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

SITUATION IN DARFUR, THE SUDAN

Public

Summary of Prosecutor's Application under Article 58

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Summary

1. Upon investigation of crimes allegedly committed in the territory of Darfur, Sudan, on or after 1 July 2002, the Office of the Prosecutor (hereafter the “Prosecution” or the “Office”) has

concluded that there are reasonable grounds to believe that **Omar Hassan Ahmad AL BASHIR** (hereafter referred to as “**AL BASHIR**”) bears criminal responsibility under the Rome Statute for the crime of **genocide** under Art. 6(a); killing members of the Fur, Masalit and Zaghawa ethnic groups; (b) causing serious bodily or mental harm to members of those groups; and (c) deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part; for **crimes against humanity** under Art. 7(1) of the Rome Statute committing as part of a widespread and systematic attack directed against the civilian population of Darfur with knowledge of the attack, the acts of (a) murder; (b) extermination; (d) forcible transfer of the population; (f) torture and (g) rapes, and for **war crimes** under Art. 8 (2)(e)(i) of the Statute, for intentionally directing attacks against the civilian population as such, and (v) pillaging a town or place.

Jurisdiction

2.The Darfur situation was referred to the Office of the Prosecutor by United Nations Security Council Resolution 1593 (2005) which affirmed that justice and accountability are critical to achieve lasting peace and security in Darfur.

Admissibility

3.The case proposed in this Application is the second case in the Situation and covers crimes committed in Darfur from March 2003 to the date of filing. In accordance with the principle of “complementarity”, the Prosecution has assessed the existence of national proceedings in the Sudan in relation to those crimes. However, this case is not being investigated or prosecuted by the Government of the Sudan (“GoS”). There are no national proceedings in the Sudan against the perpetrator of crimes relevant to this Application. The only officers investigated were those who refused to comply with **AL BASHIR**’s orders to commit genocide.

The Context in which Crimes were Committed

4.**AL BASHIR** came to power in 1989 by force, and over the years he has resorted to force to maintain his grip on power. In this bid to retain total political control over the country, **AL BASHIR** has suppressed any influential group or entity that emerged in Khartoum or in the periphery of the Sudan (Southern, Eastern or Western regions) that potentially or actually threatened his power.

5.In Darfur, over the years, **AL BASHIR** developed a policy of exploiting real or perceived grievances between the different tribes struggling to prosper in the difficult environment. He promoted the idea of a polarization between tribes aligned with him, whom he labelled “Arabs” and the three ethnic groups he perceived as the main threats, the Fur, Masalit and Zaghawa, whom become derogatory referred to as “Zurgas” or “Africans”. This exploitation is only one of

many devices used by **AL BASHIR** to disguise his crimes. Both, victims and perpetrators are “Africans” and speak Arabic.

6. The Darfur¹ population is ethnically diverse with approximately 120 tribes living in rural areas. The division of land between individual tribes in existence at 2003 dates back to the beginning of the 20th century when the last sultan of Darfur, Sultan Ali Dinar, decreed this division which was generally accepted by all tribes. Co-existence and intermarriage have blurred physical differences. However historically the target groups occupied specific territories, *Dar Fur*, *Dar Zaghawa* and *Dar Masalit*, and also spoke their own languages, different from one another and from Arabic. Members of the groups see themselves, and are seen by their attackers, as different ethnic groups.

7. **AL BASHIR**'s decision to destroy the target groups developed over time. He assessed that the Fur, Masalit and Zaghawa ethnic groups, as socially and politically dominant groups in the region, constituted a threat to his power. They challenged the economic and political marginalization of their region, and members of the three groups engaged in armed rebellions. **AL BASHIR**'s motives were largely political. His pretext was a ‘counterinsurgency’. His intent was genocide. The goal was not simply to defeat a rebellion, but to destroy those ethnic groups whose members challenged his power.

8. As established by existing jurisprudence, “in genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt.”²

The existence of an armed conflict

9. There is an armed conflict in Darfur. From March 2003 to the date of this filing this Application, the GoS has been engaged in a military campaign against rebel armed forces including the Sudan Liberation Movement/Army (“SLM/A”) and the Justice and Equality Movement (“JEM”). Both rebel groups recruit mainly from the Fur, Masalit and Zaghawa tribes. There is a right for a Government to use force to control its territory, but it cannot use genocide or crimes against humanity as means to do so. The crimes covered in the Application are not the collateral damages of a military campaign. Since 2003 **AL BASHIR**'s forces specifically and purposefully targeted civilians, in particular a substantial part of the target groups, who were not participants to any conflict.

The crimes

10. The Prosecution submits that the evidence shows a reasonable basis to believe that **AL BASHIR** intended to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups as

¹ Throughout this application, unless otherwise indicated, “Darfur” refers to the territory of Sudan encompassing the three states of North Darfur, West Darfur and South Darfur. “Darfur” should be distinguished from “Dar Fur” as the latter shares the same name as the entire territory.

² Prosecutor v. Stakić, Judgment, Appeals Chamber, Case No. IT-97-24-A, 22 March 2006; see also Prosecutor v. Blaškić, Judgment, Appeals Chamber, Case No. IT-95-14-A, 29 July 2004 at para. 694

such. To this end, he used the entire state apparatus, the Armed Forces and the Militia/Janjaweed³ (**AL BASHIR**'s forces). Forces and agents controlled by **AL BASHIR** attacked civilians in towns and villages inhabited mainly by the target groups, committing killings, rapes, torture and destroying means of livelihood. **AL BASHIR** thus forced the displacement of a substantial part of the target groups and then continued to target them in the camps for internally displaced persons (hereafter "IDPs"), causing serious bodily and mental harm – through rapes, tortures and forced displacement in traumatising conditions - and deliberately inflicting on a substantial part of those groups conditions of life calculated to bring about their physical destruction, in particular by obstructing the delivery of humanitarian assistance.

11. **AL BASHIR**'s conduct simultaneously constitutes genocide against the Fur, Masalit and Zaghawa ethnic groups, as well as crimes against humanity and war crimes against the civilian population in the area, including members of the target groups.

