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No.: **ICC-02/05-01/09**
Date: **25 September 2009**

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF PROSECUTOR v.
OMAR HASSAN AHMAD AL BASHIR

Public Document

Observations on behalf of Amici Curiae in respect of the Prosecution Appeal's against "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"

Source: **Amici Curiae, represented by Sir Geoffrey Nice QC and Rodney Dixon**

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A. Introduction

1. On 18 September 2009 the Appeals Chamber granted the Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG) permission to submit observations as *amici curiae* on this appeal limited to "the issue of whether the Pre-Trial Chamber applied the correct legal test under article 58 of the Statute to determine whether there are reasonable grounds to believe that Omar Hassan Ahmad Al Bashir is criminally responsible for genocide".

The issue

2. The only issue that is the subject of this appeal is, "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" (as stated in the Prosecutor's application for leave to appeal of 10 March 2009, and for which permission was granted to appeal by the Pre-Trial Chamber's decision of 24 June 2009).

3. The relevant part of the Pre-Trial Chamber's decision of 4 March 2009 to which this question applies is the finding of the Majority that, when all of the materials provided by the Prosecution are analysed together, no reasonable grounds existed to conclude that the GoS (as defined by the Majority) acted with a *dolus specialis/*specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups (as summarised by the Majority at paras. 202-208, cited in full below). It is for this reason alone that no warrant of arrest for genocide charges was issued.

Summary of observations

4. The submission of the SWTUF and SIDG is that the Majority of the Pre-Trial Chamber applied the correct legal test in considering the Prosecutor's application for genocide charges under Article 58. The Majority correctly required the Prosecution to "satisfy" it on the basis of the evidence and the inferences to be drawn therefrom that "reasonable grounds" exist.

5. A plain reading of the question posed by the Prosecution in its application for leave to appeal, which is now the subject of this appeal, can only have one answer: the existence of reasonable grounds must be the *only* conclusion to be drawn from all of the evidence for a warrant to be issued pursuant to Article 58. The opposite and equally correct conclusion is that if upon an examination of the evidence and the inferences therefrom, reasonable grounds do *not* exist, the Prosecution's application for genocide charges is bound to fail.

6. The Majority did not, as asserted by the Prosecution, "effectively" impose 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' " (para. 22 of the Prosecution's Appeal Brief of 6 July 2009). This is a misconception of the Majority's position in that:

   - The terminology of Articles 58, 61 and 66 make clear that Chambers are performing different functions at each stage and that it is only at the trial stage that a Chamber assesses evidence and reaches a conclusion on it. At the two earlier stages it is the potential of the evidence that is considered:

     Article 58
     Issuance by the Pre-trial Chamber of a warrant of arrest or a summons to appear
     1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, **it is satisfied that:**
     (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court (emphasis added); and
     ……………………………
     Article 61
     Confirmation of the charges before trial
     …………….
     5. At the hearing, the Prosecutor shall support each charge with **sufficient evidence to establish substantial grounds to believe that the person committed the crime charged**.
     ……………………………...
     7. The Pre-Trial Chamber shall, on the basis of the hearing, determine **whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged**. Based on its determination, the Pre-Trial
     Chamber shall:
     (a) Confirm those charges in relation to which it has determined that there is

sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed (emphasis added);

Article 66
Presumption of innocence
1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court **must be convinced of the guilt of the accused beyond reasonable doubt** (emphasis added)**.**

