

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05

Date: 12 September 2008

PRE-TRIAL CHAMBER I

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

SITUATION IN DARFUR, THE SUDAN

Public Document

**Public Redacted Version of Prosecution's Application under Article 58 filed on 14
July 2008**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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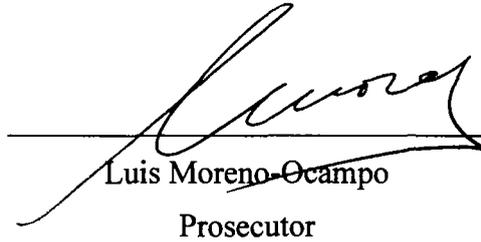
Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations
Section Other

1. On 14 July 2008, the Office of the Prosecutor (“Prosecution”) filed, under seal, an Application under Article 58 of the Rome Statute, requesting that Pre-Trial Chamber I issue a Warrant of Arrest for Omar Hassan Ahmad **AL BASHIR** (“Application”)¹.
2. In paragraph 74 of that Application, the Prosecution undertook to file a public redacted version of the Application, taking particular care to redact all information that could impact on the security of witnesses and other persons at risk on account of the Application.
3. The Prosecution notes that a Corrigendum to the Application was submitted to Pre-Trial Chamber I on 21 August 2008.²
4. The Prosecution hereby submits the public redaction version as Annex A. The Public redacted version is based on the filed corrigendum of the Application mentioned above.



Luis Moreno-Ocampo
Prosecutor

Dated this 12th day of September 2008

The Hague, Netherlands

¹ ICC-02/05-151-US-Exp.

² ICC-02/05-151-US-Exp-Corr.

No. ICC-02/05

ANNEX A

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I. 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 (hereafter “GoS”). There are no national proceedings in the Sudan against the perpetrator of crimes relevant to this Application. The Prosecution is aware of the incarceration of those who have 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 (hereafter “target groups”), who became derogatorily referred to as “Zurgas”¹ 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 Darfur population is ethnically diverse with approximately 120 tribes living in rural areas. The division of land between individual tribes in existence in 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 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

¹ “Zurga” is an Arabic word meaning “the blue ones”. In much of Sudan, it is used as a derogatory term to refer to non-Arabs in Darfur, including the Fur, Masalit and Zaghawa. In certain contexts – for example, where it is used repeatedly by attackers while they are killing and committing other violent acts against members of the Fur, Masalit and Zaghawa groups – the term “Zurga” may refer more specifically to those communities.

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, para. 694.

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 reasonable grounds to believe that **AL BASHIR** intended to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups as such. To this end, he used the entire state apparatus, the Armed Forces and the Militia/Janjaweed³ (hereafter "**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

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. In more recent times, however, the term has been used to refer to members of tribes mainly from Ma'aliya, Mahamid, Northern Reizegat, Jalul etc. who have volunteered to fight for and with the backing of the Sudanese Government. See Video Material, DAR-OTP-0136-0100.

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 Habila, 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 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 in and around 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. In 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 6,360,000.⁴ 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

⁴ The total population of Darfur for 2003 reported by the Sudanese Central Bureau of Statistics is 6,360,000. See Public Source, DAR-OTP-0149-0506.

near Zalingei hosts about 85% Fur (42,500), 10% Zaghawas (5,000), 5 % Masalit (2,500) 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 United Nations Commission of Inquiry (hereafter “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-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-traumatized because they had no choice but to revisit the places

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”.

⁶ Public Source, DAR-OTP-0138-0006.

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 target 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 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 (hereafter "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.

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 paragraphs 14-15 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 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, are destructive of the Fur, Masalit and Zaghawa groups as such.

⁷ Secretary General, 1947 Draft Convention at p. 24. 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.

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 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 crimes 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 Moon.

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 Intelligence and Security Service (hereafter the "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; (iv) the Ministry of Defence, including the Armed Forces and Militia/Janjaweed - to carry out the attacks against the target groups; (v) 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 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 ac-

⁸ See Prosecutor v. Brđanin, Judgment, Trial Chamber, Case No. IT-99-36, 1 September 2004, para. 697; Prosecutor v. Akayesu, Judgment, Trial Chamber, Case No. ICTR-96-4-T, 2 September 1998, para. 497; Stakić Trial Judgment, para. 522.

cused 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 ¾ of Darfur in order to allow ¼ 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 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 demonstrate 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 14. 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” or “Shurta Shabia”), and Border Intelligence Unit/Brigade (“BIU/B”), which is essentially a Mili-

⁹ See Krstić Trial Judgment, paras 85-87, 572; see Krstić Appeal Judgment, paras 32 and 273. The Krstić 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. Although the Krstić Trial Judgment 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.

tia/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, the organ that coordinated 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 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 groups. 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

¹⁰ [FOOTNOTE REDACTED]

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** also insisted that 99% of alleged cases of rape 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 ‘counter-insurgency 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 (hereafter “NCOI”), created by **AL BASHIR**, goes so far as mentioning crimes against humanity, but it 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. 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)

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 Arts. 6(a) and 25(3)(a) of the Rome Statute.

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

Count 2

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

Art.6 (b)

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)

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)

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, Muha-jeriya, Siraf Jidad, Silea, Sirba, Jebel Moon, and Shugag Karo in Darfur, the Sudan, in violation of Arts. 7(1)(a) and 25(3)(a) of the Rome Statute.

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)

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 lim-

ited 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)

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 Moon 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)

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 Moon 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)

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)

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, Muha-

jeriya, Siraf Jidad, Silea, Sirba, Abu Suruj, Jebel Moon, 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 in Darfur, constituting a War Crime
 Art. 8(2)(e)(v)

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 Moon, in violation of Arts. 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 (hereafter “PTC I”) 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

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.

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

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 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 and other materials provided by the UNCOI;¹⁷
- (viii) [TEXT REDACTED];
- (ix) African Union (“AU”) Resolutions and reports;

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; [SOURCE REDACTED].

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.

¹⁶ Hereafter cited as “NCOI material”.

¹⁷ Hereafter referred to as “UNCOI material”.

(x) [TEXT REDACTED]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

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, [TEXT REDACTED], 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 the summary of the case, which is the first part of the Application and explains the nature of the Application and other information that can be safely shared with the general public. The Prosecution will file a public redacted version of this Application forthwith.

75. In support of this Application, the Prosecution herein provides additional material contained in Annex 9.

¹⁸ Hereafter referred to as “Public source”.

VI. Summary of evidence and other information which establish reasonable grounds to believe that AL BASHIR committed crimes within the jurisdiction of the Court (Art. 58(2)(d))

1.Genocide

1.1. Applicable Law

76. To establish that genocide has been committed under Art. 6 of the Statute, the Prosecution is required to prove: (i) that the victims of the acts at issue belonged to a particular national, ethnical, racial or religious group; (ii) that one or more of the five acts enumerated in Art. 6(a)-(e) were committed; (iii) that such acts were committed with the intent to destroy in whole or in part the target groups as such; and (iv) that the conduct took place in the context of a manifest pattern of similar conduct directed against each of the groups or was conduct that could itself effect the destruction of the group. The requirement of intent is addressed in section VI.5 infra. This section addresses the other three requirements.

1.2. The victims of the acts at issue belonged to a particular ethnic¹⁹ group

77. The Fur, Masalit and Zaghawa each constitute an ethnic group within the meaning of Art. 6. In the absence of a generally accepted definition of an ethnic group,²⁰ an assessment must be made on a case by case basis, taking into account both objective and subjective criteria,²¹ in light of the particular political, social, historical and cultural context.²²

78. The population of Darfur²³ is ethnically diverse with approximately 120 tribes living in rural areas. The traditional division of the land into homelands – called “dar” which essentially are areas to which individual tribes can be said to have a historical claim - is crucial in the local self-perception of the population. The division of land between individual tribes in existence in 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. Each group established

¹⁹ Even though the Statute of the ICTR in Section 2 thereof uses the word “ethnical”, it has been interpreted in the cases of the Tribunal to mean ethnic group; see the ICTR case of Kayishema and Ruzindana (Trial Chamber) ICTR-95-5-T, 21 May 1999, para. 98. This section is in pari materia with Art. 6 of the Rome Statute and as such the word “ethnical” in the Rome Statute should be interpreted to mean “ethnic group”.

²⁰ In the ICTR case of Kayishema and Ruzindana (Trial Chamber) ICTR-95-5-T, 21 May 1999, para. 98, an ethnic group was considered as one whose members share a common language and culture, but additionally a group which distinguishes itself as such (self-identification); or a group identified as such by others including perpetrators of crimes (identification by others).

