a) that the Prosecution’s allegations covered not only referred to the destruction of water sources of the towns and villages attacked, but, pointed out by the dissenting judge, more generally to the destruction of “means of survival”, which includes food supplies, food sources and shelter, in addition to water supplies and sources;⁴⁰ (b) the harshness of the terrain in Darfur, to which the victims were forcibly displaced, which provides a particular background to the conduct alleged by the Prosecution;⁴¹ and (c) the degree of obstruction suffered by humanitarian workers.⁴²
28. The Majority’s assessment of Al Bashir’s and Harun’s statements is also flawed. The Majority analyzed separately Bashir’s statements and decided that “they do not provide, by themselves, any indicia of a GoS’s genocidal intention...Whether a different conclusion is merited when assessed in light of the rest of the materials provided by the Prosecution is a question that shall be analyzed below by the Majority”.⁴³ However, the Majority did not conduct the mentioned analysis⁴⁴ and ignored that in addition to their specific meaning, Al Bashir’s public statements triggered systematic attacks against

³⁸ “*Mass displacements of populations from one region to another [...] do not constitute genocide [...] unless the operation were attended by such circumstances as to lead to the death of the whole or part of the displaced population. If for example, people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, hunger, cold and epidemics*”. Secretary General, 1947 Draft Convention at p. 24, emphasis added; see also paras 108-126 of the Conclusions and Recommendations of the Historical Clarification Commission for Guatemala, headed by Prof Christian Tomuschat, that concluded acts of genocide had been committed in precisely these circumstances.

³⁹ These factors significantly distinguish the case at hand from the fact pattern before the ICJ in its Judgement on Genocide. The ICJ declined to infer genocidal intent from the deportation and forcible displacement of hundreds of thousands of Bosnian Muslim civilians (see Decision, para. 194(iii)). The Pre-Trial Chamber inappropriately relied in this finding when rejecting to draw an inference as to the genocidal intent of the GoS in the context of the forcible transfers of “hundred of thousands of civilians” under totally different circumstances (see Decision, paras. 192(iv) and 193); in particular, unlike the situation in Bosnia, the displaced civilians here were transferred to a hostile environment lacking some or all of the necessary components for life.

⁴⁰ See Majority Decision, para. 93 and para. 98 of the dissenting opinion

⁴¹ Dissenting opinion, para. 98 and 100

⁴² Dissenting opinion, para. 101

⁴³ Majority Decision, para. 172.

⁴⁴ At para. 204 (vi) of its Decision, the Majority limits itself to asserting that the statements only constitute indicia of persecutory intent.

villages and towns inhabited mainly by members of the targeted groups and, that a very high percentage of those who fled the attacks and moved to IDP's camps are members of the target groups.⁴⁵ The Majority also failed to analyze the connections between Al Bashir's instructions and their implementation in the ground.

29. As to the Majority's flawed assessment of the statements made by Al Bashir, Harun and other critical players during 2003, the Prosecution notes that after reviewing those statements the Majority concluded the following: in relation to the statements made by Harun, the Majority noted that those statements "contain the harsher language used by GoS officials that can be found in the materials provided in support of the Prosecution Application".⁴⁶ In the following paragraphs, however, the Majority dismissed the relevance of those statements on the basis that Harun was not, according to the Pre-Trial Chamber, "part of the highest level of GoS in Khartoum",⁴⁷ and that when the Prosecution requested a summons to appear for Harun in 2007, it allegedly "did not see any indicia of genocidal intent on his part and it was only alleged that he acted with persecutory intent".⁴⁸ The Prosecution submits that these considerations are immaterial; it further agrees with the dissenting Judge that "the words or deeds of others acting with or at the behest of the accused can also be relevant to support an inference of the formation of intent as well." This is all the more so in view of the key role played by Ahmad Harun in the implementation of the Al Bashir's plan during the attacks on the villages and the camps.
30. Finally, in relation to the NIF Bulletin, the Decision notes that the Prosecution had placed particular reliance on that document, which according to the Majority was described by the Prosecution in the following manner:⁴⁹

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

31. The Majority concludes that the 1992 NIF Secret Bulletin, the 1994 Decree and 1995 Local Reform "do not provide, by themselves, any indicia of a GoS's genocidal intent. In

⁴⁵ See Application, paras 270-279; ICC-02/05-161-Conf-AnxD and ICC-02/05-161-Conf-AnxD1.

⁴⁶ Decision, para. 174.

⁴⁷ Decision, para. 175.

⁴⁸ Decision, para. 176.

