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Date: **6 July 2009**

THE APPEALS CHAMBER

Before: **Judge Sang-Hyun Song**
Judge Erkki Kourula
Judge Ekaterina Trendafilova
Judge Daniel David Ntanda Nsereko
Judge Joyce Aluoch

SITUATION IN DARFUR, SUDAN
IN THE CASE OF
THE PROSECUTOR v.
OMAR HASSAN AHMAD AL BASHIR ("OMAR AL BASHIR")

Public Document

Prosecution Document in Support of Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"

Source: **Office of the Prosecutor**

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Introduction

1. The Prosecution is appealing the Decision of the Majority of Pre-Trial Chamber I ("the Majority") that refused to issue a warrant of arrest against President Omar Al Bashir for three charges of genocide.[1] The Prosecution submits that the Majority applied the wrong legal test to draw inferences for determining "reasonable grounds" under Article 58 of the Statute. As a result, the Majority Decision imposed on the Prosecution an evidentiary burden that is inappropriate for this procedural stage.
2. Although the Majority recognised that the applicable standard is one of "reasonable grounds to believe",[2] it did in fact apply a higher level of proof, one that can be identified only with the standard of proof "beyond a reasonable doubt".
3. The Majority and Judge Ušacka in her Dissenting Opinion agree that the inference of genocidal intent is reasonable.[3] However, the Majority concluded that the Prosecution failed to prove "the existence of reasonable grounds to believe that the GoS acted with a *dolus specialis*/special intent to destroy in whole or in part the Fur, Masalit, and Zaghawa groups" because it "is not the *only* reasonable conclusion to be drawn"[4] (emphasis added). While the Majority implicitly recognized that the inference proposed by the Prosecution is at least one reasonable conclusion,[5] it required that the Prosecution go further and demonstrate that the intent to commit genocide was the only reasonable conclusion.[6] Thus, the Majority applied an erroneous evidentiary test, effectively equal to that of "beyond reasonable doubt", which is required at the trial stage for a conviction of the Accused.
4. This requirement has no foundation in either the Statute or any other applicable law, and conflicts with the nature of an application of an arrest warrant. As Judge Ušacka observed in her Dissenting Opinion, at the stage of issuing an arrest warrant the summary information presented by the Prosecution may allow for more than one inference to be reasonably drawn. In that case, provided that the evidence demonstrates that the inference supporting guilt is reasonable, the Prosecution does not need to prove that all other inferences are unreasonable.[7]

[1] ICC-02/05-01/09-3, 4 March 2009 ("the Decision").
[2] Decision, para. 158. See also para. 203.
[3] Decision, para. 205; Dissenting Opinion of Judge Ušacka ("Dissenting Opinion"), para 84.
[4] Decision, para. 205; see also Decision paras. 181, 201 and 204(v).
[5] *Ibid*.
[6] Decision, para. 159.
[7] Dissenting Opinion, paras. 32-34; see also para. 86.

5. Judge Ušacka noted that the Prosecution must meet an increasingly demanding evidentiary threshold at each stage of the proceedings. She quoted the European Court of Human Rights (ECHR), which explained that reasonable suspicion or grounds to believe, sufficient to justify an arrest, does not require the same level of evidence deemed sufficient to convict, or even to confirm charges.[8] The Prosecution should not be forced to reach the highest threshold at the earliest stage, or to present more evidence than the Statute requires. This is especially important in the present case, where there are public reports that President Al Bashir's Forces have attacked and tortured persons under suspicion of cooperating with the Prosecution.[9]

6. The Prosecution submitted detailed evidence on the mobilization and use of the entire Sudanese state apparatus for the purpose of destroying a substantial part of the Fur, Masalit and Zaghawa ethnic groups in the entire region of Darfur during more than six years. The Prosecution detailed the public statements, the facts on the ground, and the specificity of the three groups attacked to prove the genocidal intentions of President Omar Al Bashir. It further detailed the massive public information and diplomatic effort of the same President Al Bashir to hide his criminal activity and allow him to pursue his genocidal goals under the radar of the international community. During those years President Omar Al Bashir exercised both *de jure* and *de facto* sovereign authority, as President of the Republic of the Sudan, the Head of National Congress Party and Commander in Chief of the Armed Forces. In 2003 President Omar Al Bashir ordered the beginning of massive military operations against the Fur, Masalit and Zaghawa villages and, through 2004, he organized the process of strangulation of the displaced communities, denying them any meaningful assistance, preventing the returns, forcing the UN and others to set up the largest humanitarian operation in the world, and yet obstructing each step of their work.

7. The issue on this appeal concerns the proper evidentiary standard that a Pre-Trial Chamber should apply to find an element of the crime, in this case the genocidal intention, for the purposes of issuing a warrant of arrest. Based on the factual findings of the Majority[10] and its agreement that genocidal intent is a reasonable inference to be drawn, and consistent with the conclusions of Judge Ušacka, the Prosecution requests that the Appeals Chamber correct the error of the Majority and enter a finding that there are reasonable grounds to believe that President Al Bashir is also criminally responsible for three counts of genocide.

[8] Dissenting Opinion, paras. 8-9.
[9] See footnote 89, below.
[10] See paras 55-61, below.

Procedural Background

8. On 14 July 2008, the Prosecution filed the "Prosecution's Application under Article 58".[11]

9. On 1 October 2008, the Pre-Trial Chamber held an *ex parte* hearing with the Prosecution.[12]

10. On 17 November 2008, upon request of the Pre-Trial Chamber,[13] the Prosecution filed additional supporting materials.[14]

11. On 3 February 2009, an *ex-parte* hearing was held with the Prosecution, the Registry and the Victims and Witnesses Unit;[15] and on 3 February,[16] 4 February,[17] 6 February[18] and 13 February 2009[19] the Prosecution filed additional written submissions and information.

12. 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").[20]

13. On 10 March 2009, the Prosecution sought leave to appeal the Decision pursuant to Article 82(1)(d), in respect of three issues regarding the refusal of the Majority to issue the warrant of arrest in respect of the genocide counts.[21]

14. On 24 June 2009, the Pre-Trial Chamber granted leave to appeal one issue, regarding the proper standard for drawing inferences at the arrest warrant stage.[22]

15. On 2 July 2009, the Prosecution requested an extension of the page limit.[23] The Appeals Chamber granted the extension, by an additional ten pages, on 3 July 2009.[24]

16. Pursuant to Regulation 65(4), the Prosecution hereby files its Document in Support of Appeal.

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[11] 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. A public redacted version was filed on 12 September 2008, ICC-02/05-157-AnxA ("Prosecution Application"). All references are to this public redacted version.
[12] ICC-02/05-T-2-Conf-Exp-ENG ET.
[13] ICC-02/05-160 and ICC-02/05-160-Conf-Exp-Anxl.
[14] ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J.
[15] ICC-02/05-T-4-Conf-Exp-ENG ET.
[16] ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxsl-5; filed pursuant to request of Pre-Trial Chamber (ICC-02/05-176 and ICC-02/05-176-Conf-Exp-Anxl).
[17] ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E; filed pursuant to request of Pre-Trial Chamber made during the hearing on 3 February 2009.
[18] ICC-02/05-186-US-Exp; filed pursuant to undertaking made by the Prosecution during the hearing on 3 February 2009.
[19] ICC-02/05-188-US-Exp; filed pursuant to request of the Pre-Trial Chamber (ICC-02/05-184-Conf-Exp).
[20] ICC-02/05-01/09-2-Conf and ICC-02/05-01/09-3.
[21] ICC-02/05-01/09-6-Conf. A public redacted version of the Application for Leave to Appeal was filed on 13 March 2009 (ICC-02/05-01/09-12).
[22] ICC-02/05-01/09-21 ("Decision Granting Leave to Appeal").
[23] ICC-02/05-01/09-22.
[24] ICC-02/05-01/09-24.