²¹ Brđanin, IT-99-36-T (Trial Judgment) 1 Sept. 2004, para. 684.

²² Bagilishema, ICTR-95-1A (Trial Judgment) 7 June 2001, para. 65; Rutaganda ICTR-96-3 (Trial Judgment) 6 December 1999, para. 56.

²³ 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.

a “native administration” of paramount importance for Darfurian society and recognized by the Government.

79. Members of the Fur, Masalit and Zaghawa ethnic groups generally share the same religion (Islam) with the majority of the population of the Sudan. Co-existence and intermarriage between the target groups and others have blurred differences, and their physical appearances are often indistinguishable. However, historically the target groups occupied a specific territory, have dominated the Darfur region and repeatedly challenged, including through armed rebellion, their political and economic marginalization by successive regimes in Khartoum.

80. The Fur are the largest ethnic group in the Darfur region of western Sudan. The heartland of the Fur is the mountainous region around Jebel Si and Jebel Marra, Wadi Salih and Zalingei and they also occupied the lower country west and southwest of that area. They are an active agricultural people who may also herd cattle. Some Fur families who have accumulated a substantial cattle herd have developed a more nomadic lifestyle.

81. The Masalit are spread out on the border between Chad and Sudan with the majority of them living in Sudan around Al Geneina. They are usually rural and mainly agriculturalists.

82. The Zaghawa are mainly located in North Darfur and North Eastern Chad and some settlements in South Darfur. Zaghawa culture is closer to the Arabs than to the Fur and the Masalit. They see themselves primarily as breeders, and traditionally favoured cattle herding; however, the recent desertification that has touched their region of origin has led many to favour camel herding.

83. Two objective markers of the distinct identities of the target groups are their language and the land they occupy. Each group speaks its own dialect in addition to Arabic. Each group has as indicated above long had its own tribal structure responsible for overseeing relations with other ethnic groups, and for administering tribal land through the *Hakura* (land grant) system.²⁴ The three groups have traditional land rights (“Dar Fur”, “Dar Masalit” and “Dar Zaghawa”, respectively, homeland of the Fur, homeland of the Masalit, homeland of the Zaghawa), that reflect the distinctive character of the groups, and the intimate bond between those groups and their respective lands (see Annex 1).

84. Subjectively, the self-perception of members of each target group – manifested in statements to the Prosecution and others – is also rooted in this ethnically-based system of tribal administration and land distribution.

²⁴ The Hakura system was abolished in 1970 by the Unregistered Land Act. This Act vests all unregistered land to the State. It was repealed and replaced by the Civil Transaction Act of 1984 as amended in 1990.

85. The target groups' distinctive identity reflects as well the views of others, in particular their attackers. In recent years, successive conflicts with different regimes in Khartoum and with local surrogates²⁵ have heightened polarisation such that, increasingly, members of the target groups see themselves – and are seen by their attackers – as different ethnic groups.²⁶

86. For many decades the Fur, Masalit and Zaghawa have been fighting to preserve their land and their identity. As far back as May/June 1989, Fur representatives at a Tribal Reconciliation Conference raised concerns that a *“dirty war that has been imposed upon us, begun as an economic war but soon it assumed a genocidal course aiming at driving us out of our ancestral land in order to achieve certain political goals. ...The aim is a total holocaust and no less than the complete annihilation of the Fur people and all things Fur.... The message is quite clear: empty the land and do not allow any Fur survivors to come back and re-establish their villages.”*²⁷

87. A 1992 bulletin published by the National Islamic Front (hereafter the “NIF”), the predecessor of the National Congress Party (hereafter the “NCP”), advocated exclusion of the Fur and Zaghawa from GoS positions and their removal from Darfur. The bulletin also advocated the destabilization of Fur areas to force the removal of the Fur from Darfur.²⁸

88. The explicit exclusion of Fur, Masalit and Zaghawa from the mobilization of Militia/Janjaweed further indicates the extent to which those groups were considered different, as does the frequent use of ethnically-based derogatory epithets during attacks on the target groups.²⁹

1.3. Acts committed

89. The acts committed with intent to destroy the target groups set out in this Application fall under Arts. 6(a) (killing members of the groups); 6(b) (causing serious bodily or mental harm to members of the groups); and 6(c) (deliberately inflicting on the groups conditions of life calculated to bring about their physical destruction).

²⁵ As manifested, for example, in the Arab-Fur war of 1987-1989 and the Arab-Masalit war of 1996-1999.

²⁶ The terms “African” and “Arab” are socially constructed. They reflect, and further reinforce, the growing sense of difference separating members of the target groups from others. Given their inherent ambiguity in light of the facts on the ground, this document does not employ the terms “African” or “Arab” except in circumstances where they are specifically appropriate.

²⁷ Public Source, DAR-OTP-0024-0200 at 0204-0205.

²⁸ [SOURCE REDACTED]; Public Source, DAR-OTP-0150-0105 at 0108 and 0118; [SOURCE REDACTED], English translation at DAR-OTP-0148-0101.

²⁹ [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0018-0010, para. 245 and para. 511 footnote 189; Public Source, DAR-OTP-0138-0006.

90. For a period of more than five years – between March 2003 up to the time of filing this Application – forces and agents under the control of **AL BASHIR** have attacked members of the Fur, Masalit and Zaghawa ethnic groups in their villages and subsequently in the camps where they were forced to flee. At all times relevant to this Application, forces and agents under the control of **AL BASHIR** targeted civilians who were not participants to any conflict.

Targeting of the three ethnic groups

91. **AL BASHIR**'s forces singled out for attack those villages and small towns inhabited mainly by members of the target groups. The attackers went out of their way to spare from attack villages inhabited predominantly by so called “Arab” tribes aligned with **AL BASHIR**, even where they were located very near villages and towns inhabited predominantly by members of the target groups.

92. [TEXT REDACTED]³⁰ [TEXT REDACTED]³¹ In some locations, the distance between a destroyed Fur village and an untouched village was less than 500 meters away.³²

93. This practice of ethnically selective targeting is borne out by a field survey of three localities of West Darfur (Habila, Wadi Salih and Mukjar) [TEXT REDACTED].³³ Of a total of 519 surveyed villages, 205 were predominantly inhabited by Fur, 109 were predominantly inhabited by Masalit, and 93 were predominantly inhabited by tribes considered as Arabs (Salamat, Reizagat, Beni Halba and others).³⁴ The population of 112 villages was “mixed” (i.e. none of the abovementioned groups had more than 50% of the population).³⁵ According to the report, (i) 248 villages were attacked and destroyed; (ii) 81 villages were attacked but not destroyed, and they were abandoned by residents following the attack; and (iii) 190 villages were untouched and remained inhabited as of April 2006. Of the 248 villages that were attacked and destroyed, 165 were inhabited predominantly by the Fur, 62 by the Masalit, 20 were mixed, and only 1 small village (60 people) was inhabited by a tribe reported as “Arab” (Targam tribe).

94. The results reveal a stark disparity in the treatment accorded villages of different ethnic composition, as follows:³⁶

³⁰ UNCOI Material, DAR-OTP-0038-0167 at 0167.

³¹ Public Source, DAR-OTP-0030-0066 at 0069.

³² Public Source, DAR-OTP-0030-0066 at 0068.

³³ Public Source, DAR-OTP-0145-0237. [TEXT REDACTED].

³⁴ For the purpose of this application “predominantly inhabited” by a group means that 50% or more of the population belonged to the group in question.

³⁵ For the purpose of this application “mixed” means villages inhabited by several groups in which Masalit, Fur or Arabs have not more than 50% of the population.

³⁶ The categories used in the application are not exactly the same in the survey.

a. *Predominantly Fur villages* – 81% (165 villages) were destroyed and abandoned, and 16% (33 villages) were abandoned but not destroyed.

b. *Predominantly Masalit villages* – 57% (62 villages) were destroyed and 28% (31 villages) were abandoned but not destroyed.

c. *Predominantly Arab villages* - Fewer than 1% percent (1 village) were destroyed. Not a single village inhabited predominantly by Arabs was abandoned.

d. *Mixed villages* – 18% (20 villages) were destroyed, and 15% (17 villages) were abandoned. In at least one mixed village the destruction focused particularly on the Fur part of the village: Gaya was divided in three parts (Fur, Tama and Borgo) and only the Fur part was destroyed.