- The terms of Article 58 require the Chamber to be "satisfied" that "reasonable grounds" exist. Article 58 does not require the Chamber to be "very satisfied" or "nearly satisfied" or "reasonably satisfied"; just "satisfied". "Satisfied" in this setting is equivalent to "determining" but also to "being certain", being "confident" – or to other synonymous states of mind - in the setting with which the Appeals Chamber is here concerned. It is the decision for or against the existence of "reasonable grounds" that is in itself absolute, "black or white", not nuanced in any way. It is only the underlying issue, the question whether or not the grounds are reasonable, where qualified judgement is made. At this stage the Statute does not require or allow the Chamber to make a decision about whether crimes were actually committed to *any* standard. It would be absurd for it to do so. Rather it requires the Chamber to decide the *potential* of the evidence according to the standard of "reasonable grounds". The Chamber must be *satisfied* from the evidence and inferences that "reasonable grounds" are made out. A Chamber cannot only be *reasonably* or *possibly* certain that "reasonable grounds" exist for a warrant to be issued. It can only conclude that there are or there are not "reasonable grounds". The same distinction is made, and the same level of certainty in *decision making*, is required on the confirmation of charges although the standard is raised and a Chamber must "determine" (although see the reference to "thoroughly satisfied" below) that there are "substantial grounds to believe" a crime has been committed. In each case the decision to be made is definitive, absolute, certain or however else conveniently described.

- Only at the last stage does the Trial Chamber actually determine whether crimes were committed, something about which it would have to be convinced.

At the two earlier stages the Chambers are performing functions similar to those engaged in by courts in adversarial systems at the end of prosecution cases where they determine whether on the evidence produced it would be proper for the fact finder (often a jury) properly to convict. Such courts assess the *potential* of the evidence just as the Pre Trial Chamber had to do in this case

- Inference/s that the Prosecution seeks to draw from the evidence, in a case dependent on inferences, must, thus, "satisfy" the Chamber that "reasonable grounds" exist. The Chamber must be "confident" (to use the Prosecution's term) that the only conclusion to be drawn is that reasonable grounds are established. The Dissenting Judge acknowledged this point in stating that where evidence renders an inference of genocidal intent unreasonable, the requirements of Article 58 are not met (para. 33). An inference after all is only a conclusion drawn on the basis of all the evidence.

- Article 58 requires no less than certainty of the *existence* of reasonable grounds in order to ensure that arrest warrants are not issued on unsubstantiated grounds. An entirely sensible requirement given that arrest warrants plainly can have far-reaching consequences for a person's liberty and standing and for States and their citizens in the context of the ICC's jurisdiction, and ultimately for the integrity and reputation of the ICC if the warrant is shown to be without foundation.

- Where the inferences relied on by the Prosecution are not found to be sufficient to satisfy the Chamber of the existence of reasonable grounds, it would be wholly improper for a Chamber to issue a warrant on the basis that it *may* be able to conclude that there are *reasonable* grounds to believe a crime was committed (a form of double uncertainty). Such an approach would defeat the object and purpose of Article 58, and effectively sanction the issuing of warrants on insufficient evidence in anticipation of the Prosecution seeking to obtain better evidence before or during trial.

- The *burden* to meet the requisite standard of proof never shifts from the Prosecutor. He bears the onus of satisfying the Chamber until it is certain that

he has presented evidence to the standard required at each stage of the proceedings. The fundamental distinction between the certainty of the decision making process required to *find* "reasonable grounds" and the standard of less than certainty implicit in the term "reasonable" once such grounds are found (or not) is one which the Prosecution has failed to appreciate.

- The Prosecution is of course correct that it is not necessary to establish at the stage of an arrest warrant that genocidal intent is proven "beyond reasonable doubt". It is inconceivable that the Majority did not appreciate the difference between proof "beyond reasonable doubt" and proof of "reasonable grounds to believe". The Majority repeatedly stated it was applying a "reasonable grounds" standard, as clearly distinct from the much higher and irrelevant "beyond reasonable grounds" standard that is only applied when a Trial Chamber decides whether offences were actually committed.

- It is equally unthinkable that the Majority deliberately or mistakenly applied the "beyond reasonable doubt" standard in assessing what the evidence and inferences could show in rendering its decision on the issuance of an arrest warrant. The issues involved at trial and the standard of assessment *then* required of a Trial Chamber is strikingly and obviously different from the issues involved and the patently lower threshold considered by a Pre Trial Chamber issuing an arrest warrant.

- In its decision the Majority rightly stated that it is sufficient to show for the issuance of a warrant that the only reasonable conclusion to be drawn on the evidence presented is that reasonable grounds exist (see para. 205 as one example). The Majority reiterated this test in its decision to grant leave to appeal of 24 June 2009 (at pp. 6-7).