⁴⁹ Decision, para. 166.

this regard, the Majority considers that they provide, at best, indicia of the GoS's intent to discriminate against the members of the Fur, Masalit and Zaghawa groups by excluding them from federal government and implementing political arrangements aimed at limiting their power in their homeland (Darfur).⁵⁰ The Majority then conducts an analysis of the remainder of the material presented by the Prosecution and concludes as follows:⁵¹

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

32. In her dissenting opinion, Judge Ušacka also makes reference, among others, to the NIF memorandum,⁵² but in contrast to the Majority Decision, she [TEXT REDACTED] also discusses other evidence of the GoS exclusionary policies in relation to the three target groups, including the assertion that “...[t]he Islamic Movement will not be appeased so long as this tribe [the Fur] is not undermined or exterminated, so that the western front remains safe”.⁵³ Judge Ušacka considered the relevant evidence and arrived at an entirely different conclusion as to its significance, namely that the evidence submitted was sufficient to satisfy her “that it would be reasonable to infer - among other things - that Omar Al Bashir possessed the intent to destroy the ethnic group of the “African tribes” as such”.⁵⁴

33. The preceding arguments suffice to demonstrate the existence of an appellable issue. The Prosecution will advance substantive arguments on the weight and impact of the evidence and factors described herein in its appellate submissions, if leave is granted by the Pre-Trial Chamber.

The issues affect the fair conduct of the proceedings

34. The Appeals Chamber has ruled that “[t]he term fair in the context of article 82(1)(d) of the Statute is associated with the norms of a fair trial, the attributes of which are an

⁵⁰ Decision, para. 167.

⁵¹ Decision, para. 167.

⁵² Separate and Partly Dissenting Opinion of Judge Anita Ušacka, paras. 42ff.

⁵³ See Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 47, footnotes 85-86; para. 59 and footnote 116. See also ICC-02/05-151-US-Exp-Anx82, at 0115-0118; ICC-02/05-151-US-Exp-Anx26, para. 45 ; ICC-02/05-161-Conf-AnxE, pages 3-4; ICC-02/05-161-Conf-AnxE1, page 6; ICC-02/05-161-Conf-AnxH, pages 19-21.

⁵⁴ Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 76.

inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it [...] and article 21(3); making its interpretation and application subject to internationally recognized human rights”.⁵⁵ It further stated that “[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime, a fact directly borne out by the provisions of articles 54(1)(c) and 55 of the Statute”,⁵⁶ and that “[p]urging the pre-trial process for errors consequential to unfairness is designed as a safeguard of the integrity of the proceedings. This is at the core of article 82(1)(d) of the Statute”.⁵⁷

35. The Prosecution submits that fairness requires that the procedural and substantive rights and obligations of all participants be respected,⁵⁸ which has been held to include fairness to the Prosecution.⁵⁹ Fairness has also been linked to the ability of a party to present its case.⁶⁰

The First Issue affects the fair conduct of the proceedings

36. The Decision has lingering damaging effects first and foremost in the instant case, to the extent that the Prosecution is required at the present stage to satisfy a standard of proof beyond what is prescribed in the Statute. The Majority found that the Decision does not prevent the Prosecution from requesting, pursuant to Article 58(6), an amendment to the arrest warrant for Omar Al Bashir, if as a result of the ongoing investigations “additional evidence on the existence of a GoS’s genocidal intent is gathered”.⁶¹ However, any such additional evidence will be measured against an excessively high standard of proof. This will necessarily affect the Prosecution’s ability to make out its case with respect to any genocide charges, thereby affecting the fairness of the proceedings vis-à-vis the Prosecution.
37. Further, the adoption of an erroneous standard by a Chamber for the purposes of its determination has a direct and detrimental impact on that Chamber’s ability to correctly

⁵⁵ *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para.11.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ See further *Situation in the DRC*, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v Kony et al*, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11. This has been held to include respect for the norms of a fair trial (*Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 11), equality and the principle of adversarial proceedings (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38)

⁵⁹ *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39; *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

⁶⁰ *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

⁶¹ Decision, para. 207.

assess the evidence.⁶² In the instant case, the Majority's erroneous approach to the evidentiary test to be applied contributed to the Majority's erroneous evaluation of the evidence adduced. Thus, if not corrected by the Appeals Chamber, future applications of the same test to any supplementary evidence adduced by the Prosecution will adversely affect the Chamber's evaluation of that evidence.