The beginning of the genocidal campaign

12. In March 2003, after both negotiations and military action failed to end the rebellion in Darfur, **AL BASHIR** decided to destroy in part the Fur, Masalit and Zaghawa groups, on account of their ethnicity. He publicly instructed the army to quell the rebellion in two weeks and not to "bring back any prisoners or wounded", triggering a brutal series of attacks against the towns and villages mainly inhabited by the Fur, Masalit and Zaghawa.

The targeting of the Fur, Masalit and Zaghawa

13. The land historically occupied by the Fur, Masalit and Zaghawa defined the target. Most of the villages and towns inhabited mainly by members of the target groups were attacked and destroyed by **AL BASHIR**'s forces. The attackers went out of their way to spare from attack so-called "Arab" villages, even where they were located very near target groups villages. For example in Forobaranga, Wadi Salih and Mukjar localities 97% of predominantly Fur villages were attacked and either destroyed or abandoned and 85% of predominantly Masalit villages were attacked and either destroyed or abandoned, while fewer than 1% of predominantly so-called "Arab" villages were attacked.

The pattern of attacks

14. The attacks against villages have followed a common pattern for a period of more than five years from March 2003 up to the time of filing this Application. The Armed Forces, acting in concert with Militia/Janjaweed, surround a village and then enter that village or town and attack the civilian

³ The Militia/Janjaweed are described using various terms such as "Janjaweed", "Fursan", "Mujahideen" and "Bashmerga". Janjaweed literally means "a man (a devil) on horse". Historically in Darfur Janjaweed has referred to armed robbers or bandits mounted on horses or camels. ¶

inhabitants. In many cases helicopters or aircraft dropped bombs on the town or village either before or during the attack. Ground forces kill men, women, children and the elderly; they subject women and girls to massive rapes. Farms are destroyed and grain stores are looted or set on fire. The attackers burn residential dwellings and community facilities including schools, mosques and hospitals. They destroy all the target groups' means of survival, poison sources of water including communal wells, destroy water pumps, steal livestock and strip the towns and villages of household and community assets.

15. As a result of the attacks, at least 2,700,000 people, including a very substantial part of the target groups attacked in their villages, have been forcibly expelled from their homes. As survivors fled the attacks, they were pursued into deserts, killed or left to die. Almost 2.5 million people, including a substantial part of the target groups, managed to reach the outskirts of bigger cities that would become camps for Internally Displaced Persons (hereafter "IDP camps") or refugee camps in Chad or Central African Republic.

The targeting of civilians

16. The targets are not rebel forces, but civilians. **AL BASHIR's** forces repeatedly attack the civilian populations in towns and villages where rebels are not present, and absent any valid military objective. Attacks do not cease until the town or village, as an entirety, has been victimised and its population forcibly displaced. Attacks on the displaced population at camps are clearly aimed at civilians, as exemplified in particular by the systematic raping of women. Thousands of women and girls belonging to the target groups were raped in all three States of Darfur by **AL BASHIR's** forces since 2003. Girls as young as 5 have been raped. A third of the victims of rape are children. Rapes, gang rapes, are used as a weapon of destruction in the attacks on the towns and around the camps.

17. There were instances that **AL BASHIR's** forces bypassed locations with a rebel presence, instead choosing to attack civilians in their homes. For instance, during attacks by the Armed Forces and Militia/Janjaweed in Wadi Salih and Mukjar localities in August 2003, the attackers knew that the rebels were located in the Sindu Hills. But instead of attacking the Sindu Hills, the Armed Forces and Militia/Janjaweed attacked civilians in the villages of Kodoom, Bindisi and Mukjar and their surrounding villages where there was no rebel presence. On July 2003, **AL BASHIR's** forces knew that rebels were based in Disa village, where no civilians were present. However, instead of attacking Disa, the local Armed Forces commander, after receiving orders from Khartoum, directed the combined Armed Forces and Militia/Janjaweed to attack all "Zurga" villages in the area, inhabited predominantly by the Zaghawa. The villages were attacked, not because they posed a military threat, but rather to destroy in part the Zaghawa group. At the end of July 2003, the combined attacks

completely destroyed between 25 and 30 villages in which, with the exception of Disa, there were no rebels present.

The fate of the displaced persons

18. In 2003, the total population of Darfur was 6,360,000⁴. The last census was carried out in 1955/56 and indicated that the target groups together formed approximately 40% of the population of Darfur (23 % Fur 1,462,800; 10 % Masalit 636,000; and 7% Zaghawa 445,200). Assuming a consistent growth of the different groups the population of the three groups in 2003 would have been approximately 2.5 million.

19. Almost the entire population of the target groups has been forcibly displaced. Data from refugee camps in Chad and IDP camps within Darfur confirm that most of those displaced belong to the target groups.

20. As of December 2007, the total number of Sudanese people from Darfur in refugee camps in Chad was approximately 235,000. Of those, there were approximately 110,000 Zaghawa and approximately 103,000 Masalit. Only approximately 7,750 members of the Fur had reached Chad, due to their geographical location in the south of Darfur.

21. According to evidence obtained by the Prosecution, the Fur represent 50% of the totality of some IDP camps in Darfur. In South Darfur, Kalma camp, near Nyala, which hosts around 92,000 IDPS, there are an estimated 46,000 - 50,000 Fur, 9,000 Zaghawa and 5,000 Masalit. In West Darfur, Nertiti camp (Jebel Marra) hosts mostly Fur (about 32,000), Hassa Hissa camp near Zalingei hosts about 85% Fur (42,500), 10% Zaghawas (5000), 5 % Masalit (2500) and smaller tribes; Hamadiya camp near Zalingei hosts about 99 % Fur (about 30,000) and Deleig camp near Wadi Salih hosts 90 % Fur (about 16,000).

22. As indicated in January 2005 by the UNCOI, there would be no policy of genocide if “*the populations surviving attacks on villages ... live together in areas selected by the government...where they are assisted*” The evidence shows that the target groups, far from being assisted, are also attacked in the camps. Such attacks, as described below, against such an overwhelming majority of members of the target groups, are a clear indication of **AL BASHIR**’s genocidal intent.