- It would be unusual and effectively impossible for a court to be required to find that it must *reasonably* conclude that it has *reasonable* grounds to believe something – in this case the commission of crimes. It must just *conclude* whether the the evidence available has the *potential* to meet the required standard. It must be satisfied (the term used in Article 58); paraphrased (see above) it must "determine", be "thoroughly satisfied", be certain etc. There

can be no purpose to having a double reasonableness requirement, namely that a Chamber must *reasonably* conclude that there are *reasonable* grounds.

- Moreover, the true import of the Majority's decision lies in its reasoned application of Article 58 to all of the evidence presented. The submission of the *amici curiae* is that, once the Majority's actual findings individually and as a whole are examined, it is abundantly clear that the test applied was one of "reasonable grounds to believe". There are numerous findings on the evidence presented that the evidence was insufficient to establish "reasonable grounds".

- The Majority specifically found that many aspects of the 'underlying facts' relied upon by the Prosecution could not be established on the evidence; for example, the Majority found that "the Prosecution has failed to substantiate its claim that the materials that it submitted provide 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 of the camps" (para. 199).

- The Majority even found that materials relied upon by the Prosecution to prove genocidal intent in fact reflected a situation *significantly different* from the situation described in the Prosecution's application (summarised at para. 204). The Prosecutor can hardly be heard to complain that the Majority applied a "beyond reasonable doubt" test when the Judges had determined that the Prosecutor's *own* submissions on the evidence were overstated and unsupported.

7. The *amici curiae* will elaborate these observations under two main headings below: (i) the legal test to be applied under Article 58 was correctly interpreted by the Majority, and (ii) the Majority's findings demonstrate that the right legal test was adopted and followed.

B. <u>The legal test under Article 58</u>

8. Article 58 provides that the Pre-Trial Chamber must "having examined the application and the evidence or other information submitted by the Prosecutor" be "*satisfied*" that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court".

9. Unsurprisingly, both the Majority and the Dissenting Judge stated this was the test to be applied to determine whether to issue a warrant. Furthermore, both the Majority and the Dissenting Judge likened the "reasonable grounds" standard under Article 58 to the "reasonable suspicion" standard applied by the European Court of Human Rights (Majority, paras. 32 and 160, and Dissenting Judge, para. 9).

10. It is also common ground, as discussed above, that at each stage of the proceedings different standards of proof apply: (i) "reasonable grounds" at the stage of issuing arrest warrants (ii) following the issuance of a warrant, at the stage of confirming charges, there must be "substantial grounds to believe" (in accordance with Article 61), and (iii) at trial, proof "beyond reasonable doubt" to find an accused guilty.

11. The observation of the *amici curiae* is that at each stage the Chamber must be certain that the evidence meets the requisite standard. Anything less would mean that the Chamber could not be "satisfied" that the standard of proof had been met. Merely because the standards applicable at the arrest warrant and confirmation stages are at a lower threshold than the standard required for proof of the commission of offences at the full trial does not mean that the Pre Trial Chamber dealing with the arrest warrant would be justified in being any less than *certain* that the requisite "reasonable grounds" standard had in fact been met. The burden is always on the Prosecution to make the Chamber certain that the requisite standard has been met.

Jurisprudence

12. The ICC's jurisprudence supports this observation.

13. The Dissenting Judge in the present case noted in a Dissenting Opinion to the Decision on the Confirmation of Charges in the *Katanga* case that, as held by that Chamber, even though the "Prosecution's burden is only to provide enough evidence to establish substantial grounds to believe ... rather than evidence to prove the

accused's culpability beyond reasonable doubt ... [i]n each phase, it is the duty of the Chamber to determine whether it is *thoroughly satisfied* that the evidence presented on each element meets the requisite legal standard".[1] The Judge continued that despite the difficulties that might be faced by the Prosecution in acquiring evidence, "it is not the duty of the Chamber to lessen the Prosecution's burden, but rather to assess the evidence presented and to decide whether such evidence is sufficient to establish substantial grounds to believe that each element of each of the crimes has been committed. On the basis of the evidence presented, I am not 'thoroughly satisfied' that there are substantial grounds to believe ...".[2]

14. The Judge's assessment of the evidence combined a review of the Prosecution's factual allegations together with the inferences to be drawn from the evidence, finding both that underlying facts were not proven and that inferences pleaded by the Prosecution did not satisfy the requisite standard, much in the same vein as the Majority has done in the present case. Such is the nature of judicial reasoning.