38. The First Issue also infringes on the Prosecution's ability to discharge its mandate under the Statute. In particular, it directly affects the Prosecution's ability and discretion to present charges not only for the purpose of an arrest warrant, but as a consequence of the rule of speciality under Article 101, also for the purposes of a trial.⁶³
39. Finally, the rights of the defence will be affected: under the test adopted in the Decision, a person arrested or summoned will be faced with a pre-existing finding of a Pre-Trial Chamber that, on the evidence presented by the Prosecution, the only reasonable inference is that the person committed a crime within the jurisdiction of the Court.⁶⁴ The unfairness for the person as a result of an excessively high standard of proof at the arrest warrant stage is exacerbated by the fact that the Chamber will have made its findings on the evidence under Article 58 without giving the person an opportunity to be heard, to test the evidence presented by the Prosecution, or to present his or her own evidence in rebuttal. Hence, contrary to the conclusion of the Majority, a higher standard of proof at the Article 58 stage is not supported by the principle of interpretation of *in dubio pro reo*;⁶⁵ on the contrary, it leads to a situation incompatible with that very principle.

The Second and Third Issues affect the fair conduct of the proceedings

40. Both issues affect the fair conduct of the proceedings, since the Majority's reliance on irrelevant factors, as well as its failure to properly consider relevant ones, leads to the Prosecution being forced to lead new evidence which is not necessary for the purposes of a positive decision at this stage, or to forego the genocide charges. In this sense, the Majority's rejection of the genocide charges on the basis of a flawed reasoning⁶⁶ can only

⁶² Prosecutor v. Jelisić, Appeals Chamber Judgement, 5 July 2001, para. 39.

⁶³ Article 101 provides that "[a] person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered".

⁶⁴ See in particular Decision, para. 159. This will affect the fairness of the proceedings *vis-à-vis* the person, especially at the stage of the confirmation of the charges, where the same chamber that issued the arrest warrant will rule on whether there are substantial grounds to believe that the person committed each of the crimes charged.

⁶⁵ Decision, para. 160.

⁶⁶ See Prosecutor v. Katanga & Ngudjolo, ICC-01/04-01/07-572 OA6, 9 June 2008, para. 25: "The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a

have a direct impact on the fairness of this and any connected proceedings *vis-à-vis* the Prosecution.

41. In practical terms, the Majority Decision's flawed approach to the relevant indicators for the purposes of any determination on genocide requires supplementary investigations and collection of material, including interviewing additional witnesses, with an unavoidable cost in terms of security risks, which, as the Court's experience demonstrates, has a direct impact on the fair conduct of the proceedings. In this sense, the Second and the Third Issues affect the Prosecution's "authority for the conduct of the investigations",⁶⁷ and thereby the fairness of the proceedings.⁶⁸
42. Finally, the Prosecution submits that the inclusion of additional indicators, which effectively amounts to imposing legal requirements which find no place in the positive law,⁶⁹ restricts the applicability of the crime of genocide for this as well as future cases. This inclusion of additional burdens or requirements can only have detrimental effects for the fairness of the proceedings *vis-à-vis* the Prosecution, but also in relation to victims of genocide, whose suffering may be portrayed in an incomplete manner if supplementary and stringent requirements not contemplated in the law are effectively demanded by the Chamber in these or any other proceedings, and these requirements cannot be met by the Prosecution.⁷⁰

The issues affect the expeditious conduct of the proceedings

43. The Prosecution notes that it has in previous filings expressed its view that once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is

misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the *sub judice* issues." See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20; and *Prosecutor v. Lubanga*, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 30: "[T]he right to a reasoned decision is an element of the right to a fair trial and that only on the basis of a reasoned decision will proper appellate review be possible".

⁶⁷ *Situation in the Democratic Republic of the Congo*, ICC-01/04-556 OA4 OA5 OA6, 19 December 2008, para. 52.

⁶⁸ See also *Prosecutor v. Kantanga*, ICC-01/04-01/07-116, 19 December 2007, p. 6. and *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 OA3, 13 July 2006, para. 11, stating that "[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial".

⁶⁹ For instance, and as noted by Judge Ušacka, whereas the majority considers as a negative indicator the absence of "long-lasting detention camps in Darfur", proof of such camps "is not a required element of any of the counts of genocide alleged" (Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 79).

⁷⁰ According to Judge Ušacka, the Prosecution established the existence of *detention* centres, under GoS control (Separate and Partly Dissenting Opinion of Judge Anita Ušacka, para. 79); the Prosecution never considered that genocide had occurred through the use of "long-lasting detention camps" by the GoS. The reasoning of the Majority would in practice mean that genocide could never occur through the use of detention facilities falling short of constituting "long-lasting detention camps". This effectively means adding legal requirements to the crime of genocide, not foreseen in the law, and restricting its applicability and scope.

superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).⁷¹ The Appeals Chamber also stated that “[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial”.⁷² Nonetheless, the Prosecution submits that the issues in this Decision do affect the expeditious conduct of the proceedings.