Massive rapes causing serious bodily and mental harm

23. **AL BASHIR**’s forces and agents subjected those approximately 2.5 million living in IDP camps, including a substantial part of the target groups, to serious bodily and mental harm through rape and other forms of sexual violence against thousands of women in the camps.⁵ Rapes are under-

⁴ The total population of Darfur for 2003 reported by the Sudanese Central Bureau of Statistics is 6,360,000. See official site <http://www.cbs.gov.sd/data/Data%20sheet.htm> (last accessed on 12 July 2008).

⁵ Akayesu Trial Judgment, para. 731 ‘sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole’.

reported. They are used as a weapon, a silent weapon, to destroy the target groups in and around the IDP camps.

24. Militia/Janjaweed, which **AL BASHIR** has recruited, armed, and purposefully failed to disarm, are stationed in the vicinity of the camps. Periodic reports and testimonies conclude that rape has been committed systematically and continuously for 5 years. Women and girls going to collect firewood, grass or water are repeatedly raped by Militia/Janjaweed, Armed Forces and other GoS security agents: *“when we see them, we run. Some of us succeed in getting away, and some are caught and taken to be raped -- gang-raped. Maybe around 20 men rape one woman [...] These things are normal for us here in Darfur. These things happen all the time. I have seen rapes too. It does not matter who sees them raping the women -- they don't care. They rape women in front of their mothers and fathers”*.⁶

25. Between March and October 2005, a health specialist treated at least 28 victims of rape and sexual trauma in IDP camps in Darfur. She told the Prosecution that most of the victims exhibited symptoms of post-traumatic stress disorder, including extreme shame, grief, hopelessness, anger and rage, flashbacks, nightmares, and inability to interpret their environment. The witness noted that many of the girls who had been raped when they went to get firewood outside IDP camps were repeatedly re-traumatised because they had no choice but to revisit the places where they had been raped. She recalled the situation of an 18-year-old girl in one of the camps. As explained by the girl's sister, their village had been attacked and bombed by an airplane. The girl was raped, beaten, and left to die. Members of the community eventually found her, but from that day she had not spoken. The girl was psychotic from her trauma and displayed no initiative. She was robotic and had to be told to dress and eat.

26. Babies born as a result of these assaults have been termed “Janjaweed babies” and are rarely accepted as members of the community. The high number of such unwanted babies has led to an explosion of infanticides and abandonment of babies in Darfur. As one victim explained: *“they kill our males and dilute our blood with rape. [They]...want to finish us as a people, end our history”*.

27. The mental harm caused by rape has been compounded by the impunity afforded to the perpetrators. As depicted by one victim: *“those who rape you wear fatigues and those who protect you wear fatigues. We don't know any more who to run from and who to run to.”*

28. Rape is an integral part of the pattern of destruction that **AL BASHIR** is inflicting upon the targeted groups in Darfur. As described by the ICTR in the *Akayesu* case, rape is used to “kill the will, the spirit, and life itself”. Particularly in view of the social stigma associated with rape and other forms

⁶ Public Source, DAR-OTP-0138-0006.

of sexual violence among the Fur, Masalit and Zaghawa, these acts caused significant and irreversible harm, to individual women, and also to their communities.

Mental harm caused by forced displacement

29. Massive forced displacements were conducted in such a manner as to traumatize the victims and prevent the reconstitution of the group. Such forced displacement constitutes serious mental harm for the target groups. Victims suffered the trauma of being forced to witness their own homes and possessions destroyed and/or looted; family members raped and/or killed. They were subjected to the mental harm caused by having to leave homelands with which they, their families, friends and entire communities have deep historical connections. The victims thereafter endured the anguish of learning that, in many cases, prior homelands had been occupied and resettled by members of other communities – and thus, that there was no prospect of ever returning. Organized insecurity in and around the camps by **AL BASHIR**'s forces and agents, including through spying and harassment by members of the Humanitarian Aid Commission (HAC), has exacerbated the fear of IDPs. Unable to rely on their own Government for protection, victims can only turn to their local leadership for support. However as soon as leaders, Sheiks, emerge and speak up, they become targets themselves. There are numerous examples of arrests and killings of camp leaders. The cumulative effect of the crimes described above is that many of the surviving members of the target groups, in particular those in IDP camps, suffer serious mental harm.

Genocide by deliberate infliction upon members of the target groups of conditions of life calculated to bring about the physical destruction of the group in whole or in part

30. The mass displacement operations in Darfur were conducted in conditions which, during the deliberations preceding adoption of the Genocide Convention, were found to constitute genocide: *“Mass displacements of populations from one region to another [...] do not constitute genocide [...] unless the operation were attended by such circumstances as to lead to the death of the whole or part of the displaced population. If for example, people were driven from their homes and forced to travel long distances in a country where they were exposed to starvation, thirst, hunger, cold and epidemics”*.⁷

31. The attacks on villages across Darfur from March 2003 to the present were designed to kill members of the targeted groups and force the survivors from their lands, but also to destroy the very means of survival of the groups as such as described in paragraph 15 above. The goal was to ensure that those inhabitants not killed outright would not be able to survive without assistance. Ensuring adequate access to water has long been an essential component of livelihood strategies in Darfur. To facilitate access to water by both humans and animals, many villagers dug communal wells or

⁷ Secretary General, 1947 Draft Convention at p24. see also para 517 of the Conclusions and Recommendations of the Historical Clarification Commission for Guatemala, headed by Prof Christian Tomuschat, that concluded acts of genocide had been committed in precisely these circumstances.

maintained other communal water sources. Militia/Janjaweed and the Armed Forces repeatedly destroyed, polluted or poisoned these wells so as to deprive the villagers of water needed for survival.

32. The attackers did not only force the survivors out of their homes. They pursued them into inhospitable terrain, into the hills and the desert. A victim in the desert overheard one attacker say to another: “Don’t waste the bullet, they’ve got nothing to eat and they will die from hunger”.