15. In particular, the Judge found that:

> "the allegations of the Prosecution as presented are insufficient for one to infer the existence of the suspects' intent ... While the Prosecution presents evidence that the crimes ... were committed, in my view such a general allegation is insufficient for the Chamber to infer that the suspects were aware that [the crimes] would occur in the ordinary course of events ... However, even if the Chamber could infer from the Prosecution's presentation that there are substantial grounds to believe that the suspects intended to ... commit the crimes ... in my view, the evidence presented is also insufficient to support the allegations ... there is also insufficient evidence to establish that if [the crimes] were committed ... this information was reported to [the suspects] ... even if the Chamber could fully rely on this evidence, it would still be insufficient to establish the inference that [the suspects would have received the information]".[3]

16. In the confirmation of the charges' decision in the *Bemba* case, the Chamber adopted the same approach. By way of illustration, the Chamber held when assessing a witness statement that it did not consider that the contents of the statement "*per se*"

[1] ICC-01/04-01/07-717, Partly Dissenting Opinion of Judge Anita Usacka, 30 September 2008 para. 2.
[2] *Ibid.* para. 28.
[3] *Ibid.* paras. 22-25.

meant that the suspect had authorised crimes, and that accordingly "the Chamber cannot infer that [the suspect] was aware that [crimes would be committed]".[4]

17. Here the Chambers are *concluding* that the evidence and the inferences do not meet the required standard of proof in exactly the same way as the Majority did in the present case. It is an absolute decision that must be taken, whether the standard is met or not. As emphasised above, the Chamber cannot be criticised for making sure - being "satisfied", "determining" etc - that there were reasonable grounds.

Interpretation of the legal test

18. The Majority and the Dissenting Judge travel different routes to arrive at the same interpretation of the test under Article 58.

19. The Majority found that the Prosecution had not presented materials upon which it could establish that there were reasonable grounds to believe that genocide had been committed. Having examined all of the evidence, the Majority held that it "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" (para. 205, emphasis added). This is precisely equivalent to saying that it does not find that there are reasonable grounds.

20. The Majority was simply stating that a Chamber must be certain that there *are* reasonable grounds before issuing a warrant. It is an obvious process of decision making that was consistently applied throughout the decision: for instance, at para. 78 "the Chamber concludes that there are reasonable grounds to believe that … war crimes … were committed". In other words, the only conclusion to be drawn on all the evidence is that there are reasonable grounds to believe in the commission of war crimes (see for further examples, paras. 83, 100, and 223 where words such as "concludes", "finds", and "considers" that reasonable grounds exist, serve the same purpose as "the only reasonable conclusion is that there are reasonable grounds to believe"). It need only have stated, as it indeed found on all of the evidence considered individually and as a whole, that it concluded that reasonable grounds do

[4] ICC-01/05-01/08-424, 15 June 2009, para. 396.

not exist. The Majority repeatedly stated that this was the correct test, and it adhered to this test throughout its careful examination of all of the evidence (as explained in Part C below).

21. The Chamber must have materials upon which it *could* exclude alternatives to genocidal intent so that it can be satisfied that there are reasonable grounds. It need not have materials which *would* lead it to conclude that all alternatives are excluded – this would amount to a finding of proof beyond reasonable doubt of the crimes themselves. As the Prosecution points out (supported by international and national case law), and as was of course understood by the Majority, it is for the Trial Chamber *at trial* to decide whether alternatives inconsistent with guilt have been excluded so that the trial Judges are sure beyond reasonable doubt.