The Prosecution's Genocide Case

(i) Overview of the Prosecution's submissions

17. In its Application under Article 58, the Prosecution submitted, among other things, that there were reasonable grounds to believe that President Omar Al Bashir bears criminal responsibility for three counts of genocide as a result of:

(a) the killing of members of the Fur, Masalit and Zaghawa ethnic groups: From March 2003 through 14 July 2008 President Al Bashir's Forces attacked civilians in towns and villages inhabited mainly by the protected groups. As a result of these attacks, just between 2003 and 2005 at least 35,000 civilians, substantially made up of members of the protected groups, were killed outright. Between 80,000 and 265,000 additional persons died "slow deaths" due to the conditions imposed during displacement and in the camps;[25]

(b) causing serious bodily or mental harm to members of these groups: President Al Bashir's Forces forcibly expelled millions of people from their homes. Victims were subjected to serious mental harm in different ways, in particular through the condition of displacement, torture and inhuman treatment, and through rape and other forms of sexual violence.[26] The victims were forced to witness their own homes and possessions destroyed and/or looted, and were expelled from homelands with which the entire communities have deep historical connections, with no prospect of ever returning.[27] Thousands of girls and women became victims of rape and other sexual violence during and in the aftermath of the attacks and in and around the Internally Displaced Persons (IDP) camps. Rape was an integral part of the pattern of destruction that President Al Bashir inflicted upon the protected groups;[28] and

(c) deliberately inflicting on these groups conditions of life calculated to bring about the groups physical destruction:[29] The attackers drove a substantial part of the protected group into hostile terrain, knowing that there they would not have any means of survival.[30] President Al Bashir's Forces destroyed food, wells and water pumping machines, shelter, crops and livestock, as well as any physical structures capable of sustaining life or commerce.[31] International humanitarian assistance saved the lives of

[25] Prosecution Application, para. 36 and 111.
[26] Prosecution Application, paras. 119-171.
[27] Prosecution Application, para. 29.
[28] Prosecution Application, paras. 10, 23 and 28.
[29] Prosecution Application, pp. 20-21.
[30] Prosecution Application, paras. 32 and 177.
[31] Prosecution Application, para. 174.

almost 2.5 million people within the camps for IDPs outside larger cities in Darfur.[32] However President Al Bahir's Forces continued to target members of the protected groups within the camps for displaced persons by systematically refusing to provide meaningful Government aid and hindering other efforts to bring humanitarian aid. Moreover, over a period of years, President Al Bashir's forces consistently blocked and delayed the delivery of aid, expelled relief staff, denied visas and travel permits, and imposed unnecessary bureaucratic requirements on aid workers.[33]

(ii) The Chamber's findings

18. Although the Majority declined to find that President Al Bashir intended to commit genocide, the Pre-Trial Chamber entered all the necessary factual findings for the establishment of reasonable grounds to believe that President Al Bashir bears criminal responsibility for the three genocide charges.[34] In particular, the Chamber accepted that President Al Bashir was in full control of the "State apparatus" which he directed to implement a counter insurgency campaign, a core component of which was the unlawful, discriminatory and systematic attack on the civilian population of Darfur.[35] Between March 2003 and 14 July 2008, President Al Bashir's Forces carried out numerous unlawful attacks on villages and towns predominantly inhabited by members of the Fur, Masalit and Zaghawa groups, and committed crimes of pillaging,[36] murder of thousands of civilians,[37] extermination,[38] rape of thousands of women,[39] forcible transfer of hundreds of thousands of civilians,[40] and torture of members of the target groups.[41] In addition, the Pre-Trial Chamber found that President Al Bashir's Forces contaminated wells and water pumps of towns and villages primarily inhabited by members of the protected groups,[42] and affirmatively obstructed medical and other humanitarian assistance in the IDP camps in Darfur.[43]

[32] Prosecution Application , para. 14.
[33] Prosecution Application, paras. 185-196.
[34] See paras. 55-61, below.
[35] Decision,paras. 74-76, 83, 85, 191, 214-219 and 222.
[36] Decision, paras. 77, 192(i).
[37] Decision, paras. 94, 192(ii).
[38] Decision, paras. 94, 97, 98 and 192(ii).
[39] Decision, paras. 108, 180 and 192(iii). See also footnote 127 of the Decision. For rapes in and around the IDP camps, see footnote 121, below.
[40] Decision, paras. 100-101 and 192(iv).
[41] Decision, paras. 104 and 192(v).
[42] Decision, para. 93. The Majority found that there are no reasonable grounds to believe that such a contamination was a core feature of their attack.
[43] Decision, paras. 181, 185-189.

The Prosecution's Ground of Appeal: the Majority applied the wrong legal standard for drawing inferences for the purposes of Article 58

(i) Overview of the Decision and the Prosecution's argument

19. The Prosecution submits that President Al Bashir's genocidal intent was proven in its Application. The Prosecution stated that the inference of intent from the proven facts met the evidentiary standard applicable to proof by inference at trial; by implication, therefore, the inference urged by the Prosecution clearly should have reached the lower standard applicable at the arrest warrant stage.[44]

20. That position was reiterated on 1 October 2008, with the Prosecution indicating that the evidence presented to the Pre-Trial Chamber went far beyond the evidentiary standard applicable at the Article 58 stage.[45] This position was correctly understood by Judge Ušacka in her Dissenting Opinion.[46] In particular, the Majority required that, as a matter of law, in order to issue an arrest warrant on genocide charges, the inference of specific genocidal intent must be the only reasonable inference available on the evidence.[47] In so doing, it erroneously assumed that there is a "law on proof by inference", a single criterion that applies at every stage from arrest warrant through conviction and appeal, and that it bars in all instances and at all stages the drawing of an inference if another reasonable inference could also be drawn.

21. The Majority failed to acknowledge that, like the law regarding standard of proof, the principles regarding inferences demand a lower level of certainty at the warrant and confirmation stages than would be applied at the trial.

22. At paragraph 155 of the Decision, the Majority notes that: "the Prosecution emphasizes that, in applying the law on the proof by inference at the current stage of the proceedings, the Chamber must take into consideration that (i) the case law of the International

[44] Prosecution Application, para 366 and footnote 505. The footnote read as follows : "Krstic, Case No. IT-98-33-A, Appeals Chamber Judgment, para. 41. 'Where direct evidence of genocidal intent is absent, the intent may still be inferred form the factual circumstances of the crime. Where an inference needs to be drawn, it has to be the only reasonable inference available on the evidence.' Brdanin, Case No. IT-99-36-T, Judgement, para. 970 (emphasis added). While this is the evidentiary standard required for proof beyond reasonable douobt, the Prosecution notes that for the purpose of an Art. 58 application the lower standard of reasonable grounds will instead be applicable."

[45] ICC-02/05-T-2-Conf-Exp, p. 63 (lines 1-12).

[46] Separate and Party 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/

[47] Decision, paras. 158, 159, 205. This is confirmed in the Decision Granting Leave to Appeal, p. 6: "the law on proof by inference became applicable; and that according to this law, an inference can only be drawn if it is the only reasonable conclusion from the joint analysis of the facts proven by the Prosecutor".

Criminal Tribunal for the former Yugoslavia (ICTY) refers to a 'beyond reasonable doubt' standard; and that (ii) 'for the purpose of an Article 58 application of the lower standard of reasonable grounds will instead be applicable'". The Majority went on to "find[] the Prosecution's submission to be a correct statement of the law on the proof by inference applicable before this Court" (para. 156), but then effectively imposed a requirement of proving an inference "beyond reasonable doubt" to describe the level of confidence in the facts underlying the finding of "reasonable grounds to believe".