33. Not only did they persecute them, **AL BASHIR**’s agents facilitated the usurpation of their lands, now occupied by new settlers. A victim was told: “*This land is liberated and you have no land and no right to cultivate on liberated areas*”. **AL BASHIR** created conditions to prevent returns as other tribes more supportive of the government, often affiliated with Militia/Janjaweed, are resettled on land previously inhabited by the IDPs. The removal from the land and the subsequent usurpation of the land, occupied by new settlers is destructive of the Fur, Masalit and Zaghawa groups as such.

34. Finally, the victims are attacked in the camps. **AL BASHIR** and his subordinates systematically refused to provide any meaningful Government aid, and hindered other efforts to bring humanitarian aid to the approximately 2.5 million civilians who found a haven in the camps, including a substantial part of the target groups. The Ministry of Humanitarian Affairs and the Humanitarian Aid Commission (HAC) within the Ministry, which work in close association with the intelligence and security apparatus of the GoS, have blocked the publication of nutrition surveys, delayed the delivery of aid, expelled relief staff denouncing such acts, denied visas and travel permits, and imposed unnecessary bureaucratic requirements on aid workers. This has had the effect of reducing nutrition and access to medical services for protracted periods of time. Thus after forcibly expelling members of the target groups from their homes, they subjected them to, at best, a subsistence diet and the reduction of essential medical services below minimum requirements.

35. **AL BASHIR** has intended to subject a substantial part of the target groups to conditions calculated to slowly bring about their physical destruction.

Killing members of the groups

36. **AL BASHIR**’s forces and agents killed outright at least 35,000 civilians, including a substantial number of members of the target groups, in physical attacks on towns and villages. Further, the conditions imposed during displacement and in the camps by **AL BASHIR**’s forces and agents have already resulted in the “slow death” of between 80,000 and 265,000 people, including a substantial part of the target groups.

Crimes against humanity

37. Charges of crimes against humanity are also required to represent the full extent of criminal activity in Darfur since 2003. These charges reflect the acts of murder, rape, forcible displacement and extermination committed against members of the target groups and other, smaller ethnic groups, such as the Tunjur, Erenga, Birgid, Misseriya Jebel, Meidob, Dajo and Birgo.

War crimes

38. As mentioned, there is an ongoing armed conflict in Darfur. **AL BASHIR** also committed the war crime of attacking civilians and pillaging towns and villages in Darfur, including but not limited to Kodoom, Bindisi, Mukjar, Arawala, Shataya, Kailek, Buram, Muhajeriya, Siraf Jidad, Silea, Sirba, Abu Suruj and Jebel Mun.

The Personal Responsibility of AL BASHIR

39. The Prosecution does not allege that **AL BASHIR** physically or directly carried out any of the crimes. He committed the crimes through members of the state apparatus, the army and the Militia/Janjaweed in accordance with Art. 25 (3) (a) of the Statute.

40. At all times relevant to this Application, **AL BASHIR** was President of the Republic of the Sudan, exercising both *de jure and de facto* sovereign authority, Head of the National Congress Party and Commander in Chief of the Armed Forces. He appointed the Governors of all the 26 states of the Sudan and they reported directly to him. He sat at the apex of, and personally directed, the state's hierarchical structure and the integration of the Militia/Janjaweed within such structure. He had absolute control.

41. As Commander in Chief, **AL BASHIR** ordered the incorporation of most of the Militia/Janjaweed into the reserve forces, and exercised both formal and informal control over such forces. **AL BASHIR**'s control of the State apparatus as reflected in the formal hierarchy has been reinforced in practice by the elaborate network of reporting lines that he established. The evidence shows that **AL BASHIR** regularly received reports of the crimes committed in Darfur from ministers, military officers and Militia/Janjaweed leaders. **AL BASHIR**'s control of the state apparatus was not only formal; it was absolute. And **AL BASHIR** used his supreme authority within the hierarchical structure of the GoS in furtherance of the crimes charged.

42. **AL BASHIR** ensured that all components of the GoS, the Armed Forces and the Militia/Janjaweed worked together in carrying out his plan. He used the state resources *inter alia* as follows: (i) the Locality and State Security Committees - to assist in planning and to

coordinate the implementation of the activities in Darfur; (ii) the intelligence apparatus including Military Intelligence and National Security and Intelligence Service (hereafter “NISS”) - to provide intelligence and other support to the Armed Forces and Militia/Janjaweed and to facilitate usurpation of the land previously inhabited by the targeted groups; (iii) the Ministry of Interior - to mobilize the Militia/Janjaweed into reserve forces and to ensure that the police would not intervene to protect the civilians; (iii) the Ministry of Defence, including the Armed Forces and Militia/Janjaweed - to carry out the attacks against the target groups; (iv) the Ministry of Humanitarian Affairs - to hinder and obstruct the delivery of humanitarian aid to the IDPs, to ensure destitution and insecurity within and around the IDP camps and to physically and psychologically abuse the IDPs; (vi) the Ministry of Information and Communication and the Ministry of Foreign Affairs - to pursue a campaign of misinformation, denial and concealment of the crimes; censor or suppress media coverage exposing the roles of **AL BASHIR**, the state apparatus and his forces in the crimes, (vii) the Ministry of Finance - to fund the operations/activities of Militia/Janjaweed and to ensure that limited funds were dedicated to aiding the IDPs; (viii) the Ministry of Justice and the Judiciary - to conduct sham investigations and pretend that crimes were being investigated and prosecuted, to threaten the victims and to provide impunity to those who followed **AL BASHIR**'s orders.

43. **AL BASHIR** repeatedly used his control to eliminate internal dissent and ensure uniform enforcement of his plan by his subordinates. Individuals who refused to implement assigned tasks were dismissed, reassigned, and/or replaced.

44. **AL BASHIR** denied victims access to the criminal justice system, while using the system against those who did not comply with his genocidal orders; the only officers investigated were those who refused to cooperate in implementation of his plan. **AL BASHIR** provided impunity to those who followed his orders so as to ensure the control of the state apparatus. On 14 May 2008, **AL BASHIR** confirmed publicly to a gathering of Militia/Janjaweed; “I will not hand over Ahmed Haroun or any Sudanese to ICC.”