22. The reasoning of the Dissenting Judge that the inference of genocidal intent must not be *unreasonable* amounts to the same test (see para. 33) – if there are other alternatives which do not permit a Chamber to conclude that there are reasonable grounds, the Prosecution application for genocide charges must be dismissed.

23. The divergence between the Majority and the Dissent is really one of differing assessments and conclusions about the evidence itself – a matter which is not the subject of the present appeal.

Inferences in the context of Article 58

24. The Majority was plainly aware that the jurisprudence of the ICTY and ICTR concerning inferences, as relied on by the Prosecutor, refers to proof at the trial stage. The case law comes from trial judgments. The Majority actually cites and adopts the Prosecution's footnote 505 in its decision: "'for the purposes of an Art. 58 application the lower standard of reasonable grounds will instead be applicable'" (para. 155).

25. There is no basis at all to suggest that the Majority mistakenly applied the "beyond reasonable doubt" standard when assessing the inferences the Prosecution sought to rely on. It plainly did *not* find that the inference of genocidal intent was not established beyond reasonable doubt. No where in its decision did it consider whether inferences were consistent with *guilt or innocence*. The Majority made it clear in a

paragraph immediately following its reference to footnote 505 that the inference would need to show that "reasonable grounds" existed:

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

26. The Majority adopted the Prosecution's reference to the jurisprudence of the ICTY and ICTR, but with the obvious caveat that as the standard of proof was "reasonable grounds" under Article 58, the only conclusion to be drawn on the facts must be one of "reasonable grounds" (para. 158). The comparable "reasonable suspicion" standard of the European Convention of Human Rights was again referenced by the Majority at this point in its decision to reinforce the standard of proof applicable under Article 58 (para. 160).

27. It is in this context that the Appeals Chamber is invited to read the Majority's statement that "*if* the existence of a GoS's genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met" (para. 159, emphasis added).

28. First, the Majority did not find that genocidal intent *is* a reasonable conclusion – it specifically prefaced its reasoning with the word "if".

29. The Prosecution is wrong to assert that the Majority did find (even if implicitly) that the inference of genocidal intent *is* reasonable on the evidence presented (para. 3 of the Prosecution Appeal Brief – the footnote reference given by the Prosecutor for this submission is para. 205 of the Majority's decision (cited above) – this paragraph does not state or imply what the Prosecution claims – rather, the Majority finds that the Prosecutor has not demonstrated that there are reasonable grounds to believe in the existence of genocidal intent; and the Prosecution has failed to read the paragraph in the context of the Majority's essential findings on the lack of evidence and the

Prosecution's misrepresentations about evidence, which immediately precede para. 205; the position is further made clear in paragraph 206).

30. Second, the Majority's findings clearly show that it did not find genocidal intent to be a reasonable conclusion on the evidence presented (see for all references to the relevant findings, Part C below).

31. As highlighted above in the findings of other Chambers, the process of judicial reasoning is not a mechanical one. All of the available evidence needs to be considered, cross-referenced and weighed together (as the Chamber noted at para. 34). In its review of the evidence, if the Chamber finds evidence that may show a reasonable conclusion, this is not an end to the matter. That evidence must be scrutinised in light of all of the other evidence. It may be seriously weakened or even completely nullified by other evidence.

32. An inference is merely a conclusion that *can* be reached, but which can change depending on a myriad of other factors that may arise from the evidence considered in its entirety. The Dissenting Judge accepted as much in stating that if there is evidence that renders an inference of genocidal intent unreasonable, the Prosecution's application must fail (para. 34).

C. <u>The findings of the Majority</u>

33. At no point in assessing the evidence did the Majority rule out any category of evidence on the basis that it did not prove beyond reasonable doubt the commission of genocide. Indeed, the Majority only ever referred to the "reasonable grounds" standard throughout its analysis of the evidence in respect of all charges, reiterating that a warrant of arrest or a summons to appear shall only be issued in relation to a specific crime if the Chamber is satisfied that there are reasonable grounds to believe that the relevant crime has been committed (para. 157).