23. The Majority considered in paragraph 158 that "such a standard would be met only if the materials provided by the Prosecution in support of the Prosecution application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS's *dolus specialis*…". Explaining the application of this standard, at paragraph 159 the Majority expressly "consider[ed] that, if the existence of a GoS's genocidal intention is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in Article 58 of the Statute would not have been met."

24. The Prosecution submits that the criterion of the "only reasonable conclusion to be drawn" is derived from, and effectively imposes, a "beyond reasonable doubt" standard. Confirming this legal error,[48] in setting out the applicable standard of proof for decisions under Article 58, the Majority relied on the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) regarding the standard of "beyond reasonable doubt" applicable at trial.[49]

[48] The Prosecution is not appealing the determination that the evidence permits an alternative inference that Al Bashir did not specifically intend to commit genocide. This appeal is solely based on the legal issue. As the Prosecution has previously submitted (see e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-1219 OA9, 10 March 2008, footnote 19), for errors of law the appropriate standard is *de novo* review by the Appeals Chamber. The Appeals Chamber ought to review any alleged errors of law to determine whether the decision was correct, and substitute its own judgment on the correct legal interpretation, without showing any deference to the finding of the original Chamber. As the ICTY and ICTR Appeals Chambers have consistently held, the Appeals Chamber is "the final arbiter of the law of the International Tribunal" – see e.g. *Prosecutor v Blaskic*, IT-95-14-A, Judgement, 29 July 2004, para 14; *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para 10; *Rutaganda v Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para 20.

[49] Decision para. 160 and fns 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. See also Dissenting Opinion, para. 33.

25. The correct approach to drawing inferences under Article 58 is provided at length by Judge Ušacka in her Dissenting Opinion:

- "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";[50]
- "when several reasonable inferences may be drawn from the evidence, at the arrest warrant stage, [….] [a]ll that is required in order to obtain an arrest warrant is for the Prosecution to establish reasonable grounds to believe that an allegation is true";[51] and
- "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."[52]

26. Judge Ušacka described how "the Statute proscribes progressively higher evidentiary thresholds which must be met at each stage of the proceedings." At the arrest warrant/summons stage, the Pre-Trial Chamber need only be "satisfied that there are reasonable grounds to believe"; at the confirmation of charges, the standard is "substantial grounds to believe"; and to convict an accused, the standard is "beyond a reasonable doubt".[53]

(ii) The Majority's standard for assessing inferences was erroneous, and effectively amounted to requiring proof beyond a reasonable doubt

(a) The Majority required the highest standard "beyond reasonable doubt" to reach the lower standard "reasonable grounds to believe"

27. The Majority stated that the Prosecution must "show that the only reasonable conclusion to be drawn [from the material presented] is the existence of reasonable grounds to believe in the existence of a GoS's *dolus specialis*".[54] Thus, the Majority effectively required proof of an inference beyond reasonable doubt in order to establish "reasonable grounds to believe" under Article 58. The Majority would not accept that the fact is established for this standard (deduced as a logical consequence from other facts) unless the deduction is

[50] Dissenting Opinion, para. 32.
[51] Dissenting Opinion, para. 33
[52] Dissenting Opinion, para. 34.
[53] Dissenting Opinion, para. 8.
[54] Decision, para. 158; see also para. 205.

the only reasonable one. That level of certainty is imposed without precedent or reason, and imposed only for inferences but not any other form of proof.

28. The Majority initially recognised that the "only reasonable conclusion" is a criterion which applies when making a finding "beyond reasonable doubt".[55] However, the Majority failed to recognise that this criterion is the requirement for proof beyond reasonable doubt. As a result, by applying the criterion in addition to that of "reasonable grounds to believe", the Majority effectively used it to transform the lowest standard into a higher standard of "beyond reasonable doubt". The Majority did not, as it should have, adapt the principles for drawing inferences to the standard of "reasonable grounds to believe". Rather, as paragraph 158 shows, the Majority added to the statutory standard an additional requirement that the inference be the only reasonable conclusion:

> "the Majority considers that, if the existence of a GoS's genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met."[56]

29. The Majority's conclusion is erroneous, as Judge Usacka's Dissent makes clear.[57] Nothing in Article 58 requires that a conclusion be the only reasonable conclusion. Nor is this a generic requirement for proof by inference at all stages.[58] The requirement that there be no other reasonable conclusion available is solely a function of the standard "beyond reasonable doubt".[59] It means that any other reasonable alternatives, i.e. anything that would give rise to a reasonable doubt, have been excluded.[60] The Majority's standard is higher than that required by Article 58 and is inconsistent with the escalating standards of proof in the Statute.

30. In the Decision Granting Leave to Appeal, the Pre-Trial Chamber denied that it had required proof of an inference beyond a reasonable doubt. It explained that it had not required "that the only reasonable conclusion from the facts proven by the Prosecutor is the existence of genocidal intent beyond reasonable doubt".[61] But its explanation provided no reason to apply the requirement of "only reasonable conclusion" as a

[55] Decision, para. 155.
[56] Decision, para. 159.
[57] Dissenting Opinion, paras. 28-34.
[58] See further Decision Granting Leave to Appeal, p. 6.
[59] The Prosecution provided a number of examples in its application, explicitly stating that "this is the evidentiary standard required for proof beyond reasonable doubt" (Prosecution Application, footnote 505). For a further recent illustration see *Prosecutor v Krajisnik*, IT-00-39-A, Appeal Judgement, 17 March 2009, para. 192.
[60] See further, Dissenting Opinion, para. 31.
[61] Decision Granting Leave to Appeal, p. 6 (emphasis added).

condition to reach a lower threshold of "reasonable basis to believe".[62] Instead, it shows the source of the Majority's error: an erroneous and duplicative two-stage test for drawing inferences at trial.[63] This erroneous test led the Majority to apply the first half (i.e. the first iteration of "beyond reasonable doubt" in the form of "only reasonable conclusion") to the arrest warrant stage.

(b) The application of this standard and the assessment of evidence by the Majority amounted to requiring proof beyond reasonable doubt

31. The manner in which the Majority assessed elements of the Prosecution's evidence demonstrates that the standard applied by the Pre-Trial Chamber for proof by inferences effectively required proof "beyond reasonable doubt".

32. By stating that the genocidal intent of President Al Bashir "is not the only reasonable inference that can be drawn"[64] the Majority accepts that his genocidal intent is reasonably inferred. This is consistent with the findings of Judge Ušacka, who considered whether the inferences proposed by the Prosecution were reasonable based on the evidence and, applying the correct standard, found that it was "reasonable to infer – among other things – that Omar Al Bashir possessed the intent to destroy the ethnic group".[65]

33. However, because it applied an erroneous legal standard, the Majority declined to authorize arrest based on what it implicitly acknowledged is a reasonable inference.[66] Instead, it dismissed a number of the factors presented by the Prosecution on the basis that there may be other reasonable inferences which could also be drawn (i.e. other than the genocidal intent of President Al Bashir) from the relevant evidence.

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[62] If there is only one reasonable inference -- that a person has the necessary intent -- there can be no reasonable doubt as to that element.

[63] The use of inferences to prove guilt beyond reasonable doubt only requires that "when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence." - *Prosecutor v. Vasiljević*, IT-98-32-A, Appeals Judgement, 25 February 2004, para. 120. In that case, the Appeals Chamber noted that "the standard of proof to be applied is beyond a reasonable doubt, and the burden lies on the Prosecution as the accused enjoys the benefit of the presumption of innocence." To give effect to that standard and burden, "The Appeals Chamber agrees with the test adopted by the Trial Chamber according to which, when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence." See also, e.g. *Prosecutor v Strugar*, IT-01-42-T, Trial Judgment, 31 January 2005, para. 333 ("The standard of proof dictates, of course, that it be the only reasonable inference from the evidence"); *Prosecutor v Krnojelac*, IT-97-25-T, Trial Judgment, 15 March 2002, para. 8.