AL BASHIR’ s mens rea

45. The crime of genocide is a crime of intention. It does not require that the intended destruction succeed.⁸ Recognising that express manifestations of intent to commit genocide are rare, international courts have repeatedly held that genocidal intent can be inferred from the factual

⁸ See Prosecutor v. Brđanin, Judgment, Trial Chamber, Case No. IT-99-36, 1 September 2004, at para. 697; Prosecutor v. Akayesu, Judgment, Trial Chamber, Case No. ICTR-96-4-T, 2 September 1998, para. 497; Stakić Trial Judgment, para. 522. The crime of genocide requires that certain acts were committed with the intent to destroy targeted groups as such, in whole or in part. It is not required that the intended destruction succeed.

circumstances of the crime. The systematic targeting of victims on account of their membership of a particular group; the deliberate failure to differentiate between civilians and persons of military status; the perpetration of acts which violate the very foundation of the groups such as mass rapes and mass expulsions from the land with no possibility to return or reconstitute as a group; the utterances of perpetrators; the sophisticated strategy of concealing crimes; and the existence of a plan constitute the facts of this case from which the existence of the intent required for genocide is the only reasonable inference.

A substantial part of each group

46. **AL BASHIR** intended to destroy a substantial part of each group living in small towns and villages. Forces and agents under the control of **AL BASHIR** meticulously targeted for violence almost exclusively villages and towns inhabited mainly by members of the target groups. Then they abused those who fled into the camps. The Prosecution submits that in the instant case, the intent to destroy a substantial part of the group as such has to be inferred from the number of members of the target groups upon whom conditions of life calculated to bring about their physical destruction are imposed.

47. This reflects one of the fundamental principles of criminal law – that, because an actor is presumed to have intended to bring about the consequences of his actions, those consequences are relevant indicia of his intent. This principle carries particular weight where, as here, the accused exercised total control over the hierarchical structure that attacked the target groups in their villages and in the camps. In such a case, the only reasonable inference available on the evidence is that the acts of destruction were committed because **AL BASHIR** so intended. A military General who taught at the Military Staff College in Sudan, explained in an interview with the Prosecution that based on his knowledge of military and other structures in Sudan, the “*inevitable conclusion*” is that the crimes in Darfur “*must have stemmed from a deliberate policy accepted and approved by the highest levels of command.*” Further, he noted that “*in situations where excesses were occurring consistently, senior commanders fulfilling their duties would be aware of such events. In such circumstances, were these commanders not to institute disciplinary measures nor take action, there would be an implication that they were part of a criminal policy.*” Significantly, **AL BASHIR** consistently punished those who did not comply with his orders while providing impunity to those who committed crimes under his genocidal plan. Ahmad Harun is an example. Ahmad Harun said that **AL BASHIR** had given him the power to kill whoever in Darfur and that they were “ready to kill $\frac{3}{4}$ of Darfur in order to allow $\frac{1}{4}$ to live”. Harun coordinated the attacks against the villages during 2003-2005. The State Security Committees reported to him. Since September 2005, Harun has been responsible for the

Humanitarian Affairs Commission (hereafter “HAC”) that controls the camps. He is a key element of both aspects of the genocide, the attacks to the villages and the attacks in the camps.

48. In June 2007, **AL BASHIR** publicly announced that he would never hand over Harun to the ICC; to the contrary, Harun would continue working in Darfur to implement his orders.

*Existence of a genocidal plan or policy,*⁹

49. The crimes at issue reflected a conscious policy decided by **AL BASHIR** and their overall coordination and daily implementation at all levels demonstrates the existence of a plan. Indeed the head of the Army in the Darfur operation, General Ismat, described the military operations in Darfur in a way that is consistent with the pattern of attacks described in paragraph 15. He told the Prosecution during an interview in Khartoum that during operations, the Armed Forces and the reserve forces Popular Defence Force (“PDF”), Popular Police Force (“PPF”), and Border Intelligence Unit (“BIU”), a Militia/Janjaweed unit typically attacked in formation spanning almost a kilometre. As the forces moved towards their target, “numerous small villages would be overrun.”

50. In addition, GoS documents in the possession of the Prosecution, including the “Armed Forces Memorandum” and the minutes of the State Security Committee of West Darfur, define details of the mechanisms established by **AL BASHIR** to ensure the coordination required.

51. The “Armed Forces Memorandum” establishes that “The chain of command, with the administration and organization of the forces, is specified in Arts. 11 and 12 [of the Armed Forces Act of 1986], in the form of a pyramid that grants supreme command to the President of the Republic in accordance with the principle of the armed forces being subject to political command.” The memorandum also explains that “In accordance with political wishes, the recommendations and orders of the Security Committees, and their duties as specified under the Constitution and the law, the armed forces, and the forces working with them, implemented military plans to contain the security situation in Darfur.”

52. The minutes of the State Security Committee of West Darfur, organ that coordinate attacks established that it also acted in “accordance with a *national security plan disseminated from Khartoum*” The significance of the minutes was highlighted by a witness interviewed by the

⁹ The Krstic Trial Chamber was persuaded of the existence of a plan by the number and nature of the forces involved, the standardised coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied (see para 571). Although existence of a plan or policy is not a legal ingredient of the crime of genocide, proof that a genocidal plan or policy exists may be strong evidence of genocidal intent. Although the Krstic Trial Judgement was overturned on appeal, the fact that there was a genocidal plan seems to be taken for granted by the Appeals Chamber suggesting that the Trial Chamber’s analysis in respect to a genocidal plan is correct. See Krstic Appeals Chamber para 32 and 273.

UNCOI. He confirmed that Harun refused to provide all Security Committee Minutes, stating that “*we cannot give them because we don’t want to be seen in la haye*” (the Hague).