34. The Majority undertook a thorough review of all of the Prosecution's evidence in respect of genocidal intent. Its analysis and findings were structured around the nine

different factors identified by the Prosecution from which to infer genocidal intent. The Majority grouped them into three categories: (i) the alleged existence of a GoS strategy to deny and conceal the crimes; (ii) official statements and public documents; and, (iii) the nature and extent of the alleged acts of violence (paras. 163-164). The Majority proceeded to review the evidence and arguments presented in each category in order to reach its conclusion.

35. From this process it is abundantly clear that the Majority applied the right test, one of whether it was satisfied that reasonable grounds existed, throughout its review of the evidence. The summary of the Majority's findings appear at paras. 202-208 and are as follows:

> 202. The Majority observes that the Prosecution acknowledges that it has no direct evidence of the GoS's genocidal intent and that it therefore relies on proof by inference.
>
> 203. In light of this circumstance, the Majority agrees with the Prosecution in that the article 58 evidentiary standard would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe that the GoS acted with a dolus specialis/specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups.
>
> 204. In this regard, the Majority recalls that the above-mentioned analysis of the Prosecution's allegations concerning the GoS's genocidal intent and its supporting materials has led the Majority to make the following findings:
>
> > i. even if the existence of an alleged GoS strategy to deny and conceal the crimes committed in Darfur was to be proven, there can be a variety of plausible reasons for its adoption, including the intention to conceal the commission of war crimes and crimes against humanity;
> >
> > ii. the Prosecution's allegations concerning the alleged insufficient resources allocated by the GoS to ensure adequate conditions of life in IDP Camps in Darfur are vague in light of the fact that, in addition to the Prosecution's failure to provide any specific information as to what possible additional resources could have been provided by the GoS, there existed an ongoing armed conflict at the relevant time and the number of IDPS s, according to the United Nations, was as high as two million by mid 2004, and as high as 2.7 million today;

iii. the materials submitted by the Prosecution in support of the Prosecution Application reflect a situation within the IDP Camps which significantly differs from the situation described by the Prosecution in the Prosecution Application;

iv. the materials submitted by the Prosecution in support of the Prosecution Application reflect a level of GoS hindrance of medical and humanitarian assistance in IDP Camps in Darfur which significantly differs from that described by the Prosecution in the Prosecution Application;

v. despite the particular seriousness of those war crimes and crimes against humanity that appeared to have been committed by GoS forces in Darfur between 2003 and 2008, a number of materials provided by the Prosecution point to the existence of several factors indicating that the commission of such crimes can reasonably be explained by reasons other than the existence of a GoS's genocidal intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups;

vi. the handful of GoS official statements (including three allegedly made by Omar Al Bashir himself) and public documents relied upon by the Prosecution provide only indicia of a GoS's persecutory intent (as opposed to a genocidal intent) against the members of the Fur, Masalit and Zaghawa groups; and

vii. as shown by the Prosecution's allegations in the case of The Prosecutor v. Ahmad Harun and Al Kushayb, the Prosecution has not found any indicia of genocidal intent on the part of Ahmad Harun, in spite of the fact that the harsher language contained in the above-mentioned GoS official statements and documents comes allegedly from him.

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

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

Finding (i)

36. The Majority did not find that there existed a strategy to conceal crimes – it prefaced its finding at (i) by stating that "even if" such a strategy were proven.

37. When the Majority stated that there can be a variety of "plausible reasons" for an alleged attempt by the Government of Sudan to conceal crimes (if this were proven), the Majority is providing its reason for why it held that no reasonable grounds existed to find genocidal intent. It is a common sense conclusion that a strategy to conceal crimes does not *per se* establish genocidal intent. Each of the Majority's findings must be read in the context of its stated position that only if reasonable grounds are established by the evidence is it permitted to order the inclusion of genocide charges.