[64] Decision, para. 205 (emphasis added); see also paras. 181, 201 and 204(v).

[65] Dissenting Opinion, para. 76; see also para. 84, "the evidence discussed above demonstrates that the possession of genocidal intent is one reasonable inference to be drawn from the available evidence. As previously explained, this inference need not be the only reasonable one at this stage. Indeed, as noted by the Majority, there are also reasonable grounds to believe that the evidence presented supports various alternative conclusions." Judge Ušacka went on to find that there were reasonable grounds to believe that each of the pleaded *actus reus* of genocide had been committed (paras. 93, 96 and 102).

[66] See para. 3, above, and para. 58, below.

34. The Majority explained that a) "a variety of other plausible reasons" could explain President Al Bashir's strategy of concealing the crimes;[67] b) the hindrance by the GoS of medical and other humanitarian assistance in the IDP camps "can be carried out for a variety of other reasons other than intending to destroy in whole or in part the targeted group";[68] and c) the nature and extent of the war crimes and crimes against humanity committed by GoS forces "can reasonably be explained by reasons other than the GoS's genocidal intent".[69] The Majority also repeatedly required the Prosecution to show that the only reasonable conclusion is reasonable grounds to believe that President Al Bashir had genocidal intent.[70] Significantly, however, the Majority did not find that the inference urged by the Proscution was less reasonable than the alternatives; it simply found that other plausible inferences existed and that this required rejection of the inference of genocidal intent.

35. By way of example, one factor considered by the Majority as an indicia of President Al Bashir's genocidal intent was the widespread and systematic nature of the crimes committed, including the forcible transfer of hundreds of thousands of civilians.[71] It is recalled that this forcible transfer often included expelling the population into the most inhospitable terrain, and was at times combined with the destruction of basic means of survival,[72] such that death of a significant number was all but inevitable.[73] Such evidence in addition to the later decision to provide no meaningful assistance to those forcibly displaced and to hinder the humanitarian assistance provided by the international organizations form a powerful basis from which one could conclude an intent to destroy the group, at least in part.

36. Regardless of whether an intent to destroy the group is the only reasonable inference available based on this evidence, it is at a minimum a reasonable inference that could be drawn. The Majority's dismissal of this evidence, on the basis that "the existence of reasonable grounds to believe that the GoS acted with genocidal intent is not the only reasonable conclusion" thus demonstrates its failure to properly apply the standard in Article 58.

[67] Decision, paras. 165 and 204(i).
[68] Decision, para. 181.
[69] Decision, paras. 201 and 204(v).
[70] Decision, paras. 195, 201 and 205.
[71] Decision, para. 192(iv), see further paras. 99-100.
[72] Decision, para. 93. See further Prosecution Application, paras. 174-176.
[73] Prosecution Application, paras. 388-389; see also paras. 177-178.

(iii) At the arrest warrant stage, it is sufficient if the inference of genocidal intent drawn from the evidence is reasonable; there is no requirement that the inference be the only one available

37. The correct application of the Article 58 standard of "reasonable grounds to believe" to a finding based on inference is that the inference to be drawn from the evidence presented must be reasonable, i.e. that the evidence provide a reasonable basis from which an objective observer could draw such an inference.[74] This standard does not exclude that other reasonable inferences may also be available on the evidence. Rather, the standard only requires that the inference that the person committed the crime be objectively reasonable.

38. As the Appeals Chamber has stated, when interpreting a provision a Chamber must look first and foremost to its ordinary language, read in context.[75] Under Article 58, the information or evidence presented by the Prosecution must provide reasonable (not conclusive or definitive) grounds to believe that the person committed a crime within the jurisdiction of the Court. As a result, and as held by Judge Ušacka, when the Prosecution alleged that the evidence supports an inference that the suspect had the relevant intent, that inference must be reasonable and there must be no other evidence which would render the inference unreasonable.[76] The Chamber must thus be satisfied, having considered all of the relevant evidence, that the Application provides a basis from which it is reasonable to believe, based on the directly and inferentially proven facts, that the conduct attributed to the person fulfils the relevant elements of the crime.

39. However, the standard which the Majority applied as to inferential facts effectively required that they be established beyond reasonable doubt. Notably, the Chamber's standard is not applicable to other evidence presented in support of an arrest warrant: for example, if the Prosecution establishes by other evidence that the suspect was given information, it is not required to prove the absence of any information contradicting that fact.

40. The Statute does not differentiate between various classes of evidence, and it provides no basis for creating or applying different standards of proof – one for direct evidence and a

[74] The material presented also must not contain any evidence which would render the inference unreasonable, as noted by Judge Ušacka: see Dissenting Opinion, paras. 33-34.
[75] *Situation in the DRC*, ICC-01/04-168 OA3, 13 July 2006, para. 33; see also *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-573 OA6, 9 June 2008, para. 5; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para 55-56.
[76] Dissenting Opinion, paras. 32-33. The Prosecution notes that whether this is seen as two considerations or as a single holistic assessment, the outcome remains the same: the Chamber must be satisfied that, having considered all of the relevant material, that material provides a basis from which it is reasonable to infer (i.e. to believe based on inference) that the person fulfils the relevant elements of the crime.

separate one for circumstantial evidence, from which inferences may be drawn – as the Majority did. Rather, there is only *one* standard of proof under Article 58, and it applies to any finding and to all types of evidence. An inference is simply a factual finding which is based on circumstantial or indirect evidence; in other words, it is "a deduction of fact which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that may, not must be drawn in the circumstances."[77] Circumstantial evidence, which has the same intrinsic value as direct evidence, is assessed in the same manner and to the same standard as any other evidence.[78] Courts simply assess the circumstantial evidence and determine whether it is sufficient to infer the fact to the standard of proof required.[79]

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[77] *R. v. Munoz*, 205 C.C.C. (3d) 70, 2006 CarswellOnt 673, (Feb. 8, 2006) at para 24, quoting Watt, *Watt's Manual of Criminal Evidence*, (Toronto: Carswell, 2005) at p. 108.