Statements exposing intent made by those involved in the crimes

53. Statements by **AL BASHIR** and his subordinates, as well as by the direct perpetrators he used to implement the Darfur plan, provide further evidence of **AL BASHIR**’s intent to destroy, in part, the target group. In March 2003 **AL BASHIR** directed the Armed Forces to quell the rebellion in two weeks and not to bring back any prisoners or wounded; he declared at different times that he “didn't want any villages or prisoners, only scorched earth”, publicly gave orders to the military, police and intelligence to eliminate the opposition and leave no survivors¹⁰, and told the Sudanese public that he had given the Armed Forces a *carte blanche* (in Arabic “*atlakto yad al-jaysh*”) in Darfur not to take “*asra*” (war prisoners) or inflict injuries.

54. The attackers expressed openly **AL BASHIR**’s intent. They told victimized members of the target groups during attacks against them that “*the Fur are slaves, we will kill them*”; “*You are Zaghawa tribes, you are slaves*”; “*You are Masalit. Why do you come here, why do you take our grass? You will not take anything today*”.

Forcible transfers accompanying the genocidal acts pleaded

55. Consistent jurisprudence has established that, in certain circumstances forcible transfer may constitute evidence of genocidal intention. The forcible transfer of members of the target groups has been conducted in such a way that the groups can no longer reconstitute themselves. The appointment of Ahmed Harun, to coordinate the attacks in the villages, followed by his transfer to a role in which he could continue to target those he had been involved in displacing, shows a consistent intention to destroy a substantial part of the target groups through their forcible displacement in a manner accompanied by methods of destruction.

Rapes and sexual violence as part of a destruction process

^{56.} In accordance with established jurisprudence, the magnitude of the rapes and sexual assaults carried out by forces and agents under the control of **AL BASHIR** during attacks on villages and around IDP settlements and camps, indicates an intent to destroy the target groups as such.

Denial of the crimes as evidence of intent

57. Instead of investigating and punishing the perpetrators of genocide, **AL BASHIR** concealed the crimes. **AL BASHIR** labelled as “fabrications” photographs of thousands of burned villages in Darfur. On 19 March 2007, speaking on the issue of rapes, he said that “It is not in the Sudanese culture or people of Darfur to rape. It doesn’t exist. We don’t have it”. **AL BASHIR**

¹⁰ ICC Statement, DAR-OTP-0097-0619 at 0624 para. 21; Alternative: ICC Statement, DAR-OTP-0128-0042 at 0078, para 242.

also insisted that 99% of alleged cases of rapes are fabricated in order to place blame on the government.

58. Given the international attention on Darfur, genocide by imposing conditions calculated to bring about the physical destruction of the target groups, if combined with a studied misinformation campaign, was an efficient strategy to achieve complete destruction. By preventing the truth about the crimes from being revealed; concealing his crimes under the guise of a ‘counterinsurgency strategy’, ‘inter tribal clashes’, or the ‘actions of lawless autonomous militia’; threatening Sudanese citizens into silence, and trying to blackmail the international community into silence, **AL BASHIR** made possible the commission of further crimes.

59. The Prosecution holds that such a sophisticated cover up strategy is evidence of intent by the person who controlled the entire communication apparatus of the state. Significantly, **AL BASHIR** wanted to conceal not just the crimes, but their genocidal character. The Sudanese National Commission of Inquiry, created by **AL BASHIR**, goes so far as mentioning crimes against humanity, but they did not identify any member of the government involved in the crimes and did not consider genocide. When the UNCOI issued its report concluding that Government forces and militias conducted indiscriminate attacks that could amount to crimes against humanity, Mustafa Ismail, then Sudanese External Affairs Minister, emphasised that the report did not make a finding of genocide and similarly, Jamal Ibrahim, a top official in the External Affairs Ministry, stated “we feel relieved” that there was not finding of genocide.

60. On the basis of all these factors, the only reasonable inference available on the evidence is that **AL BASHIR** intended to destroy in part the Fur, Zaghawa and Masalit groups, as such.

II. Identification of AL BASHIR as the person against whom the Warrant of Arrest is being sought pursuant to Art. 58(2)(a)

61. **Omar Hassan Ahmad AL BASHIR** was born on 1 January 1944 in Hoshe Bannaga, Shendi Governorate (approximately 100 miles north of Khartoum, in the Sudan). He belongs to the Jaáli tribe, a tribe in Northern Sudan. In 1963 he was admitted to the Sudanese military academy as a cadet. He rose steadily in the Sudanese Armed Forces and became Commander of the eighth independent infantry brigade in 1987. On 30 June 1989, **AL BASHIR** led a successful military *coup d'état* which deposed the regime of Sadiq Al Mahdi. **AL BASHIR** swiftly dismantled civilian rule, suspended the constitution, dissolved all political institutions and imposed the Revolution Command Council of National Salvation (RCC-NS) as the new Government of the Sudan (hereafter GoS). Since that date, **AL BASHIR** has held supreme power in the Sudan. He served as Chairman of the RCC-NS and Head of State of the Sudan until 16 October 1993, when

he was appointed President of the Republic by the RCC-NS. On 1 April 1996, he was elected President of the Republic. He was re-elected on 12 February 2001, and again on 9 July 2005.¹¹

III. Crimes within the jurisdiction of the Court which AL BASHIR has committed pursuant to Art. 58(2)(b) of the Statute

62. Pursuant to Art. 58(2) of the Rome Statute, the Office of the Prosecutor has concluded that there are reasonable grounds to believe that **AL BASHIR** bears criminal responsibility under Art. 25(3)(a) of the Rome Statute for the following crimes:

Count 1

Genocide by killing of members of each target group

Art.6 (a) (Paragraphs X-Y, inclusive)

From March 2003 to the date of filing of this Application **AL BASHIR** committed, through other persons, genocide against the Fur, Masalit and Zaghawa ethnic groups in Darfur, the Sudan, by using the state apparatus, the Armed Forces and Militia/Janjaweed to commit acts of killing members of these groups with intent to destroy the groups as such, in part, in violation of Art.s 6(a) and 25(3)(a) of the Rome Statute.

Count 2

Genocide by causing serious bodily or mental harm to members of each target group

Art.6 (b) (Paragraphs X-Y, inclusive)

From March 2003 to the date of filing of this Application, **AL BASHIR** committed, through other persons, genocide against the Fur, Masalit and Zaghawa ethnic groups in Darfur, the Sudan, by using the state apparatus, the Armed Forces and Militia/Janjaweed to cause serious bodily or mental harm to members of these groups through acts of rape, other forms of sexual violence, torture and forcible displacement of members of these groups, with intent to destroy the groups as such, in part, in violation of Arts. 6(b) and 25(3)(a) of the Rome Statute.