Finding (ii)

38. Similarly, in stating that the Prosecution's allegations about the lack of provision of resources in the camps are vague and unsubstantiated by information, particularly in light of the evidence of the on-going nature of the conflict, the Chamber is explaining in clear terms its reasons for finding that reasonable grounds do not exist. The Majority is not "effectively imposing a requirement of proving an inference 'beyond reasonable doubt'" (as the Prosecution seeks to argue: para. 22). The Majority is plainly indicating that the Prosecution's evidence (and lack thereof) on this point does not establish reasonable grounds.

Finding (iii)

39. The Majority is indicating that materials submitted by the Prosecutor in support of his application reflect a situation within the camps in Darfur which significantly differs from the situation described by him in his application. The Majority reached this "conclusion as a result of an overall assessment of the materials provided by the Prosecution – including … the latest report issued on 23 January 2009 by the United Nations High Commissioner for Human Rights" (see para. 180). It is a finding by the Majority that the Prosecutor's allegations are not supported by the evidence – another reason why the Majority was not convinced that reasonable grounds were made out.

Finding (iv)

40. Similarly, the Majority finds that the materials submitted by the Prosecutor reflect a level of GoS hindrance of humanitarian assistance in the camps in Darfur which differs from that claimed by the Prosecutor. These materials included additional ones supplied by the Prosecutor at the request of the Chamber on 18 November 2008 (see para. 184). As noted in the decision, the Majority took into account various reports which indicated that the Prosecution's assertion about the hindrance of aid as a strategy of the GoS was not established. Once again, this is the Majority finding that there are no reasonable grounds to accept the underlying facts alleged by the Prosecutor.

Finding (v)

41. The Majority gave various reasons for finding that the nature and pattern of the alleged crimes did not establish reasonable grounds for genocidal intent (at paras. 195-201), including that: (i) the evidence showed that the large majority of inhabitants of towns and villages that were allegedly attacked were neither killed nor injured; (ii) no detention camps were established; (iii) on the evidence presented, GoS forces did not prevent civilians from reaching camps in Darfur and Chad; and, (iv) there are no reasonable grounds to believe that Janjaweed militiamen were stationed around the camps for the purpose of raping women and killing men who ventured outside the camps.

42. Clearly, these are findings *on* the evidence that the evidence is insufficient to satisfy the Chamber that there are reasonable grounds.

Finding (vi)

43. The statements and documents relied on by the Prosecution were found not to be sufficient to establish reasonable grounds for genocidal intent. This is the Majority making a finding on what the documents show. Merely because they support a finding of persecutory intent by the Chamber does not mean that there are automatically reasonable grounds to infer genocidal intent as well.

44. The Majority was acutely aware of the specific legal requirements of genocidal intent as compared with persecution or the practice of ethnic cleansing (see paras. 139-145).

It correctly noted that allegations of widespread crimes which could constitute crimes against humanity cannot automatically always amount to genocide:

> "The Majority considers that the existence of reasonable grounds to believe that GoS forces carried out such serious war crimes and crimes against humanity in a widespread and systematic manner does not automatically lead to the conclusion that there exist reasonable grounds to believe that the GoS forces intended to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups" (para. 193).

45. It is the evidence that must be determinative. Indeed, as the Majority noted, there were various factors which prevented it from concluding that reasonable grounds existed (see those mentioned in (v) above).

Finding (vii)

46. The reasoning of the Majority is that the Prosecution did not find any indicia of genocidal intent in its case against Ahmad Harun despite his allegedly central role in the GoS plan. This is another factor taken into account by the Majority in determining whether reasonable grounds existed. It is a question that leaps out, why the difference in approach by the Prosecutor between the two cases? What additional evidence has been submitted in the present case, if any? For the Chamber to satisfy itself that there are reasonable grounds, these are questions that it is entirely appropriate to consider. It in no way at all shows that the Majority was seeking to have the case proved beyond reasonable doubt.

47. In light of each of these findings, the Majority's conclusion is that reasonable grounds for genocidal intent were not established. That is what is meant at the concluding paras. 205-206: the Majority is not certain of the existence of reasonable grounds, the Prosecution's materials fail to provide reasonable grounds, and hence no warrant can be issued for genocide.