In sum, while 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, fewer than 1% of predominantly Arab villages were attacked.

95. By contrast, fewer than 4% of the predominantly Fur villages, and just under 15% of the 109 predominantly Masalit villages remained inhabited at the conclusion of the study, while fully 99 % (92) of the villages predominantly inhabited by Arabs at the start of the violence were never attacked and remained inhabited when the study was completed.³⁷

96. The Prosecution has charted on a map of Darfur, towns, villages and the tribal composition of the inhabitants, and of all the known attacks that have taken place in Darfur from 2003 to 2008 (see Annex 2).

97. The results show that the overwhelming majority of villages attacked were inhabited mainly by the target groups. This indicates that towns and villages inhabited mainly by the target groups were selected for attack.

98. [TEXT REDACTED] data on the tribal distribution of Sudanese refugees in Chad show that the Zaghawa and Masalit constitute the vast majority of the refugee population across the border from their homeland.³⁸ As most of the refugees fled due to attacks on their villages, the ethnic composition of the refugees provides an indication as to the ethnic groups around the borders that were targeted. As such, it is reasonable to conclude that these ethnic groups were targeted.³⁹

³⁷ The remaining 75 were mixed villages.

³⁸ Public Source, DAR-OTP-0148-0098.

³⁹ The traditional home of the Fur is further inland from the border with Chad, and most of them were displaced internally. As such Fur numbers among refugees is not as high compared to Zaghawa and Masalit.

99. These findings are consistent with the accounts of victims interviewed by the Prosecution.⁴⁰ The Prosecution has also compiled open source information, victim accounts, video footage, photographs and satellite imagery about the attacks and destruction of villages; all such material has been incorporated on a map of Darfur (see Annex 3). This map illustrates the broader pattern of criminal activity throughout Darfur, whereby villages and small towns whose residents were predominantly from the target groups were singled out and attacked *in toto*.

Targeting Civilians

100. Forces controlled by **AL BASHIR** consistently targeted not rebel forces, but civilians from the target groups. Attacks were typically launched against civilian targets, and did not cease until the town or village, as an entirety, had been victimised and its population forcibly displaced.

101. Witnesses interviewed by the Prosecution have confirmed the findings of the UNCOI, [TEXT REDACTED], that forces controlled by **AL BASHIR** repeatedly attacked the civilian populations of towns and villages when rebels were not present, and absent any valid military objective.⁴¹ Sometimes, the attackers knew where rebels were located but instead chose to attack places with no known rebel presence. 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.⁴² But instead of attacking the Sindu Hills, they attacked the villages of Kodoom, Bindisi and Mukjar and their surrounding villages where there was no rebel presence.

102. Witnesses have also described instances in which rebels were known to be located outside of towns or villages, but attackers from the Armed Forces and Militia/Janjaweed bypassed those locations to attack the towns or villages instead.⁴³ During Armed Forces operations in North Darfur in July 2003, which the GoS called “Disa 1” and “Disa 2”, the GoS 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 from Fata Borno to Disa – an area inhabited predominantly by the Zaghawa (see Annex 1). The villages were attacked, not because they posed a military threat, but rather to destroy in part the Zaghawa

⁴⁰ [FOOTNOTE REDACTED]

⁴¹ [FOOTNOTE REDACTED]

⁴² [FOOTNOTE REDACTED]

⁴³ [FOOTNOTE REDACTED]

group. By the time this operation ended 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.

103. Finally, attacks on IDP camps are clearly aimed at civilians, as exemplified in particular by the systematic rape of women and girls.

i. Genocide by killing members of each target group

104. For the purposes of the *actus reus* of genocide by killing, the Prosecution must prove that members of each target group were killed with the intention of destroying the group as such.⁴⁴

105. Between March 2003 and the date of filing this Application, members of the Armed Forces, often acting together with the Militia/Janjaweed, killed tens of thousands of civilians in attacks on towns, villages, IDP camps and settlements in Darfur.

106. Joint attacks by members of the Armed Forces and Militia/Janjaweed followed a common pattern. In about half of the attacks described by eyewitnesses, the members of the Armed Forces and the Militia/Janjaweed arrived in the town or village together.⁴⁵ Typically, the Armed Forces would arrive in trucks and land cruisers mounted with *Dshkas* and the Militia/Janjaweed would arrive on camels and horseback. On many occasions, military helicopters or aircraft would drop bombs on the town or village as a precursor to, or during, a ground attack. The joint forces would surround the village, enter and attack civilian inhabitants, killing many, torturing and raping others, and forcing all survivors to flee. Published reports suggest that at least 2,000 villages were attacked and destroyed during the period between March 2003 and November 2004 alone.⁴⁶ Published reports, and evidence gathered by the Prosecution, suggest that at least 3000 villages have been attacked throughout Darfur between 2003 and November 2005.⁴⁷ Statements obtained by the Prosecution from eyewitnesses corroborate many of these attacks.⁴⁸

107. Some of the most murderous attacks against the Fur villages which fall within the above mentioned pattern are the following: (1) Shoba in North Darfur (on or about 25 July 2003) (be-

⁴⁴ Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, Elements of Genocide by killing, para. 1, DAR-OTP-0143-0085; see Prosecutor v. Kajelijeli, Judgment, Trial Chamber, Case No. ICTR-98-44A-T, 1 December 2003 (Kajelijeli Trial Judgment), para. 813; Prosecutor v. Semanza, Judgment, Trial Chamber, Case No. ICTR-97-20-T, 15 May 2003 (Semanza Trial Judgment), para. 319.

⁴⁵ [FOOTNOTE REDACTED]

⁴⁶ UNCOI Material, DAR-OTP-0018-0010 at 0066, paras 226, 236; Public Source, DAR-OTP-0119-0635 at 0643; Public Source, DAR-OTP-0147-0897; Public Source, DAR-OTP-0147-0917; Public Source, DAR-OTP-0147-0923.

⁴⁷ Public Source, DAR-OTP-0147-0900; Public Source, DAR-OTP-0150-0082 at 0083; Public Source, DAR-OTP-0147-0923.

⁴⁸ [FOOTNOTE REDACTED]

tween 42⁴⁹ and 51⁵⁰ civilians were killed)⁵¹ (2) Tanako in West Darfur (in or around August and in or around December 2003) (between 510 and 525 civilians were killed),⁵² (3) Sourra in West Darfur (January-February 2004) (between 250 and 334⁵³ civilians were killed),⁵⁴ (4) Garsila and Deleig in West Darfur (March 2004) (a total of 168 civilian males were executed in Deleig);⁵⁵ (5) Kyla in South Darfur (August 2003 and February 2004) (at least 70 civilians were killed),⁵⁶ (6) Shattaya in South Darfur (9 February 2004) (approximately 85 civilians were killed),⁵⁷ (7) Kailek in South Darfur (March-April 2004) (between 1350⁵⁸ and 1700⁵⁹ civilians were killed),⁶⁰ (8) Adwa in South Darfur (November-December 2004) (between 200 and 400⁶¹ civilians were killed),⁶² (9) Kidingir in West Darfur (in 2003) (at least 80 civilians were killed)⁶³.

108. Some of the most murderous attacks against the Masalit villages which fall within this pattern are the following: (1) Terbeba (on or about 15 February 2004)⁶⁴ (2) Habila (on 27 August 2003) (24-30 civilians were killed)⁶⁵ in West Darfur; (3) Buram (between November 2005 and September 2006) (approximately 500 civilians mainly from the Masalit and Zaghawa tribes were killed) in South Darfur.⁶⁶

109. Some of the most murderous attacks against the Zaghawa villages which fall within this pattern are the following: (1) Furawiya (May 2003-January 2004),⁶⁷ (2) Tawila (27 February 2004) (more than 100 civilians were killed)⁶⁸ and (3) Kornoi (July 2003 – March 2004) (at least

⁴⁹ UNCOI Material, DAR-OTP-0011-0077 at 0078-0079.

⁵⁰ Public Source, DAR-OTP-0002-0207 at 0243, Public Source, DAR-OTP-0090-0377.

⁵¹ [SOURCE REDACTED], UNCOI Material, DAR-OTP-0011-0077 at 0078-0079.

⁵² [SOURCES REDACTED]; UNCOI Material DAR-OTP-0010-0229 at 0255.

⁵³ UNCOI Material, DAR-OTP-0018-0010 at 0077 para. 272; UNCOI Material, DAR-OTP-0055-0224 at 0229.