Count 3

Genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction

Art. 6(c) (Paragraphs X to Y, inclusive)

From March 2003 to the date of filing of this Application, **AL BASHIR** committed, through other persons, genocide against the Fur, Masalit and Zaghawa ethnic groups in Darfur, the Sudan, by using the state apparatus, the Armed Forces and Militia/Janjaweed to deliberately inflict on these groups conditions of life calculated to bring about the physical destruction of the groups as such, in part, in violation of Arts 6(c) and 25(3)(a) of the Rome Statute.

Count 4

Murder of civilians in Darfur constituting a Crime against Humanity

Art. 7(1)(a) (Paragraphs X-Y, inclusive)

From March 2003 to the date of filing of this Application **AL BASHIR** committed, through other persons, a crime against humanity, namely murder, by using the state apparatus, the Armed Forces and Militia/Janjaweed, to kill members of the civilian population including but not limited to civilians in Kodoom, Bindisi, Mukjar, Arawala, Shataya, Kailek, Buram, Muhajeriya, Siraf Jidad, Silea, Sirba, Jebel Mun, and Shugag Karo in Darfur, the Sudan, in violation of Art.s 7(1)(a) and 25(3)(a) of the Rome Statute.

¹¹ Public Source, DAR-OTP-0138-0311, Translation, DAR-OTP-0150-0081.

Count 5

Extermination by inflicting conditions of life calculated to bring about the destruction of a part of the civilian population in Darfur constituting a Crime against Humanity

Art. 7(1)(b) (Paragraphs X-Y, inclusive)

From March 2003 to the date of filing of this Application **AL BASHIR** committed, through other persons, a crime against humanity, namely extermination, by using the state apparatus, the Armed Forces and Militia/Janjaweed, to carry out mass killing and inflicting conditions of life calculated to bring about the destruction of a part of the population, including but not limited to civilians in Mukjar and Kailek in Darfur, the Sudan, in violation of Arts. 7(1)(b) and 25(3)(a) of the Rome Statute.

Count 6

Forcible Transfer of population in Darfur constituting a Crime against Humanity

Art.7(1)(d) (Paragraphs X-Y, inclusive)

From March 2003 to the date of filing of this Application **AL BASHIR** committed, through other persons, a crime against humanity, namely forcible transfer of population, by using the state apparatus, the Armed Forces and Militia/Janjaweed, to forcibly transfer approximately 2.7 million members of the civilian population including but not limited to civilians from Kodoom, Bindisi, Mukjar, Arawala, Shataya, Kailek, Buram, Muhajeriya, Siraf Jidad, Silea, Sirba, Abu Suruj and Jebel Mun in Darfur, the Sudan, in violation of Arts. 7(1)(d) and 25(3)(a) of the Rome Statute.

Count 7

Torture of civilians in Darfur constituting a Crime against Humanity

Art. 7(1)(f) (Paragraphs X-Y, inclusive)

From March 2003 to the date of filing of this Application **AL BASHIR** committed, through other persons, a crime against humanity, namely torture, by using the state apparatus, the Armed Forces and Militia/Janjaweed, to torture members of the civilian population, including but not limited to civilians in Mukjar, Kailek, and Jebel Mun in Darfur, the Sudan, in violation of Arts. 7(1)(f) and 25(3)(a) of the Rome Statute.

Count 8

Rapes of civilians in Darfur constituting a Crime against Humanity

Art. 7(1)(g) (Paragraphs X-Y, inclusive)

From March 2003 to the date of filing of this Application **AL BASHIR** committed, through other persons, a crime against humanity, namely rape, by using the state apparatus, the Armed Forces and Militia/Janjaweed, to rape women and girls including but not limited to women and girls in Bindisi, Arawala, Shataya, Kailek, Silea and Sirba and IDP camps, in Darfur, the Sudan, in violation of Arts. 7(1)(g) and 25(3)(a) of the Rome Statute.

Count 9

Attacks against the civilian population in Darfur, constituting a War Crime

Art. 8(2)(e)(i) (Paragraphs X-Y, inclusive)

From March 2003 to the date of filing of this Application **AL BASHIR** committed, through other persons, a war crime, namely attacks against the civilian population taking no direct part in hostilities, by using the state apparatus, the Armed Forces and Militia/Janjaweed, to intentionally direct attacks against the civilian population in Darfur, the Sudan, including but not limited to civilians in Kodoom, Bindisi, Mukjar, Arawala, Shataya, Kailek, Buram, Muhajeriya, Siraf Jidad, Silea, Sirba, Abu Suruj, Jebel Mun, and Shugag Karo, in violation of Arts. 8(2)(e)(i) and 25(3)(a) of the Rome Statute.

Count 10

Pillaging of towns and villages and towns in Darfur, constituting a War Crime

Art.8(2)(e)(v) (Paragraphs X-Y, inclusive)

From March 2003 to the date of filing of this Application **AL BASHIR** committed, through other persons, a war crime, namely pillaging, by using the state apparatus, the Armed Forces and Militia/Janjaweed, to pillage towns and villages in Darfur, the Sudan including but not limited to Kodoom, Bindisi, Mukjar, Arawala, Shataya, Kailek, Buram, Muhajeriya, Siraf Jidad, Silea, Sirba, Abu Suruj and Jebel Mun, in violation of Art.s 8(2)(e)(v) and 25(3)(a) of the Rome Statute.

IV. Background of the investigation

63. On 31 March 2005, the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations (hereafter “UN”), adopted Resolution 1593 referring the situation in the Darfur region of the Sudan (hereafter the “Darfur Situation”) to the Prosecutor of the International Criminal Court (hereafter the “Court” or “ICC”), thereby conferring jurisdiction upon the Court over crimes committed in the Darfur region since 1 July 2002.