On-going investigations

48. The Majority recognised that it could not issue an arrest warrant on the basis that the evidence could be supplemented by the Prosecutor at a later stage. It adopted the only

proper approach of indicating that there is no bar on the Prosecution presenting new evidence at a *subsequent* stage in the proceedings to seek to discharge its burden:

> 207. Nevertheless, the Majority considers that, if, as a result of the ongoing Prosecution's investigation into the crimes allegedly committed by Omar Al Bashir, additional evidence on the existence of a GoS's genocidal intent is gathered, the Majority's conclusion in the present decision would not prevent the Prosecution from requesting, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir so as to include the crime of genocide.
>
> 208. In addition, the Prosecution may always request, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir to include crimes against humanity and war crimes which are not part of the Prosecution Application, and for which the Prosecution considers that there are reasonable grounds to believe that Omar Al Bashir is criminally liable under the Statute.

D. Whether there can be a factual determination by the Appeals Chamber?

49. As the correct legal test for Article 58 is the only issue on appeal, the *amici curiae* submit that the only question that Appeals Chamber must answer is whether the Majority properly applied the provisions of Article 58, and in rejecting the Prosecution's application for genocide charges, did so on the basis that no reasonable grounds to believe had been established on the evidence. Were the Appeals Chamber to conclude that the Majority applied the correct test, the Majority's decision should be upheld. There would be no basis to go behind the factual findings of the Majority.

50. As an alternative submission, if the Appeals Chamber does not decide the single issue on appeal in favour of the Majority, then it should return the case to the Pre-Trial Chamber to reconsider the Prosecution's application for genocide charges to be added in light of all of the evidence.

51. The Prosecution is wrong to assert that the Appeals Chamber can rely upon the factual findings of the Majority to substitute its own conclusion of a reasonable basis for genocide charges to be added (Prosecution Appeal Brief, paras. 55-61). The Majority's finding on the evidence before it is that there is no reasonable basis under Article 58 to charge genocide. These findings cannot be overturned by the Appeals Chamber without the benefit of examining and assessing all of the evidence, an exercise which the Appeals Chamber is not in a position to perform.

52. Even the Dissenting Opinion recognised that the Majority in their review of the evidence reached a conclusion opposite to that of the Dissenting Judge regarding the existence of reasonable grounds on the available evidence (see para. 77). Judge Usacka then proceeded to examine the reasons given by the Majority for rejecting the genocide charges, providing her alternative findings *on the evidence*.

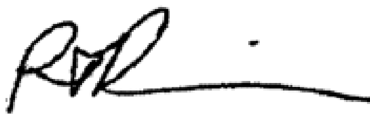
53. These are matters of interpretation and assessment of the evidence over which the Majority and the Minority disagreed. They are not the subject of this appeal, and have not been briefed by the parties. The Appeals Chamber cannot adopt the factual findings and analysis of the Dissenting Opinion. Were the Appeals Chamber to decide that the Majority identified the incorrect standard, and that this had had any bearing on their actual findings, the matter should be referred back to the Pre-Trial Chamber to reconsider in light of the evidence.

E. <u>Conclusion</u>

54. An opinion referenced by the Prosecutor as a legal commentator critical of the Majority (at footnote 46 of Prosecution's Appeal Brief) states, "It is also worth noting that the [Chamber] has apparently subjected the request for the arrest warrant against Bashir to an unprecedented level of scrutiny ... decisions in Lubanga or Bemba: they are mere boilerplate".

55. The *amici curiae* submit that there is no merit at all in criticising the Majority's thorough analysis of the evidence. The duty of the court is to satisfy itself that reasonable grounds are indeed established by the Prosecutor before a warrant or

summons can be issued. It is not a "boilerplate" requirement; the Chamber must be certain that the Prosecution has discharged its burden. This is the test applied by the Majority, as expressed and explained on countless occasions in its decision, and meticulously adhered to throughout its reasoning. The *amici curiae* respectfully submit that that the Majority's decision must be upheld.



For Sir Geoffrey Nice QC

Rodney Dixon
Counsel on behalf of the Applicant

Dated this 25th day of September 2009
London, United Kingdom