⁵⁴ [FOOTNOTE REDACTED]

⁵⁵ [SOURCES REDACTED]; Public Source, DAR-OTP-0090-0173 at 0186.

⁵⁶ [FOOTNOTE REDACTED]

⁵⁷ UNCOI Material, DAR-OTP-0010-0003 at 0036; UNCOI Material, DAR-OTP-0018-0010 at 0078 para. 273.

⁵⁸ [SOURCE REDACTED] (1350 people killed).

⁵⁹ [FOOTNOTE REDACTED]

⁶⁰ UNCOI Material, DAR-OTP-0018-0010 at 0078 para. 274.

⁶¹ [FOOTNOTE REDACTED]

⁶² Public Source, DAR-OTP-0107-1151 at 1189-1191; UNCOI Material, DAR-OTP-0018-0010 at 0070-0071, para. 253.

⁶³ Video Material, DAR-OTP-0028-0199 at 0201.

⁶⁴ Public Source, DAR-OTP-0003-0099 at 0121-0122.

⁶⁵ Public Source, DAR-OTP-0147-0989 at 0091; Public Source, DAR-OTP-0020-0067 at 0100; [SOURCE REDACTED].

⁶⁶ Public Source, DAR-OTP-0138-0024, at 0026 and 0028; Public Source, DAR-OTP-0108-0562, para. 32. Public Source, DAR-OTP-0147-0931 at 0936; Public Source DAR-OTP-0147-1230 at 1271 para. 169; Public Source DAR-OTP-0147-1125 at 1194-1195 paras 240,244(a).

⁶⁷ Public Source, DAR-OTP-0121-0025 at 0028; Public Source DAR-OTP-0007-0070 at 0069-0070.

⁶⁸ [SOURCE REDACTED]; Public Source, DAR-OTP-0121-0084; Public Source DAR-OTP-0121-0078; Public Source, DAR-OTP-0121-0086.

225 civilians were killed)⁶⁹ in North Darfur; (4) Labado (16-17 December 2004) (approximately 100 civilians were killed)⁷⁰ and (5) Buram (between November 2005 and September 2006) (approximately 500 civilians mainly from the Masalit and Zaghawa tribes were killed) in South Darfur⁷¹ (see Annex 4).

110. For each target group, many of the casualties are women and children.⁷²

111. There exists no definitive account of the total number of civilians killed in Darfur since 2003.⁷³ [TEXT REDACTED]⁷⁴, [TEXT REDACTED].⁷⁵ According to this report, the number of people dead as a consequence of the conflict during the period September 2003 – January 2005⁷⁶ is 118,142, of whom approximately 35,000 were killed and 83,000 died as a consequence of injury, starvation, lack of water, or conditions in the camps. In April 2008, the United Nations estimated the total number of deaths since 2003 at 300,000.⁷⁷ The vast majority of these deaths were caused by forces and agents under the control of **AL BASHIR**.⁷⁸

The following are examples of victim-witness accounts of killings of members of the target groups:

Killings of members of the Fur Group

*Witness SDK-629*⁷⁹

112. Witness SDK-629 is a Fur, approximately 30 years old and [TEXT REDACTED]. South Darfur (see Annex 1), which was inhabited mainly by the Fur. At [TEXT REDACTED]. Witness SDK-629 was [TEXT REDACTED] when he was told that Kyla was attacked between 27 and 29 August 2003. Witness SDK-629 left Nyala [TEXT REDACTED]. They told him that the Militia/Janjaweed and Armed Forces had encircled the village as villagers fled to the mosque or the local school. An Antonov airplane dropped bombs on the village destroying the school. A helicopter also hovered over the village and there was a man at the

⁶⁹ [FOOTNOTE REDACTED]

⁷⁰ Public Source, DAR-OTP-0121-0014; Public Source, DAR-OTP-0121-0036 at 0037; Public Source, DAR-OTP-0121-0039.

⁷¹ Public Source, DAR-OTP-0138-0024, at 0026 and 0028; Public Source, DAR-OTP-0108-0562, para. 32. Public Source, DAR-OTP-0147-0931 at 0936; Public Source DAR-OTP-0147-1230 at 1271 para. 169; Public Source DAR-OTP-0147-1125 at 1194-1195 paras 240_244(a).

⁷² [FOOTNOTE REDACTED]

⁷³ Public Source, DAR-OTP-0080-0539; Public Source, DAR-OTP-0148-0257; Public Source, DAR-OTP-138-0323; Public Source, DAR-OTP-0138-0327.

⁷⁴ [FOOTNOTE REDACTED]

⁷⁵ Public Source, DAR-OTP-0080-0542 at 0547, 0576-0577.

⁷⁶ Public Source, DAR-OTP-0080-0542 at 0575-0576.

⁷⁷ Public Source, DAR-OTP-0147-1068.

⁷⁸ See Public Source, DAR-OTP-0003-0099; Public Source, DAR-OTP-0002-0163, at 0163, 0177; Public Source, DAR-OTP-0003-0185; Public Source, DAR-OTP-0115-0673.

⁷⁹ [FOOTNOTE REDACTED]

door shooting at the villagers as they fled. After the aerial assault, the ground forces entered the village and went door to door. They killed any people they found in their houses then looted the houses and burned some of them. All the while, the attackers were singing "Hail the name of Allah, our orders came from Ali Usman Taha". Survivors fled either to the mountains or gathered in [TEXT REDACTED] where the attackers subjected them to further attacks including torture, killings and rape.

113. After staying in [TEXT REDACTED] for a few days, Witness SDK-629 and some local men left [TEXT REDACTED] and went to Kyla. When they arrived, they saw numerous dead bodies as they walked through the village, including that of his uncle and of two local women named [NAMES REDACTED]. [NAME REDACTED] baby had also been killed and was lying on his back with his penis cut off and stuffed in his mouth. [TEXT REDACTED] The group discovered and buried a total of 67 bodies [TEXT REDACTED]. When Kyla village was attacked for the second time, in February 2004, Witness SDK-629 was in the village and saw an Antonov airplane fly over the village and drop bombs. One bomb hit a group of people loading children on to donkeys preparing to escape. Another bomb destroyed the house of a man named Abo Husayn killing him, his wife and his new born baby. Yet another bomb exploded near a woman named [NAME REDACTED] who was fleeing on a donkey with her two children aged 3 and 5. [NAME REDACTED] was wounded and Witness SDK-629 saw that her intestines were hanging out of her lower body. She was struggling to stay alive and calling out to her children who had fallen off the donkey. Witness SDK-629 explained that he was unable to stop and help because he had a child with him. As he fled, he saw that the whole village was burning. He stated that a total of 86 people were missing following the second attack and he presumed that they were killed. Witness SDK-629 eventually [TEXT REDACTED].and later left the Sudan.⁸⁰

Killings of members of the Zaghawa Group

*Witness ALQ-300*⁸¹

114. Witness ALQ-300 is a Zaghawa from [TEXT REDACTED]. North Darfur (see Annex 1). Witness ALQ-300 related [TEXT REDACTED].was attacked by members of the Armed Forces and Militia/Janjaweed on or [TEXT REDACTED].. He awoke at about 4 a.m. to the noise of people shouting and airplanes bombing the area. He fled his compound and managed to hide in a hole. As he fled, he saw one of the attackers on a horse set fire to his neighbour's house. As he did so, the attacker was shouting "atala'o y a abid" which Witness ALQ-300 un-

⁸⁰ [FOOTNOTE REDACTED]

⁸¹ [FOOTNOTE REDACTED]

derstood to mean "slaves come out". From where he was hiding, Witness ALQ-300 heard gunshots, bombing and villagers calling out in panic for their children. The shooting and bombing subsided about 2 hours later and Witness ALQ-300 came out of his hiding place. His mother and sisters were crying and told him that his father was dead. He found the body of his father who had been burned to death in his hut. He also found the dead body of his brother [NAME REDACTED] who was shot in the side. The villagers buried a total of 12 bodies, [TEXT REDACTED]. Witness ALQ-300 and the rest of his family [TEXT REDACTED] to stay with relatives [TEXT REDACTED]⁸² after the attack.