[78] Trial Chambers of the ICTY have "not considered circumstantial evidence to be of less substance than direct evidence" - , *Prosecutor v. Brdjanin,* IT-99-36-T, Judgment. 1 September 2004, para 35; see also *Prosecutor v. Oric.* IT-03-68-T, Judgment, 30 June 2006. para 21 (referring to Order Concerning Guidelines on Evidence and the Conduct of Parties During Trial Proceedings, 24 October 2004, para. 3 and guideline (ix)). Their guidelines for admission of evidence have also "recognize[d] that circumstantial evidence may be necessary in order to establish an alleged fact, particularly in criminal trials such as those before this Tribunal, where there is often no eye-witness or conclusive documents relating to a particular alleged fact. The Trial Chamber does not consider circumstantial evidence to be of less value than direct evidence" (*Prosecutor v Martic*, IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, para. 10). See further *Desert Palace, Inc v Costa*, 539 U.S. 90, 100 123 S.Ct. 2148, 2154 (U.S. Supreme Court 2003): "The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.' *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 508, n. 17, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957)." See also *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127 (U.S. Supreme Court, 1954) (in criminal cases, circumstantial evidence is "intrinsically no different from testimonial evidence"). See also, *R v Puttick* (1985) 1 CRNZ 644, 647 (Court of Appeal of New Zealand) : "there is no distinction either in law or logic between facts established by direct evidence and those established by inference". *R. v. Slaney* (1985) 18 C.R.R. 332 (Supreme Court of Newfoundland, Court of Appeal, Canada), at para 14: "It is now settled that when dealing with circumstantial evidence, the burden of proof on the Crown is no higher than it is in dealing with direct evidence." The same principle applies in many civil law systems. The commentary of the German *Criminal Procedure Code* states that "Indizienbeweis ist ein Beweis, bei dem unmittelbar entscheidungserhebliche Haupttatsachen aus Hilfstatsachen (Indizien, Beweisanzeichen) geschlossen werden. Für die Feststellung der Hilfstatsachen gilt nichts besonderes; es handelt sich keinesfalls um einen Beweis 'minderen Werts'" ('Circumstantial evidence is evidence with which facts directly relevant facts are established by way of auxiliary facts. For the establishment of auxiliary facts no special rules apply; in no way are they considered to be proof of "lesser value".') – Pfeiffer, *StPO Strafprozessordnung Kommentar*, (Auflage, München 2005), § 261.15 p 711. Swiss courts often emphasize that "Der Indizienbeweis ist dem direkten Beweis gleichwertig" (Evidence by inference has the same value as direct evidence) – see e.g. *Decision of the Schweizerisches Bundesgericht*, 6B_297/2007/zga, 4 September 2007; *Decision of the Kantonsgericht des Kantons Obwald*, St 05/006/jo, 4 October 2005; *Decision of the Kantonsgericht von Graubünden*, SB 02 48, 29 July 2005; *Decision of the Kantonsgericht von Graubünden*, SF 07 4, 07 July 2007; *Decision of the Obergericht des Kantons Obwalden*, A 05/007+008/bk, 30 May 2006; see further Hauser, Schweri and Hartmann, *Schweizerisches Strafprozessrecht*, (Auflage, Basel/Genf/München 2005), § 59.14, p. 277. Spanish doctrine similarly does not consider circumstantial evidence to have less probative value, but rather notes its great significance especially in those cases where there is not direct evidence regarding the participation of the accused in the criminal conduct - Tomé García, JA., in Andre de Oliva Santos et al (eds) *"Derecho Procesal Penal" (7th ed.)* (2004) pp. 490 para. 42)*; indeed* the Supreme Court has gone so far as to call it the "queen of evidence" in some jurisprudence (STS 1586/1999, 10 November 1999 p.3; see also STS 872/2002, 16 May 2002 p.6).

[79] For example, in a civil case, where proof is to a standard of "balance of probabilities" – a standard higher than that of merely "reasonable grounds to believe" – one simply determines whether the inference is the most probable inference, based on the circumstantial evidence presented. This is illustrated in the case of *Bradshaw v.*

41. In this sense, the Prosecution notes that direct evidence of a person's state of mind is rarely available; fact finders commonly rely on circumstantial evidence and the reasonable inferences that may be drawn. As a result, the intent and knowledge of suspects before this Court will often be proved by inference established through circumstantial evidence.[80]

42. That an inference must be objectively reasonable but need not be the only reasonable inference is also consistent with the nature of an Application for an Arrest Warrant. For the issuance of an arrest warrant, the Prosecution must establish "reasonable grounds to believe" that the person has committed a crime:[81] the first, and lowest, in the series of escalating standards of proof set out in the Statute.[82] The Prosecution is not required to present its case in full and to exclude all other reasonable inferences.

43. Consequently, as Judge Ušacka observed, more than one inference may well be reasonable based on the information submitted in support of an arrest warrant, but this does not mean that the Prosecution has failed to meet its burden under Article 58.[83] Given the summary nature of the evidence and proceedings, it might, for example, be reasonable to infer that a person intended that certain crimes be committed as part of an attack, or it might also be reasonable to infer that the person was only aware of a risk. In this sense, it has been held that "[c]ircumstantial evidence may give rise to a number of inferences, but if at least one inference is indicative of guilt of the crime charged, then there is a case to answer".[84] If the inference advanced by the Prosecution "*could* be drawn, then it is of no concern to the preliminary inquiry judge that there are additional competing inferences pointing to the innocence of the accused. It is exclusively for the trier of fact to determine whether it will draw such competing inferences and what weight it will give them."[85]

McEwans Pty. Ltd. (High Court of Australia, 27 April 1951, unreported; cited in *Newman's Appeal, Re*, 13 FLR 268, 27 September 1968, Courts-Martial Appeal Tribunal, at pp. 291-292).

> "this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged." (emphasis added).

The same distinction is explained in *Cooper and Another v. Merchant Trade Finance Ltd*., 1999 ZASCA 97, 1 Dec. 1999 (Supreme Court of Appeal of South Africa) at para 7. As the U.S. Supreme Court articulated, "we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (U.S. Supreme Court 2003).

[80] See Prosecution Application, para. 364 and authorities cited in footnote 503; see also Decision, para. 153 and Dissenting Opinion, para. 27.

[81] Article 58(1)(a).

[82] See para. 26, above.

[83] Dissenting Opinion, paras. 32-33.

[84] *Smith v. HM Advocate*, 2008 HCJAC 7, at para. 15, (7 Feb. 2008)

[85] *R. v. Gillespie*, 2006 YKSC 66, 2006 CarswellYukon 121, (Dec. 15, 2006) at para 29: "the test for a committal for trial in cases where the evidence is entirely circumstantial only requires that the preliminary inquiry judge be satisfied that there is some evidence reasonably capable of supporting the inference which *the*

(iv) Legal authorities confirm that an inference at the Article 58 stage need not be the only reasonable one

a. The prior ICC jurisprudence

44. This same Court has issued arrest warrants based on inferences that the person acted with the relevant *mens rea* and without any requirement that they be the only reasonable inference. Pre-Trial Chamber I has, for example, made findings based on inferences that there are reasonable grounds to believe the suspect intentionally contributed to the crimes and knew that the contribution would further the criminal plan of a group.[86] In no instance when making findings of reasonable grounds to believe the intent or knowledge of a suspect based on inferences in other cases did Pre-Trial Chamber I previously require or find that the inference was the only reasonable one available on the evidence.

45. The same approach was taken by Pre-Trial Chamber III, which followed Pre-Trial Chamber I's interpretation of the "reasonable grounds to believe" standard and also drew inferences regarding the mental elements without requiring or finding that the inference was the only reasonable conclusion.[87]

46. It is, moreover, reasonable that the Pre-Trial Chambers made those inferences. To do otherwise, and to require that the Prosecution prove that reasonable inferences are the only inferences that may be drawn, would require a level of proof impossible to meet in these cases at the arrest warrant stage. Requiring excessive evidence or direct proof at the arrest warrant stage, when the suspect is still at large and when their detention may be required "to ensure that the person does not obstruct or endanger the investigation",[88] could well endanger the lives of prospective witnesses. For example, in the current case, there are public reports that President Al Bashir's forces attack and torture persons suspected of cooperating with the Prosecution.[89]

Crown would ask the trier of fact to draw. The preliminary inquiry judge does not have to be satisfied that that is the *only* inference which can be drawn. Indeed, the evidence may give rise to other competing inferences which point to the accused's innocence. But the preliminary inquiry judge, and equally a judge reviewing a committal for trial in these circumstances, is not to concern him or herself with whether there are such competing inferences, but only whether the inference the Crown will ask the trier of fact to draw is reasonably possible, based upon the evidence."

[86] *Harun and Kushayb* Summons to Appear Decision, para. 88; see also para. 106. Pre-Trial Chamber I has also previously drawn similar inferences regarding the fact that certain consequences of a plan were either intended or accepted by the suspects, based on submissions and evidence from the Prosecution setting out a series of factors which indicated such intent or acceptance: see e.g. *Prosecutor v Katanga*, ICC-01/04-01/07-4, 6 July 2007, para. 57; *Prosecutor v Ngudjolo*, ICC-01/04-02/07-3 / ICC-01/04-01/07-262, 6 July 2007, para. 58.

[87] *Bemba* Arrest Warrant Decision, para. 80; see also paras. 74, 82, 83.

[88] Article 58(1)(b)(ii); see Decision, paras. 233-234.