The First Issue affects the expeditious conduct of the proceedings

44. If the Decision is not corrected by the Appeals Chamber, any supplementary evidence adduced by the Prosecution in accordance with Article 58(6) and following the suggestion by the Majority,⁷³ will be assessed against the overly high evidentiary threshold adopted by the Majority. This means that the Prosecution may effectively be required already at this early stage to prove its case with respect to the suspect’s genocidal intent beyond a reasonable doubt. This will force the Prosecution to conduct a considerable amount of additional investigations and to analyse and present more evidence to the Pre-Trial Chamber. Furthermore the Prosecution may be required to make additional presentations to the Pre-Trial Chamber, which will necessarily prolong not only the investigative operations, but also any proceedings connected thereto, including the time required by the Pre-Trial Chamber to analyse the information and to issue a decision.⁷⁴
45. The higher evidentiary threshold and the related need to provide more evidence at the Article 58 stage also requires the Prosecution, VWU and the Chamber to assess security implication and to put in place protective measures for a higher number of victims, witnesses, Prosecution sources, and other persons at risk on account of the activities of the

⁷¹ Similarly, if a party had demonstrated that the issue does affect the expeditious conduct of the proceedings, then any showing that it also affected the fair conduct of the proceedings would likewise be superfluous. See in particular *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see further *Situation in the DRC*, ICC-01/04-103, footnote 5; *Prosecutor v Lubanga*, ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair, or no longer expeditious, they are no longer “fair and expeditious”; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the “fair and expeditious conduct of the proceedings”. The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition. In both tribunals, Chambers have often granted leave to appeal solely on the basis that the issue affects the fair conduct of the proceedings - see authorities set out in *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see subsequently *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions on Protection of Defence Witnesses, 28 September 2005.

⁷² *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para.11. For a wider discussion on this matter, see also *Interlocutory Appellate Review of Early Decisions by the International Criminal Court*, American University, War Crimes Research Office, January 2008, p. 66-67, *inter alia*.

⁷³ Decision, para. 207.

⁷⁴ Sequential and protracted presentation of evidence is also a tangible possibility if the Chamber, applying its high test, remains unsatisfied after each additional presentation – a process with an automatic impact on the expeditious conduct of the proceedings.

Court.⁷⁵ This is especially so in light of a recent ruling by the Appeals Chamber regarding the Prosecution's duty to provide the Defence to the largest extent possible with the documents that are essential in order effectively to challenge the lawfulness of detention, ideally at the time of his or her initial appearance before the Court.⁷⁶

46. The Single Judge of this Pre-Trial Chamber has previously held that an issue relating to the scope of the protection of Prosecution sources "significantly affect[s] the expeditious conduct of the proceedings because, depending on the approach taken, it may have an impact on how the Prosecution goes about selecting its witnesses".⁷⁷

The Second and Third Issues affect the expeditious conduct of the proceedings

47. A decision that directly impacts the length of the investigation and that defers a critical component of the Prosecution's case to a future application, must necessarily impact on the expeditious conduct of the proceedings.
48. In addition, the Majority Decision contains fundamental defects in its assessment of the relevant indicators for the purposes of determining the existence of reasonable grounds to believe that acts of genocide have been committed. These defects taint the Majority's determination, but, due to their fundamental nature, will also necessarily infect any supplementary presentation of evidence by the Prosecution, since that evidence will be assessed without the benefit of any joint analysis with the critical factors that the Majority has omitted to consider, and in light of the irrelevant factors that the Majority has adopted. Thus, unless the Chamber is instructed to properly consider relevant factors and to avoid irrelevant considerations, any supplementary presentation of evidence can lead to the same flawed outcome, in turn requiring the Prosecution to make subsequent presentations.

The issues affect the outcome of the trial

49. The resolution of each individual issue affects the question of whether genocide charges can be brought and tried in this case. The Majority expressly found that in light of additional evidence, the Prosecution may seek an amendment to the arrest warrant so as to include the crime of genocide.⁷⁸ If the decision is not corrected by the Appeals Chamber, the Prosecution cannot now proceed against the suspect on genocide charges. And if the Prosecution were to submit a new application to the Pre-Trial Chamber with additional evidence, that application would also be assessed against the excessively high evidentiary

⁷⁵ *Prosecutor v. Katanga*, ICC-01/04-01/07-475 OA, 13 May 2008, para. 1.