115. In or around October 2004, at about 4 a.m., members of the Armed Forces and Militia/Janjaweed also attacked Tawila. Witness ALQ-300 was in [TEXT REDACTED] from the town and was awoken by the sound of aircraft. He saw an Antonov airplane and a helicopter displaying a Sudanese flag flying towards Tawila. He hid under a tree but saw the Antonov continuously dropping bombs on the area for about three hours. When the bombing stopped, Witness ALQ-300 went into Tawila and found his mother dead. She was killed from a gunshot wound to her lower abdomen. He also saw dead bodies scattered all over the town, many of them with burns or gunshot wounds. According to Witness ALQ-300, more than 150 civilians were killed during the attack itself; many more died from their injuries afterwards. He stated that his grand uncle was wounded on his left ankle during bombing and many other members of his family and friends were killed during the attack. He lost most of his possessions, including livestock and [TEXT REDACTED] houses during the attack and still has nightmares. He eventually fled the Sudan after the attack.⁸³

Killings of members of the Masalit Group

*Witness RTE-380*⁸⁴

116. Witness RTE-380 is a Masalit, [TEXT REDACTED] West Darfur (see Annex 1). On 17 November 2003 [TEXT REDACTED]. Arara was indeed attacked on [TEXT REDACTED] by approximately 800 members of the Armed Forces and Militia/Janjaweed. Witness RTE-380 related [TEXT REDACTED].

117. The attack started in a village called Agara, south of Arara, where a man and a girl were killed. Witness RTE-380 also saw the villages of Dumbarta and Arbata attacked. In Dumbarta, 5 people were killed including a man named [NAME REDACTED], who was killed in his home. Witness RTE-380 also saw the attackers shoot to death 3 people named [NAMES RE-

⁸² A town in North Darfur inhabited mainly by the Zaghawa, Fur and Berti tribes (see Annex 1).

⁸³ [FOOTNOTE REDACTED]

⁸⁴ [FOOTNOTE REDACTED]

DACTED]. In Arbata, Witness RTE-380 saw another 5 people shot to death, [TEXT REDACTED].

118. He also saw 2 dead women who were shot in their hiding place behind some plants. Witness RTE-380 related that although members of the Armed Forces were in the town (Arara) during the attack they did nothing to protect the villagers. He also saw at least 8 people who were injured during the attacks. One of the injured - [TEXT REDACTED] was shot in the head. Witness RTE-380 and her husband managed to take her to [TEXT REDACTED], she did not fully recover. Witness RTE-380 related that a total of 19 people were killed in Arara, Arbata, Dumbarta and Agara alone. Although at least 18 other villages were attacked and burned down, he was unable to say how many were killed in those villages. The attackers also looted Arara and the other villages. Witness RTE-380 and other villagers eventually fled [TEXT REDACTED].⁸⁵

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

119. For the purposes of the *actus reus* of genocide by causing serious bodily and/or mental harm to members of each target group, the Prosecution must prove that serious bodily or mental harm was inflicted on members of the target groups with the intention of destroying the groups as such.⁸⁶ Acts which have been held to engender bodily or mental harm include forcible transfer or displacement, deportation, rape, torture and inhuman and degrading treatment. Serious bodily or mental harm “must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”⁸⁷ By any measure, the nature and magnitude of bodily and mental harm suffered by the target groups in Darfur during the time period relevant to the Application satisfies this standard.

120. Throughout the time period relevant to this Application, members of the target groups in Darfur were subjected to severe bodily and mental harm through a consistent pattern of (a) rape and other forms of sexual violence, (b) torture and inhuman and degrading treatment, and (c) forcible displacement.

(a) Rape and other forms of sexual violence causing serious bodily and mental harm

⁸⁵ [FOOTNOTE REDACTED]

⁸⁶ Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, Elements of Genocide by causing serious bodily or mental harm, para. 1. See Semanza Trial Judgment, 15 May 2003, para. 323; see also Musema Trial Judgment, 27 January 2000, para. 165; Rutaganda Trial Judgment, 6 December 1999, para. 60; Akayesu Trial Judgment, September 2, 1998, para. 521.

⁸⁷ Krstić Trial Judgment, para. 513.

121. Witnesses interviewed by the Prosecution,⁸⁸ the UNCOI,⁸⁹ [TEXT REDACTED]⁹⁰ [TEXT REDACTED]⁹¹ have reported that, since March 2003, thousands of women and girls belonging to the target groups were raped in all three States of Darfur by members of the Armed Forces and Militia/Janjaweed.⁹² Girls as young as five and women as old as 70 have been raped.⁹³ Gang rape – the rape of one or more victims by more than one perpetrator – has been a distinctive feature of sexual violence in Darfur. [TEXT REDACTED]⁹⁴ [TEXT REDACTED]⁹⁵ [TEXT REDACTED],⁹⁶ UNCOI⁹⁷ and witnesses interviewed by the Prosecution corroborate that gang-rape has been pronounced.⁹⁸

122. Rape has been used as a weapon during attacks on villages and has been “*a critical element in the sweeping, scorched-earth campaign launched by the Janjaweed and the GoS against the non-Arab Darfurians.*”⁹⁹ Rape has also been a characteristic of the abuses in and around the camps for the internally displaced persons.¹⁰⁰ Most of these rapes have been attributed by victims to members of the Armed Forces, Militia/Janjaweed or other GoS agents.

123. [TEXT REDACTED]¹⁰¹

124. In July 2005 [TEXT REDACTED] reported that [TEXT REDACTED] in Darfur were documenting “*new cases of rape on a weekly basis, perpetrated by armed men alleged to be members of the Government armed forces, law enforcement agencies and Janjaweed*”.¹⁰² In April 2006, [TEXT REDACTED]¹⁰³ [TEXT REDACTED]¹⁰⁴ [TEXT REDACTED]¹⁰⁵

⁸⁸ [FOOTNOTE REDACTED]

⁸⁹ UNCOI Material, DAR-OTP-0018-0010 at 0090-0097 paras 332-353.

⁹⁰ Public Source, DAR-OTP-0090-0030.

⁹¹ Public Source, DAR-OTP-0005-0108 at 0114; Public Source, DAR-OTP-0121-0084; Public Source, DAR-OTP-0121-0086; Public Source, DAR-OTP-0002-0128; Public Source, DAR-OTP-0138-0021; Public Source, DAR-OTP-0138-0222.

⁹² Public Source, DAR-OTP-0005-0108, at 0114, 0128; Public Source, DAR-OTP-0138-0224 at 0224.

⁹³ Public Source, DAR-OTP-0090-0030, at 0040-0042; Public Source, DAR-OTP-0119-0352 at 0352-0353; Public Source, DAR-OTP-0005-0108, at 0127.

⁹⁴ Public Source, DAR-OTP-0141-0299, at 0301.

⁹⁵ Public Source, DAR-OTP-0120-0004 at 0006-0009.

⁹⁶ Public Source, DAR-OTP 0136-0263 at 0276.

⁹⁷ UNCOI Material, DAR-OTP-0018-0010 at 0090 paras 333-334, at 0091, para. 338, at 0093, para. 343.

⁹⁸ Public Source, DAR-OTP-0120-0004 at 0007; Public Source, DAR-OTP-0090-0030 at 0039; UNCOI Material, DAR-OTP-0018-0010 at 0090 para. 333; [SOURCES REDACTED]. See also Public Source, DAR-OTP-0090-0030.

⁹⁹ Public Source, DAR-OTP-0005-0108 at 0139.

¹⁰⁰ Public Source, DAR-OTP-0025-0088 at 0098, para. 38.

¹⁰¹ Public Source, DAR-OTP-0146-0123 at 0125.

¹⁰² Public Source, DAR-OTP-0090-0030 at 0037.

¹⁰³ Public Source, DAR-OTP- 0136-0306 at 0321.

¹⁰⁴ Public Source, DAR-OTP-0119-0352 at 0352-0353.

¹⁰⁵ Public Source, DAR-OTP-0147-1102 at 1105. Public Source, DAR-OTP-0147-01111 at 1115.

125. These attacks on women and girls still continue, 5 years into the conflict. [TEXT REDACTED]¹⁰⁶ [TEXT REDACTED]¹⁰⁷

126. Under-reporting of rape is widespread and makes it difficult to assess a number of victims. [TEXT REDACTED]¹⁰⁸

127. [TEXT REDACTED]¹⁰⁹ In December 2005 [TEXT REDACTED]¹¹⁰ The numerous reports and testimonies of victims of sexual violence make clear that, notwithstanding this under-reporting, rape has been committed systematically and continuously throughout the time covered by this Application.

128. As many studies have documented, rapes have been intentionally used to physically injure and terrorise women, accentuate their sense of displacement, and humiliate them.¹¹¹ Rape and other forms of sexual violence cause physical and psychological damage to the victims.¹¹² While it is not possible to determine the effect of rape in Darfur on inhibiting the reproduction of the groups as such, there is substantial evidence that systematic rape¹¹³ produced serious bodily and mental harm to members of the target groups.