[89] See e.g. Sudan Tribune, "Sudan tries a man accused of spying for the ICC", 23 December 2008, DAR-OTP-0164-0398; BBC News, "Sudanese 'war crimes spy' jailed", 28 January 2009, DAR-OTP-0164-0427; UNMIS

b. The Ad-Hoc Tribunals

47. The Majority did not provide any reasoning for the test which it created. It referred to judgments of the ICTY and ICTR cited in the Prosecution's Application for Arrest Warrant.[90] Those judgments, however, stand only for the propositions that genocidal intent may be inferred from circumstantial evidence, and that for conviction based on circumstantial evidence, the inference must be the only reasonable one available. They do not support the majority's importation of that standard to the arrest stage.[91] As Judge Ušacka acknowledges,[92] the Prosecution clarified this critical point in its Application[93] and subsequently.[94]

48. A detailed review of the jurisprudence of the ICTY and ICTR confirms that prior to a final judgment, inferences do not need to be the only reasonable conclusion. At earlier stages of proceedings, chambers of the ICTY and ICTR have readily drawn any inferences that they deem reasonable based on the material before them. For example, they considered that a chamber should "make any reasonably possible inferences"[95] in determining whether the evidence is insufficient to sustain a conviction at the end of the Prosecution's case under Rule 98*bis*.[96] The direct reliance by the Pre-Trial Chamber on the tests used in final judgments of the ad-hoc tribunals (in which findings were made beyond reasonable

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Media Monitoring Report (http://www.unmis.org/English/2008Docs/mmr-dec30.pdf), 30 December 2008; Human Rights Watch, "It's an Everyday Battle" (http://www.hrw.org/en/node/80840/section/6) 18 February 2009; Sudan Tribune, "Three Human Rights Activists Arrested in Sudan", 26 November 2008, (http://www.sudantribune.com/spip.php?article29393).

[90] Decision, para. 153-156, referring to Prosecution Application, paras. 365-366.

[91] Decision para. 160 and fns 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.

[92] Dissenting Opinion, paras. 28-34.

[93] The Prosecution stated that this jurisprudence set out the evidentiary standard for proof beyond a reasonable doubt and submitted that "for the purpose of an Art. 58 application the lower standard of reasonable grounds will instead be applicable." See Prosecution Application, footnote 505.

[94] ICC-02/05-T-2-Conf-Exp, p. 63, lines 1-12; see Application for Leave to Appeal, para. 17.

[95] *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis,* 22 May 2007, para 2. Other chambers have similarly held that they are "entitled to any inferences or presumptions which a reasonable trier of fact could make" - *Prosecutor v. Bagosora et al*, ICTR-98-41-7, Decision on Motions for judgment of acquittal, 2 February 2005, para 10, citing *Prosecutor v Kvocka et al*., Decision on Defence Motions for Acquittal, 15 December 2000, para. 13.

[96] "The test applied [at the Rule 98*bis* stage] is whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question" *Prosecutor v. Jelisic,* IT-95-10-A, Judgement, 5 July 2001, para. 37 (emphasis added). The determinations that a suspect should be committed for trial, and subsequently that he or she has a case to answer, "are more onerous" than decisions which authorise the arrest of a person – Hunt, "The Meaning of a 'prima facie case' for the Purposes of Confirmation" in May et al (eds) *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Kluwer, 2001), 135 at 136-7.

doubt) while simultaneously overlooking the approach of those tribunals to inferences at earlier stages of the proceedings, applying lower standards of proof, is further demonstrative of the Chamber's error

c. The jurisprudence of the European Court of Human Rights

49. The jurisprudence of the ECHR cited in the Decision and regularly relied upon by Pre-Trial Chambers in interpreting Article 58[97] confirms that an inference for the purposes of issuing an arrest warrant does not need to be the only reasonable conclusion. The analogous standard in the ECHR, "reasonable suspicion", requires "the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence".[98] Proof of reasonable grounds to believe or reasonable suspicion thus does not require proof that the inference is the only reasonable one.

d. Relevant national practice

50. Finally, this approach is consistent with the practice in national legal systems. In national systems, when determining the existence of reasonable grounds (or an analogous standard of proof)[99] to issue a warrant or commit a person for trial, a judge must be satisfied that the relevant inference is a reasonable one having regard to all the evidence.[100] At this stage the judge is not required to determine that no inference other than guilt can be drawn where more than one inference is available:[101] "Where 'more than one inference can be

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[97] These principles are affirmed in the Decision in both the Majority (para. 32) and Dissenting (paras. 8-9) opinions. See also *Prosecutor v Harun and Kushayb*, ICC-02/05-01/07-1-Corr, "Decision on Prosecution Application under Article 58(7) of the Statute", 27 April 2007, para. 28 ("*Harun and Kushayb* Summons to Appear Decision"); *Prosecutor v Bemba*, ICC-01/05-01/08-14-tENG, "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Gombo", para. 24 ("*Bemba* Arrest Warrant Decision").

[98] *Bemba* Arrest Warrant Decision, para. 24, citing ECHR cases of *Fox, Campbell and Hartley v. United Kingdom*, Judgment of 30 August 1990, para. 32; *K.-F. v. Germany*, Judgment of 27 November 1997, para. 57; *Labita v. Italy*, Judgment of 6 April 2000, para. 155; *Berktay v. Turkey*, Judgment of 1 March 2001, para. 199; *O'Hara v. United Kingdom*, Judgment of 16 October 2001, para. 34). See further in *Berktay v. Turkey*, Judgment of 1 March 2001, para. 199: "L'existence de soupçons plausibles présuppose celle de faits ou renseignements propres à persuader un observateur objectif que l'individu en cause peut avoir accompli l'infraction. Elle rappelle qu'il incombe au gouvernement défendeur de lui fournir au moins certains faits ou renseignements propres à la convaincre qu'il existait des motifs plausibles de soupçonner la personne arrêtée d'avoir commis l'infraction alléguée".

[99] In the U.S., the Supreme Court explained that "the substance of all the definitions of probable cause is a reasonable ground for belief of guilt [….]". *Maryland v. Pringle*, 540 U.S. 366, 371 (U.S. Supreme Court 2003); *Brinegar v. United* States, 338 U.S. 160, 175 (U.S. Supreme Court 1949); see also *Stacey v Emery*, 97 U.S. 642, 646 (U.S. Supreme Court 1878) (no substantive difference between a warrant issued on "reasonable cause" and one on "probable cause").

[100] *R. v. Franks*, 2003 SKCA 70, 2003 CarswellSask 520 (April 7, 2003) at para 41; *R. v. Munoz*, 205 C.C.C. (3d) 70, 2006 CarswellOnt 673, (Feb. 8, 2006) at para 22. An inference must be reasonable and logical - *R. v. Katwaru*, 52 OR (3d) 321, 2001 CarswellOnt 173, (Jan. 25, 2001) at para 40.