64. The Prosecutor, by letter dated 1 June 2005, communicated to the President of the Court his decision to commence an investigation, in accordance with Art. 53(3)(1) of the Statute. On 6 June 2005, the commencement of the investigation was publicly announced.

65. On 27 February 2007 the Prosecutor, having concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed and having determined that the case was admissible, filed the first case in the Darfur Situation against Ahmad Muhammad Harun (hereafter “Ahmad Harun” or “Harun”) and Ali Muhammad Ali Abd-Al-Rahman (also known as and hereafter referred to as “Ali Kushayb” or “Kushayb”)¹² for their responsibility for crimes against humanity and war crimes committed in 2003 and 2004. The Pre-Trial Chamber issued warrants of arrest for both of these individuals on 27 April 2007.¹³ These warrants are yet to be executed by the “GoS”. Both Ali Kushayb and Ahmad Harun remain at large in the Sudan. Ahmad Harun continues to serve as Minister of State for Humanitarian Affairs in the Government of **AL BASHIR**.¹⁴ The GoS has ceased all cooperation with the Prosecution. On January 31 2007, in a letter to the Prosecutor, the GoS refused to permit the Office to carry out interviews with possible suspects in Sudan. The GoS has also failed to respond to two requests by the Court, dated 16 June and 17 October 2007 respectively, seeking information on the execution of the above mentioned arrest warrants.¹⁵

¹² See Situation in Darfur, the Sudan, ICC-02/05-55-US-Exp, Prosecutor’s Application Under Art. 58(7), 27 February 2007.

¹³ See the case Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-al Rahman (“Ali Kushayb”), ICC-02/05-01/07-2-Corr, Warrant of Arrest for Ahmad Harun, 15 May 2007 and ICC-02/05-01/07-3-Corr, Warrant of Arrest for Ali Kushayb, 15 May 2007.

¹⁴ Public Source, DAR-OTP-0138-0302; Public Source, DAR-OTP-0138-0305; Public Source, DAR-OTP-0138-0307; Public Source, DAR-OTP-0115-0670 at 0671; ICC Statement, DAR-OTP-0133-0573 at 0607 para. 129.

¹⁵ Situation in Darfur, the Sudan, ICC-02/05-55-US-Exp, in the case of the Prosecutor v. Ahmad Harun and Ali Kushayb, Notification to the Chamber of Non-cooperation by the Government of the Sudan, 27 May 2008

66. The case proposed in this Application is the second case in the Situation and covers crimes committed in Darfur from March 2003 to the date of filing this Application. This case is not being investigated or prosecuted by the GoS.

V. Categories of evidence and information relied upon, protection of victims and witnesses and sealing of the Application

a – Categories of evidence and information

67. Consistent with the requirements of Art. 58(2(d), the Prosecution furnishes in this Application a summary of evidence and other information sufficient to establish reasonable grounds to believe that **AL BASHIR** has committed crimes within the jurisdiction of the Court.

68. In support of this Application the Prosecution relies mainly on the following categories of evidence or other information:

- (i) Statements taken by the Prosecution from victims of, and other witnesses to crimes in Darfur;
- (ii) Recorded interviews of GoS officials by the Prosecution;
- (iii) Statements taken by the Prosecution from other individuals who possess knowledge of the activities of GoS officials and Militia/Janjaweed in Darfur;
- (iv) Documents and other information provided by the GoS upon request of the Prosecution;
- (v) The Report of the Sudanese National Commission of Inquiry (“NCOI”) and other materials provided by the NCOI;¹⁶
- (vi) Public statements of officials of the GoS and communiqués published on the official websites of the GoS;
- (vii) The Report of the United Nations Commission of Inquiry (“UNCOI”) and other materials provided by the UNCOI;¹⁷
- (viii) Other documents of the UN and its various agencies on matters relating to Darfur;
- (ix) African Union (“AU”) Resolutions and reports;
- (x) Documents and statements provided from by non-Governmental organisations (“NGOs”) and;
- (xi) Documents and other materials obtained from open sources.¹⁸

69. In accordance with its obligations under Art. 54(1) the Prosecution has investigated incriminating and exonerating circumstances equally.

70. Pursuant to Art. 53 of the Statute and Rule 104 of the Rules of Procedure and Evidence, the Prosecution has thoroughly evaluated this material including the conclusions of the UNCOI and the NCOI, and the materials underlying the findings of those commissions.

71. The Prosecution has, after requesting cooperation of the GoS, conducted five missions to Khartoum, the Sudan and has also conducted 105 missions to 18 different countries.

b. Protection of victims and witnesses, Sealing of Application and Filing of Public Redacted Version

¹⁶ Hereafter cited as “NCOI material”.

¹⁷ Hereafter referred to as “UNCOI material”

¹⁸ Hereafter referred to as “Public source”

72. Pursuant to Art. 68(1), the Prosecution is obliged to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, particularly during the investigation and prosecution of crimes. In order to minimize potential risks to victims and witnesses, the Prosecution has not conducted any interviews in Darfur. Victims of alleged crimes committed in the Darfur region were interviewed in other countries because of the ongoing insecurity in Darfur.

73. Nonetheless, victim and witness protection considerations apply to this Application. In fulfilment of its statutory responsibilities, the Office has continuously monitored the security of victims and witnesses in consultation with the Victims and Witnesses Unit (“VWU”) of the Court, and appropriate protective measures have been taken. Both the Prosecution and the VWU will continue to monitor and assess the risk to witnesses.

74. In view of the above, and taking into account the sensitive nature of the information cited herein, including the numerous references to protected witnesses, and also description of highly sensitive information from different organs and agencies of international organizations, including the UN and NGOs operating in the Sudan, which are being publicly and explicitly threatened by the Sudanese authorities, the Prosecution is filing this Application under seal. For the same reasons, preparing a public redacted version will require a careful approach and additional time. In the interim, consistent with the practice of the Court so far, the Prosecution is also filing this summary of the case, and other information that can be safely shared with the general public. The Prosecution will file a public redacted version of this Application forthwith.



Luis Moreno Ocampo

Prosecutor

Done on 14 July 2008,

At the Hague, the Netherlands