129. The physical damage caused by rape – including increased incidence of fistula¹¹⁴ – has been exacerbated by the prevalence of female genital mutilation (“FGM”) among women in Darfur, including among the target groups. According to one witness interviewed by the Prosecution, for “*virgins who had FGM and were sexually assaulted, the impact was particularly painful and debilitating.*”¹¹⁵

130. In view of the social stigma associated with rape and other forms of sexual violence among the Fur, Masalit and Zaghawa,¹¹⁶ these acts caused significant and irreversible psychological harm to individual women and to their communities.¹¹⁷ An observer [TEXT REDACTED] noted, “[*I*n this society if you rape one woman, you have raped the entire tribe.”¹¹⁸

¹⁰⁶ Public Source, DAR-OTP-0146-0111 at 0115.

¹⁰⁷ Public Source, DAR-OTP-0147-1068.

¹⁰⁸ Public Source, DAR-OTP-0148-0259 at 0270, paras 47-48.

¹⁰⁹ Public Source, DAR-OTP-0120-0004 at 0005.

¹¹⁰ Public Source, DAR-OTP-0146-0038 at 0055.

¹¹¹ UNCOI Material, DAR-OTP-0018-0010 at 0097; Public Source, DAR-OTP-0107-1455 at 1461.

¹¹² [SOURCE REDACTED]; Public Source, DAR-OTP-0119-0635 at 0672.

¹¹³ UNCOI Material, DAR-OTP-0018-0010 at 0097.

¹¹⁴ Public Source, DAR-OTP-0080-0360 at 0385 and 0399.

¹¹⁵ [FOOTNOTE REDACTED]

¹¹⁶ Public Source, DAR-OTP-0002-0128 at 0142-0144.

¹¹⁷ Acts of rape and sexual violence may form an integral part of the process of destruction of the group, Akayesu Trial Judgment, paras 731-732; Musema Trial Judgment, para. 933; see also Blagojević & Jokić Trial Judgment, para. 662.

¹¹⁸ Public Source, DAR-OTP-0140-0220 at 0226.

A Zaghawa witness interviewed by the Prosecution stated: “[I]n my community sexual violence is emotionally shattering.... The impact of rape and sexual violence on the victims is such that those who are not married would have difficulty finding a husband, and the people look at [a rape victim] as though she has a terminal disability.”¹¹⁹ Babies born as a result of these assaults have been termed “Janjaweed babies” and are rarely accepted as members of the community.¹²⁰ The high number of such unwanted babies has led to an explosion of infanticides and abandonment of babies in Darfur.¹²¹

131. Like many observers, [TEXT REDACTED] considers that the threat of rape in Darfur has been one of the “most traumatic” aspects of the conflict for victims: “A recent report from [TEXT REDACTED] said that in almost one in three reported rapes, the victims were children, and a recent [TEXT REDACTED] study suggests that the number might be even higher. The immediate impact of these rapes is life-threatening and horrific for the victims. Longer-term concerns centre on healing the physical and mental wounds, and raising children born as a result of rape whom communities are reluctant to accept as their own.”¹²²

132. Between [TEXT REDACTED].victims of rape and sexual trauma [TEXT REDACTED] 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 girls 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. According to the witness, the absence of any psychiatric or psychological treatment in the camp for these victims could prolong or worsen the mental harm suffered by the victim.¹²³

133. The witness 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. [TEXT REDACTED]..¹²⁴

134. Testimony provided [TEXT REDACTED] by the mother of another girl who had been raped in Darfur further demonstrates the serious mental harm caused: [TEXT REDACTED]¹²⁵

¹¹⁹ [FOOTNOTE REDACTED]

¹²⁰ [SOURCE REDACTED]; Public Source, DAR-OTP-0146-0038 at 0057.

¹²¹ [SOURCE REDACTED]; Public Source, DAR-OTP-0146-0138; [SOURCE REDACTED].

¹²² Public Source, DAR-OTP-0146-0038 at 0057.

¹²³ [FOOTNOTE REDACTED]

¹²⁴ [FOOTNOTE REDACTED]

¹²⁵ Public Source, DAR-OTP-0107-1455 at 1466-1467.

135. The vulnerability of women in the camps has been reported [TEXT REDACTED] in the following terms: [TEXT REDACTED]¹²⁶

136. The mental harm caused by rape has been compounded by the impunity afforded the perpetrators. In many instances, rape has been committed by officials of the very agencies charged with protection of civilians. Police routinely refuse to entertain, let alone address complaints by rape victims and GoS officials leading up to **AL BASHIR** himself have repeatedly denied that rape even occurs.¹²⁷

137. The [TEXT REDACTED] in a statement [TEXT REDACTED] [TEXT REDACTED] about the story of her rape together with six other women: “*On [TEXT REDACTED] while the two were taken away and raped several times, those who escaped reported their abduction to the police who had been deployed to their camp for their protection. The police refused to come to their rescue. When the two victims were found by their friends and relatives they were naked and could not walk. They were carried back to the camp where, again, the incident was reported to the police. This time, the police accused the victims of making up the story. The victims were then taken to the local hospital which confirmed the rape and prescribed the necessary treatment...Subsequently, the police said they filed the case but they have taken no further action on it, even though the victims stated that they would be able to identify their assailants. [TEXT REDACTED] the local chief of police: he informed them that no instances of rape had been reported to him.*”¹²⁸ A witness interviewed by the Prosecution was told by a [TEXT REDACTED] that when she reported her own rape and that of seven other women by Militia/Janjaweed, the Police told her to forget the incident had happened.¹²⁹ Another victim described [TEXT REDACTED] the plight of the women in camps as follows: “*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.*”¹³⁰

The following are examples of victim-witness accounts of rapes of members of the target groups:

Rape of members of the Fur Group

*Witness TFM-320*¹³¹

¹²⁶ Public Source, DAR-OTP-0119-0352 at 0352.

¹²⁷ Video Material, DAR-OTP-0136-0018.

¹²⁸ Public Source, DAR-OTP-0006-0076 at 0101-0102.

¹²⁹ [FOOTNOTE REDACTED]

¹³⁰ [FOOTNOTE REDACTED]

¹³¹ [FOOTNOTE REDACTED]

138. Witness TFM-320 is a Fur, [TEXT REDACTED]. West Darfur (see Annex 1). Arawala was attacked by members of the Armed Forces and Militia/Janjaweed in early December 2003. During the attack, the members of the Armed Forces and Militia/Janjaweed killed 26 civilians and completely destroyed the town. Witness TFM-320 related that some of the attacking forces captured her and other women and girls. The attackers separated the young women and girls from the group and took Witness TFM-320 group to the local military garrison. Witness TFM-320 had her 18 month-old baby with her. She stated that when they got to the military garrison, the soldiers stripped them naked. Ali Kushayb, the Militia/Janjaweed leader in the area, was then called by the soldiers, and he came to inspect the women then left. That night, men in military uniform tied the women to trees with their legs apart and continually raped them. The captors told the women: “*little dogs, this land is not for you*”. Witness TFM-320 related that she was raped by between ten and twenty-five of the members of the attacking forces on the first night. When she tried to struggle the attackers beat her with a whip. Her baby was crying through the night, and by the morning he had lost his voice. In the morning, the women were untied and, still naked, taken to another location about an hour’s walk away. Witness TFM-320 saw dead bodies on their way there, including the bodies of [NAMES REDACTED] and an old woman who was burned in her hut.

139. On the third day her baby continued to cry. One of the attackers called the baby “Jana Azaba”, which she understood to mean “the child of a whore”. He then grabbed the baby, cut his throat and smashed his head on the floor. The baby died. The other young women held with Witness TFM-320 were also beaten by the attackers and denied food. They were continually raped by soldiers on the nights that followed and kept naked for at least six days. Witness TFM-320 eventually managed to escape and made her way to Garsila. She identified seven other victims of the detention and rape [TEXT REDACTED]. She stated that three of the women detained with her – [NAMES REDACTED] – died while they were in captivity.¹³²

Rape of members of the Zaghawa Group

*Witness FAS-880*¹³³

140. [TEXT REDACTED], a Zaghawa [TEXT REDACTED]. South Darfur (see Annex 1). [TEXT REDACTED] On 12 December 2003, she was [TEXT REDACTED] in Tawila¹³⁴ (a town that is inhabited predominantly by the Zaghawa). [TEXT REDACTED] On or about 27 February 2004, members of the Armed Forces and Militia Janjaweed attacked Tawila. In the

¹³² [FOOTNOTE REDACTED]

¹³³ [FOOTNOTE REDACTED]

¹³⁴ A town in North Darfur inhabited mainly by the Zaghawa, Fur and Berti tribes (see Annex 1).

course of the attack, the Militia/Janjaweed went to the girl's boarding school and raped a number of the schoolgirls.