[101] *R. v. Franks*, 2003 SKCA 70, 2003 CarswellSask 520 (April 7, 2003) at para 41. Indeed, a "preliminary inquiry judge commits jurisdictional error where he weighs competing inferences or chooses among them" – *R. v. Munoz*, 205 C.C.C. (3d) 70, 2006 CarswellOnt 673, (Feb. 8, 2006) at para. 22 citing *R. v. C. (A.)* (1999), 140 C.C.C. (3d) 164 (Ont. C.A.), at 165; *R. v. Montour*, [2002] O.J. No. 141 (Ont. C.A.) at paras. 3-5.

drawn from the evidence, only the inferences that favour the Crown are to be considered.' […] If there are competing inferences, these are for the trier of fact to resolve. A preliminary inquiry judge commits jurisdictional error where he weighs competing inferences or chooses among them."[102]

(v) Conclusion

51. The Majority of the Pre-Trial Chamber erred in law in holding that the Prosecution must prove that the inference that President Al Bashir had genocidal intent was the only reasonable inference available on the materials presented, and in refusing to issue a warrant of arrest in respect of the counts of genocide on that basis. The Majority did not find that the inference that President Al Bashir had genocidal intent was unreasonable, but rather based its findings on the fact that other inferences also existed. The correct approach is that taken by Judge Ušacka: namely that the inference must be reasonable based on the evidence presented by the Prosecution. And as confirmed by Judge Ušacka, the application of this proper standard of proof to the evidence presented by the Prosecution would have resulted in the issuance of a warrant for the genocide counts.[103]

Relief Sought: The Appeals Chamber should apply the correct legal standard to the factual conclusions of the Pre-Trial Chamber

52. For the reasons set out above, the Prosecution submits that the Majority of the Pre-Trial Chamber erred in considering that a reasonable inference of intent is inadequate for a decision under Article 58, and in requiring that any such reasonable inference be the only one available. This error rendered the Chamber's refusal to authorise arrest on the genocide charges unsound.[104]

53. In this case, the Prosecution submits that the Appeals Chamber should, on the basis of the facts found by the Pre-Trial Chamber, determine that there are reasonable grounds to believe that President Al Bashir is criminally responsible for the three counts of genocide

[102] *R. v. Munoz*, 205 C.C.C. (3d) 70, 2006 CarswellOnt 673, (Feb. 8, 2006) at para 21 (quoting *R. v. Sazant*, [2004] S.C.J. No. 74 (S.C.C.) at para 18, per Major J.), also at paras. 22. See further *R. v. Foster*, 76 W.C.B. (2d) 769, 2008 CarswellOnt 1144, (Feb. 21, 2008) at para 31(8). As noted above, even when considering whether to commit a person to trial, once the reasonable basis for an inference of guilt has been established then it "is of no concern to the preliminary inquiry judge that there are additional competing inferences pointing to the innocence of the accused. It is exclusively for the trier of fact to determine whether it will draw such competing inferences and what weight it will give them" - *R. v. Gillespie*, 2006 YKSC 66, 2006 CarswellYukon 121, (Dec. 15, 2006) at para 10.

[103] Dissenting Opinion, para. 84.

[104] The Prosecution recalls that Judge Ušacka considered that when the proper standard of proof was applied, and the proper factors were considered, the evidence presented did establish reasonable grounds to believe the Bashir had committed genocide – Dissenting Opinion, paras. 84, 105.

and remand the case to the Pre-Trial Chamber with direction to authorize the arrest of President Al Bashir for genocide. The Appeals Chamber has the power to do so and it has before it all the relevant material and information. Moreover, in the instant case a factual finding by the Appeals Chamber would serve the interests of justice

(i) The power of the Appeals Chamber to enter a finding of fact

54. Pursuant to Article 83(2) and Rule 158(1), the Appeals Chamber has the authority to substitute a discretionary decision of another Chamber with its own.[105] As long as the Appeals Chamber has before it all the relevant materials and information, it has the discretion to determine the issue rather than remitting the case back to the Pre-Trial or Trial Chamber. Such a decision would be consistent with the issue of finality which is attached to the appeals process under Rule 158(1).[106] For instance, the Appeals Chamber of the ICTY, having concluded that a Trial Chamber had adopted the wrong legal standard with respect to the relevant mode of liability, applied "the correct legal framework to the factual conclusions of the Trial Chamber" and found the accused guilty under another mode of liability.[107]

(ii) The factual basis for a finding by the Appeals Chamber

55. For the Appeals Chamber to enter a finding on whether there are reasonable grounds to believe that President Al Bashir bears criminal responsibility for the three genocide charges, there is no need in the instant case to re-consider the evidence that was before the Pre-Trial Chamber. The Appeals Chamber may make such a finding based on the relevant facts that have already been accepted as established by the Pre-Trial Chamber.[108] In so doing, the Appeals Chamber may, if it considers so appropriate, independently evaluate

[105] *Situation in the DRC*, ICC-01/04-169, 13 July 2006, para. 91; *Situation in the DRC*, ICC-01/04-169, 13 July 2006, Dissenting Opinion Judge Pikis, para. 46.
[106] *Prosecutor v. Katanga et al*., ICC-01/04-01/07-522 OA3, 27 May 2008, Judge Pikis Dissenting Opinion, para. 2. *Situation in the DRC*, ICC-01/04-169, 13 July 2006, Dissenting Opinion Judge Pikis, paras. 44-48. See also Staker, "Article 83" in Triffterer (ed) *Commentary on the Rome Statute of the ICC (2nd ed)* (2008), p. 1483.
[107] *Prosecutor v. Stakic*, IT-97-24-A, Appeals Judgement, 22 March 2006, paras. 62-63, 85 and 98. See also *Prosecutor v. Jelisic*, IT-95-10-A, Appeals Judgement, 5 July 2001, where the Appeals Chamber found that the Trial Chamber had applied the wrong legal standard when assessing the evidence to establish the special intent for genocide at the Rule 89*bis* stage. In this case the Appeals Chamber substituted the finding of the Trial Chamber, ruling that a re-trial was not "in the interests of justice (paras. 39, 56 and 77).
[108] The Majority took the same approach, when examining whether Al Bashir's genocidal intent can be inferred "from the facts proven by the Prosecutor" (Decision, para. 205; Decision Granting Leave, p. 7). In so doing, the Appeals Chamber may consider all those facts that have not been rejected by the Majority for lack of evidence.

the relevance and the weight to be given to these facts and draw its own conclusion from them.[109]

56. The factual findings of the Pre-Trial Chamber in support of the first element of each of the genocide charges (the perpetrator killed/caused serious bodily or mental harm to/ inflicted certain conditions of life upon one or more persons) are to be found among others in the following paragraphs of the Decision:

- paragraphs 94, 97 and 192(ii) (killing);
- paragraphs 108, 192 (iii) (causing serious bodily or mental harm through the acts of rape);
- paragraphs 104, 192 (v) (causing serious bodily or mental harm through the acts of torture);
- paragraphs 100, 192 (iv) (causing serious bodily or mental harm through the acts of forcible transfer);
- paragraphs 77, 93, 97, 100-101, 104, 108, 180, 181, 184-189, 192 (inflicting conditions of life).

57. The factual findings in support of the second element of each of the genocide charges (such person or person belonged to a particular national, ethnical, racial or religious group) are to be found among others in paragraphs 136-137 and 192 of the Decision.[110]

58. With respect to the third element of each of the genocide charges (the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such), the Prosecution submits that from an individual and collective assessment of the facts established by the Prosecution it must be inferred that there are reasonable grounds to believe that President Al Bashir acted with genocidal intent. The Prosecution stresses that at no point in the Decision did the Majority conclude that the inference that the GoS acted with genocidal intent was an unreasonable one. Rather, the Majority determined that it was not the *only* reasonable inference that can be drawn from individual factors established by the Prosecution,[111] or from a collective assessment of its factual findings.[112] Implicit in this finding by the Majority is that it is reasonable to infer that President Al

[109] For instance, the Appeals Chamber may consider specific facts to which the Majority has not given any weight (see for instance Decision para. 173-176). It may also decide not to give any weight to other facts that have been considered by the Pre-Trial Chamber in the Decision (see for instance decision paras. 196-200).
[110] See also paras 76, 83, 85, 94, 100-101, 104, 108, 191, 215.
[111] See for instance the particular seriousness of war crimes and crimes against humanity committed by the GoS force Decision (paras. 201 and 204(v)) and acts of hindrance of humanitarian assistance, as well as cutting off supplies of food and other essential goods (para. 181).
[112] Decision, para. 205.

Bashir had genocidal intent. This, the Prosecution submits, is in fact what is required to issue a warrant of arrest.