⁷⁶ ICC-01/05-01/08-323 OA, 16 December 2008, para. 32.

⁷⁷ ICC-01/04-01/07-116, 19 December 2007, p. 6.

⁷⁸ Decision, para. 207.

threshold. Nor is there any guarantee that the Pre-Trial Chamber would not continue to consider irrelevant factors and fail to consider appropriate critical factors in deciding if there are reasonable grounds to establish genocidal intent. This will severely affect the Prosecution's ability to obtain an amendment of the arrest warrant and therefore the outcome of the trial.

50. The absence of an amended arrest warrant may in turn lead to the Prosecution's definitive inability to bring and try genocide charges against Omar Al Bashir, thereby affecting the outcome of the trial. This is especially so in light of the rule of speciality under Article 101, which may lead to the Prosecution's inability to try genocide charges if Omar Al Bashir is surrendered to the Court prior to any genocide charges being brought and the Court cannot secure a waiver from the surrendering State under this provision.

Immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings

51. The Prosecution submits that immediate resolution of these issues will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that "prompt reference of the issue to the court of appeal" and its "authoritative determination" will help the proceedings "'move forward'; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings."⁷⁹ The Appeals Chamber has also confirmed that proceedings are "not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto."⁸⁰

Immediate resolution of the First Issue may materially advance the proceedings:

54. The Prosecution submits that immediate resolution by the Appeals Chamber of the First Issue will materially advance the proceedings. This will ensure that an error with respect to the applicable standard of proof at the Article 58 stage does not taint the ongoing proceedings. In this sense, immediate resolution by the Appeals Chamber of the First Issue will help proceedings move forward following the right course by ensuring that the proper crimes are included in the warrant of arrest and form part of the case against Omar Al Bashir.
55. An immediate resolution of the First Issue by the Appeals Chamber will further ensure that for the purposes of any future request for amendment of the warrant of

⁷⁹ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 14-15, 18.

⁸⁰ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 12, see also para. 17.

arrest the evidence adduced by the Prosecution will be assessed on the basis of the correct standard of proof.

56. Finally, and to the extent that the First Issue touches upon the fundamental question on how much evidence to present for the purposes of requesting a warrant of arrest, any corrective action by the Appeals Chamber will extend its beneficial effects to all future investigations, pre-trial proceedings and trials.

Immediate resolution of the Second and Third Issues may materially advance the proceedings:

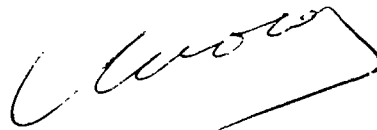
57. As noted above, the Prosecution intends to request again that a warrant be issued for the arrest of Al Bashir for genocide. Because the Chamber's existing decision drew negative inferences from irrelevant factors and declined to consider properly other relevant ones, a new request will require the presentation of different evidence and a reformulation of the Prosecution's case. The Prosecution submits that the evidence already submitted, when appropriately weighed, amply satisfies Article 58. If the Prosecution's view is correct, then it will clearly materially advance the proceedings to reconsider the already-submitted application and give appropriate weight to the facts already presented, rather than requiring the Prosecution to recast its case.
58. Thus, if the genocide case the Prosecution presented to the Pre-Trial Chamber is sufficient to authorize the arrest warrant, delay in presenting anew the case will only slow the proceedings unnecessarily. And, should the suspect⁸¹ be surrendered in the interim, the proceedings against him could be further delayed while a specialty waiver is sought for the genocide charge.
59. Finally, the Prosecution submits that the Chamber's approach to the relevant indicators for the purposes of a determination on genocide is a matter of fundamental importance for the Court as a whole. This is the first time that the Court is faced with charges of genocide and the nature of evidence that the Court must assess in deciding whether there are reasonable grounds to believe the suspect committed the crime. Intervention by the Appeals Chamber in relation to the Second and Third Issues will provide critical guidance for all Chambers of the Court as to the relevant indicators that ought to be considered, and conversely, the ones that should not, for the purposes

⁸¹ The Prosecution notes that the confidential version of this filing mistakenly referred to AL BASHIR as 'the accused'. The Prosecution acknowledges that AL BASHIR's procedural status under the Statute is that of a person against whom a warrant of arrest has been issued.

of a determination on genocide, therefore contributing to any future proceedings related to genocide before the Court.

Relief sought

52. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the specific aspects of the Decision identified above.



Luis Moreno-Ocampo,
Prosecutor

Dated this 10th day of March, 2009 ✓
At The Hague, The Netherlands