141. [TEXT REDACTED] in Tawila when the attack took place [TEXT REDACTED]. She observed that they were all between 8 and 13 years old – some of them so young that they did not understand what had happened to them. Several of them said they had been raped by more than one man. According to Witness FAS-880, some of the girls were bleeding and others had suffered vaginal tears and knife cuts to their limbs. Although Witness FAS-880 was unable to say how many girls were raped at the school, she stated that a later survey estimated that about 40 girls were raped. Other reports suggested that as many as 110 girls and teachers were raped¹³⁵ and that as many as 37 girls were abducted.¹³⁶ The Prosecution is also in possession of a Forensic Report and photographs obtained from the UNCOI in respect of this attack. The photographs depict one of the classrooms where the rapes allegedly occurred and appear to show female underwear strewn all over the classroom.¹³⁷

142. On 1 April 2004, [TEXT REDACTED]. They slapped and kicked her, tied her ankles and big toes together and gagged her. They left her tied to a pole and around midnight 3 men took turns raping her. She was raped continually for two consecutive nights and then released [TEXT REDACTED]. She walked for about 4 hours and managed to make her way to her friend's house. In addition to her experiences in Nyala and Tawila, Witness FAS-880 father was killed by the Militia/Janjaweed during an attack [TEXT REDACTED]. As a result Witness FAS-880 abandoned her family [TEXT REDACTED] and fled the Sudan.¹³⁸

Rape of members of the Masalit Group

*Witness JQT-993*¹³⁹

143. Witness JQT-993. [TEXT REDACTED] Two women, one of whom was Masalit, the other Tama, were raped [TEXT REDACTED] when they were searching for wood. Two other women, a Tama and a Masalit, also told Witness JQT-993 that they had been raped in the gardens between [TEXT REDACTED]. According to Witness JQT-993, all six victims were beaten and stripped before they were raped. [TEXT REDACTED] According to Witness JQT-993 he

¹³⁵ UNCOI Material, DAR-OTP-0102-0814 at 0832.

¹³⁶ UNCOI Material, DAR-OTP-0015-0165 at 0189; Public Source, DAR-OTP-0003-0185; Public Source, DAR-OTP0125-0268.

¹³⁷ Photographs, DAR-OTP-0013-0271.

¹³⁸ [FOOTNOTE REDACTED]

¹³⁹ [FOOTNOTE REDACTED]

heard of many reports of women and girls being raped in [TEXT REDACTED] when they went to pluck mangos.¹⁴⁰

144. The [TEXT REDACTED] reports also provide examples of rape and sexual assault against Masalit women and girls. In February 2006, [TEXT REDACTED] observed an increase in cases of sexual violence by Armed Forces personnel in the Masalit dominated area of [TEXT REDACTED] in West Darfur (see Annex 1). The [TEXT REDACTED] also reported that on 3 September 2006 four Masalit IDP women in [TEXT REDACTED] South Darfur were surrounded by 60 uniformed armed men, who beat the women and raped two of them.¹⁴¹ Between January and March 2007, Masalit women and girls between the ages of 15 and 60 were victims of at least eight different reported incidents of sexual and gender-based violence in a single IDP camp in West Darfur.¹⁴²

145. A [TEXT REDACTED] report documenting sexual violence from 2007 to 2008 described an incident in West Darfur where [TEXT REDACTED] an “*Arab man armed with an AK-47 assault rifle, whip, and a stick, attacked a Masalit woman and her seven-year-old daughter on a hillside. The girl escaped but he caught the mother and beat her severely. She said during the beating he shouted, ‘We stopped all the Masalit from coming to this area. How come you dared to venture out this way?’*” A Masalit woman from Habila, West Darfur informed [TEXT REDACTED]: “*Sometimes we go to collect grass, to sell in the market to buy things we need for our children. They [the Janjaweed] send two people, and the rest of them set up an ambush. They stop their car in a khor or a hill. Some of them act as guards. The two people then approach us and, 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... Last time a number of women got caught and I do not know what was done to them -- we ran.[...] 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’*.”¹⁴³

(b) Torture and inhumane and degrading treatment causing serious bodily and mental harm

146. Acts of torture and inhuman and degrading treatment have been committed with regularity against members of the target groups during the attacks on villages. In its Final Report to the

¹⁴⁰ [FOOTNOTE REDACTED]

¹⁴¹ Public Source, DAR-OTP-0147-1102 at 1105-1106 para. 22.

¹⁴² Public Source, DAR-OTP- 0147-1111 at 1115, para. 21.

¹⁴³ Public Source, DAR-OTP-0138-0006.

Security Council, the UNCOI found that “*torture has been carried out on such a large scale and in such widespread and systematic manner not only during attacks on the civilian population, where it was inextricably linked with these attacks, but also in detention centres under the authority of the NISS and the Military Intelligence.*”¹⁴⁴

147. A [DATE REDACTED] report of the [TEXT REDACTED] is also illustrative of the general pattern: [TEXT REDACTED]“*In Darfur, [TEXT REDACTED] documented nearly 100 cases of people arrested or in detention during the second half of 2005. The cases revealed a regular occurrence of a number of human rights violations. In South Darfur, [TEXT REDACTED] spoke with eighteen people who reported being tortured, subjected to humiliating or degrading treatment, or otherwise physically mistreated by National Security.... Reported abuses included beatings with electric wire, wooden sticks, and hose pipes, punching, kicking and whipping with plastic whips, being forced to lift 25 kilogram stones, being hanged upside down from a metal bar with one’s hands and legs tied whilst being beaten with electric wire, having sand forced into one’s eyes, death threats at gun point, being left in the sun for eight hours without water, burns with cigarettes, and forced consumption of large volumes of water. [TEXT REDACTED] also spoke to seven people who reported being subjected to physical abuse in the hands of Military Intelligence in South Darfur, such as hanging a detainee with an electric cable or plastic whip, beating him with sticks on his bare back, and subjecting detainees to ethnic slurs such as, ‘Hey Zaghawa, we have the right to kill you and loot your cattle’.*”

In Zalingei¹⁴⁵ (West Darfur) as well [TEXT REDACTED] documented cases of ill-treatment at the hands of National Security and Military Intelligence personnel”¹⁴⁶

The following are examples of torture of members of the target groups:

Torture of members of the Fur Group

*Witness AKB-999*¹⁴⁷

148. Witness AKB-999 is [TEXT REDACTED]. Witness AKB-999 related that [TEXT REDACTED] in [TEXT REDACTED] Darfur. [TEXT REDACTED] Between [TEXT REDACTED].he visited at least 6 IDP camps [TEXT REDACTED].

149. He stated that one of the IDP camps [TEXT REDACTED], a [TEXT REDACTED] camp in [TEXT REDACTED] Darfur. There, he [TEXT REDACTED]. [NAME REDACTED] told him that on one occasion Militia/Janjaweed from the BIU/B abducted him and at least 20 other

¹⁴⁴ UNCOI Material, DAR-OTP-0018-0010 at 0102.

¹⁴⁵ Inhabited mainly by Fur (see Annex 1).

¹⁴⁶ Public Source, DAR-OTP-0136-0263 at 0283.

¹⁴⁷ [FOOTNOTE REDACTED]

Fur men and women IDPs when they went out of the camp, accusing them of torturing an Arab. [NAME REDACTED] said their captors took them to a location approximately 5 kilometres from the camp where they were flogged, deprived of food and water for a 24-hour period, and threatened that they would be slaughtered. The abductors called them “Zurga” and told them that one Arab was equal to 20 of them. They were only released following the intervention of [TEXT REDACTED].