59. In addition, the Majority made findings that: a) President Al Bashir acted with discriminatory intent against members of the Fur, Masalit and Zaghawa groups;[113] b) President Al Bashir made public statements that provide evidence for his responsibility for war crimes and crimes against humanity that were a core component of the GoS counter-insurgency campaign;[114] c) Ahmad Harun, a Senior Member of the GoS who was entrusted among other things with the task of acting as a link between the government of the three Darfurian States and the highest level of the GoS, made public statements that "contain the harsher language used by GoS officials";[115] d) President Al Bashir and other high ranking Sudanese political and military leaders shared a common plan to carry out this counter-insurgency campaign;[116] e) a core component of the GoS counter-insurgency campaign was the unlawful, discriminatory and systematic attack on the part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – which was perceived by the GoS as being close to groups, such as the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing conflict in Darfur;[117] f) President Al Bashir was in full control of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, and directed the branches of the "apparatus" to play an essential role in the implementation of the common plan;[118] g) the GoS carried out numerous unlawful attacks, followed by systematic acts of pillage, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups;[119] h) the GoS subjected thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of murder, as well as to acts of extermination;[120] i) the GoS subjected thousands of civilian women, belonging primarily to the said groups to acts of rape both in the context of the attacks, as well as in and around the IDP camps;[121] j) the GoS subjected hundreds of thousands of civilians belonging primarily to

[113] Decision, paras. 167, 172 and 204(vi).
[114] Decision, paras. 170-172.
[115] Decision, paras. 173-174 and 220.
[116] Decision, paras. 214-215.
[117] Decision, paras. 74-76, 83, 85, 191 and 214-215.
[118] Decision, paras. 216-219 and 222.
[119] Decision, paras. 77 and 192(i).
[120] Decision, paras. 94, 97 and 192(ii).
[121] Decision, paras. 108 and 192(iii). Although the Majority found that there are no reasonable grounds to believe "that Janjaweed militiamen were stationed around IDP Camps for the purpose of raping those women and killing those men who ventured outside the camps" (para. 199), for the purpose of its findings that thousands of rapes occurred, the Majority relied on incidents of rape in or around the IDP camps: See UN General Assembly, Human Rights Council, Human Rights Situations that Require the Council's Attention (A/HRC/7/22), 3 March 2008 (Anx J28) at DAR-OTP-0148-0259 at 0270, para. 47, which states as follows: "The female population of Darfur, in particular internally displaced persons continue to be the target of rape and other sexual and gender-

the said groups to acts of forcible transfer, and encouraged members of other tribes which were allied with the GoS, to resettle in the villages and lands previously inhabited by members of these groups;[122] k) the GoS subjected civilians belonging primarily to the said groups to acts of torture;[123] l) the GoS engaged in acts of hindrance of medical and other humanitarian assistance in the IDP Camps in Darfur, among others by subjecting the aid to bureaucratic barriers and difficulties in accessing a number of areas, which is explained in some reports by the GoS's attempt to hide the magnitude of the crisis;[124] and m) at times, GoS forces contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked.[125]

60. The Prosecution submits that these facts as found by the Pre-Trial Chamber amply support reasonable grounds from which to infer that President Al Bashir acted with genocidal intent.

61. Finally, the factual findings in support of the fourth element of each of the genocide charges (the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction) are to be found in paragraphs 83-85, 88 of the Decision.[126]

(iii) A factual finding by the Appeals Chamber is in the interest of justice

62. Having determined the correct legal standard, and given that the facts relevant to the issue are uncontested, the Appeals Chamber is in as good a position as the Pre-Trial Chamber to draw conclusions from them.[127] In addition, the remedy sought is intrinsically linked to

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based violence. The established pattern of violence against women that emerged at the beginning of the conflict continued during the reporting period. As documented in many previous incidents, the perpetrators were very often armed men in military uniforms or in civilian clothes travelling in groups on horses or camels. In North Darfur, internally displaced persons were victims in 80 per cent of all reported cases of sexual and gender-based violence. Female internally displaced persons were usually attacked when they left the confines of the camps for internally displaced persons to engage in income-gathering activities, such as the collection of firewood, grass and fruit." See also Witness Statement, (Anx 66) DAROTP-0119-0711 at 0718, para. 36, according to which "the villagers were trapped in Kailek for around 2 months. […] the women and girls were raped on a daily basis. In 2005 as part of the SOAT collection project I interviewed 3 or 4 women/girls who had been raped in Kailek and had given birth to 'Janjaweed babies' in Kalma IDP camp. I also learnt that there were hundreds of women and girls who had become pregnant following forced sexual intercourse in Kailek and some women/girls had died as a result of the brutality of the rape". See further the evidence on rape at the Kalma camp accepted by the Majority at para. 180 of the Decision.

[122] Decision, paras. 100-101 and 192(iv). The Majority referred to an estimate of the United Nations, according to which the number of IDPs is as high as 2.7 million (paras. 179 and 204((ii)).

[123] Decision, paras. 104 and 192(v).

[124] Decision, paras. 181, 185-189.

[125] Decision, para. 93. The Pre-Trial Chamber found that there are no reasonable grounds to believe that such a contamination was a core feature of their attack.

[126] See also paras. 76, 94, 97, 100, 108, 191-192, 215.

[127] *Situation in the DRC*, ICC-01/04-169, 13 July 2006, Dissenting Opinion Judge Pikis, para. 46.

the appealed issue,[128] which is a discrete and self-contained question. Moreover, a determination of the issue by the Appeals Chamber in the instant case does not require that the Appeals Chamber has "daily control of the case and a full awareness of the complete factual background".[129] Given the early stage of this case (issuance of an arrest warrant), there has been no litigation between the parties. The Appeals Chamber thus has before it all the necessary factual background, putting it in a position to apply the correct legal standard – if it so finds – to the undisputed facts set out by the Pre-Trial Chamber.[130]

63. The Prosecution submits that in the instant case it is in the interest of justice that the Appeals Chamber exercise its discretionary power and find that there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for the three counts of genocide included in the Prosecution Application. The Appeals Chamber may take a decision on the issue expeditiously, without there being any need to a further assessment of evidence or facts by the Pre-Trial Chamber.

64. Should the Appeals Chamber conclude that it would not be appropriate to enter itself a finding of reasonable grounds, then the Prosecution requests that the Chamber, after reversing the Decision and determining the correct standard, remand the matter to the Pre-Trial Chamber for a new determination under Article 58.

[128] *Prosecutor v. Katanga et al.,* ICC-01/04-01/07-475, para. 111, and *Prosecutor v. Katanga et al.,* ICC-01/04-01/07-522, OA3, 27 May 2008, para. 65.
[129] *Prosecutor v. Katanga et al*, ICC-01/04-01/07-522 OA3, 27 May 2008, paras. 65 and 69.
[130] A *contrario*, *Prosecutor v. Katanga et al.,* ICC-01/04-01/07-475, para. 111.

(iv) Relief Sought

65. The Prosecution therefore respectfully requests that the Appeals Chamber:

- overturn the Decision to the extent that it held the Prosecution had not established reasonable grounds to believe that President Omar Al Bashir had genocidal intent;
- set out the correct standard for drawing inferences under Article 58; and
- apply that correct standard to the facts found by the Pre-Trial Chamber, entering a finding that there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for genocide under Articles 6(a), (b) and (c) of the Statute, and
- direct the Pre-Trial Chamber to issue a warrant of arrest on those counts; or in the alternative,
- remand the matter to the Pre-Trial Chamber to decide on whether there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for genocide under Articles 6(a), (b) and (c) of the Statute, applying the correct standard.

Luis Moreno-Ocampo,
Prosecutor

Dated this 6th day of July 2009

At The Hague, The Netherlands