150. The witness also visited [TEXT REDACTED], another predominantly Fur camp in [TEXT REDACTED] Darfur. [TEXT REDACTED] a male IDP who related that he and a group of 6 other men were abducted by Militia/Janjaweed from the BIU/B when they went out to collect firewood. The abductors stripped them naked, tied them together and flogged them. All the while their abductors were saying “*you are black slaves and this is our country*”. They left them tied to trees until other IDPs came by and set them free.¹⁴⁸

Torture of members of the Zaghawa Group

*Witness QPS-888*¹⁴⁹

151. Witness QPS-888 is a Zaghawa, [TEXT REDACTED], South Darfur (see Annex 1). The inhabitants [TEXT REDACTED]. On or about 25 March 2003, members of the Armed Forces and Militia/Janjaweed, supported by at least 3 military helicopters, attacked [TEXT REDACTED]. They killed at least 25 people, including Witness QPS-888 mother, father and two brothers. Amongst other crimes that he witnessed, Witness QPS-888 stated that he was arrested and taken to the local football field near the local police station where at least 50 soldiers were detaining 60 - 65 other men. Witness QPS-888 was taken before the military commander who inquired what tribe he was from. When he responded that he was a Zaghawa, the commander said “*you are the children of dogs and you are making all this trouble*” and slapped him. The detainees were made to sit on the ground with their hands tied to their knees so that they could not move and they were detained there for four days.

152. During this time their captors beat them and burned them with burning wood. Witness QPS-888 sustained burns to his arms. He and the other men were eventually transferred to the prison in Nyala where they were detained for approximately one year. Over this period, they were fed only bread, cheese and water on alternate days and beaten repeatedly. Their cells were so small that it was impossible for all of them to lie down at the same time; as such, they had to take turns sleeping. Five of the detainees, including [NAMES REDACTED] died during their captivity. After about a year, Witness QPS-888 and a few other detainees managed to over-

¹⁴⁸ [FOOTNOTE REDACTED]

¹⁴⁹ [FOOTNOTE REDACTED]

power their captors and escape. He stayed in hiding until May 2005 when he managed to flee [TEXT REDACTED].

Torture of members of the Masalit Group

*Witness JWB-331*¹⁵⁰

153. Witness JWB-331 is a Masalit [TEXT REDACTED]. West Darfur (see Annex 1). In or around September 2003, members of the Armed Forces and Militia/Janjaweed attacked [TEXT REDACTED]. and captured him as he tried to escape with his child. One of the attackers suggested that he be shot immediately, but another suggested that they delay killing him until later. They tied his hands behind his back and one of the attackers riding a horse led him through the village by the rope he was tied with. They took him to the market and Witness JWB-331 saw that other civilians had also been captured and detained there. Their hands and legs were bound together and they were made to lie with their faces to the ground. Witness JWB-331 was tied to a tree and blindfolded.

154. The attackers hit him repeatedly. Then they untied him, removed his blindfold and took him first to his shop and then his house, demanding that he give money. When they got there he discovered that his shop had been burgled and his house had been burned down during the attack. His captors then took him to the [TEXT REDACTED]. There, he saw the dead bodies of the [TEXT REDACTED] and three others in a pool of blood. At the [TEXT REDACTED], Witness JWB-331 captors continued to hit him repeatedly and he related that he was in so much pain that he had difficulty walking. The attackers blindfolded him again and took him back to the market, where his blindfold was removed. Two of the attackers called him a slave, and made him serve them and fetch water for their horses. Witness JWB-331 managed to escape from his guard when sent to get water. He eventually fled to [TEXT REDACTED].

(c) Forcible displacement causing serious mental harm

155. Jurisprudence from the International Tribunals has recognized that forcible displacement “*in such a manner as to traumatise [the victims] and prevent them from ever returning – obliged to abandon their property and their belongings as well as their traditions and more in general their relationship with the territory they are living on, does constitute serious mental harm*”.¹⁵¹

156. The mass displacement operations in Darfur were conducted in conditions which caused serious mental harm.

¹⁵⁰ [FOOTNOTE REDACTED]

¹⁵¹ Blagojević, Trial Chamber Judgment, paras 652-654.

157. In total, forces controlled by **AL BASHIR**, by physically attacking and terrorizing the civilian population in Darfur, destroyed all means of survival, displaced approximately 2.7 million civilians¹⁵² – including a substantial part of the target groups – from lands on which they and their ancestors had been living for centuries.

158. Victims thus suffered a succession of traumas, including witnessing the burning and destruction of homes and possessions, and the killing and/or rape of their loved ones; the uncertainty and fear accompanying flight from homelands; enduring deprivation and conditions of insecurity, harassment, and intimidation in IDP camps resulting from the continued threats and violence of **AL BASHIR**'s forces and GoS agents.¹⁵³ Particularly in view of the importance that members of target groups attach to their lands, the mental harm caused by their forced displacement has been devastating. The Prosecution submits that the sequence of cumulative events described below has caused the mental harm required by Art. 6 (b).

159. Criminal acts, such as killings carried out by **AL BASHIR**'s forces against members of the target groups, have the effect of leaving surviving relatives, dependants and friends particularly traumatized. The Prosecution is in possession of video footage of a family which lost a number of its members in Darfur. Six children of the family were massacred by Militia/Janjaweed in front of their parents. As a result of the attack, both parents suffered from shock. [TEXT REDACTED].¹⁵⁴

160. After being forcibly displaced, the victims found no real refuge. They were pursued during their flights; they gathered in "sites" which for months were not organized with food, water and sanitation.¹⁵⁵

161. In the camps, they endure the anguish of learning that, in many cases, prior homelands had been occupied and resettled by members of other communities – and thus that, in practical terms, there was little or no prospect of ever returning.

162. Victims are forced to live in destitution, in what amount to no more than ramshackle shelters in IDP camps. They have been reduced to penury due to theft or destruction. Individuals who once had respect and dignity in their communities have been reduced to begging and living on hand outs from the international community.

163. Organized insecurity in and around the camps by **AL BASHIR**'s forces and agents, including through the spying and harassment by members of the HAC, has exacerbated the fear

¹⁵² Public Source, DAR-OTP-0147-0859 at 0860.

¹⁵³ Cf. Blagojević & Jokić Trial Judgment, para. 652.

¹⁵⁴ Video Material, DAR-OTP-0106-0002, running time 14:20-15-15.

¹⁵⁵ Public Source, DAR-OTP-0004-0022 at 0240-0040.

of IDPs. An IDP in [TEXT REDACTED] explained to the UNCOI that “*if [IDPs] try to get out of [TEXT REDACTED] to get to [TEXT REDACTED] officials will arrest [them]*”.¹⁵⁶ In [TEXT REDACTED], IDPs have reported feeling trapped in the camp and have explained that those who ventured out were followed by security forces. The pattern of confinement extended to camps throughout the Darfur region. In 2004, IDPs [TEXT REDACTED] were not able to leave the environs of the camp as the Janjaweed had surrounded the camp. The IDPs explained to the UNCOI that if they strayed out of the area, they were fired upon¹⁵⁷. The [TEXT REDACTED] reported that in [TEXT REDACTED], in July 2004, village elders reported to [TEXT REDACTED] that “*IDP men could not venture outside [TEXT REDACTED] for work [...] because they would be killed by Janjaweed.*”¹⁵⁸ [TEXT REDACTED] reports from January and July of 2006¹⁵⁹ and a [TEXT REDACTED] report of 2007¹⁶⁰ describe the same pattern of effective confinement.

164. Another video in the Prosecution’s possession depicts daily life in IDP camps in Darfur. In one portion, [TEXT REDACTED] is seen moulding mud walls around the shack she lives in. Asked why, she explained that this was the only way she knew to protect herself from the nightly shooting by the Militia/Janjaweed.¹⁶¹

165. Local police have contributed to the anguish and insecurity of IDPs, not only by failing to respond to complaints of abuse by **AL BASHIR**’s forces and agents, but also by affirmatively attacking camp residents. In [TEXT REDACTED] camp in [TEXT REDACTED] Darfur, in September 2004, and in [TEXT REDACTED] and [TEXT REDACTED] camps in [TEXT REDACTED] Darfur in November 2004, police shot at IDPs and employed other forms of violence.¹⁶² A Fur man interviewed in [TEXT REDACTED] camp in July 2004 said that he did not trust the Police in the camp because “*they displaced us, killed us and still continue*”.¹⁶³ Also in July 2004, a Fur man from [TEXT REDACTED] stated that he did not trust the Police and that they were not secure in the camps.¹⁶⁴

166. Mental harm suffered by children as the consequence of forced displacement is particularly significant as they represent half of the conflict-affected populations in Darfur, including

¹⁵⁶ UNCOI Material, DAR-OTP-0012-0056 at 0062.

¹⁵⁷ UNCOI Material, DAR-OTP-0025-0069 at 0074.

¹⁵⁸ UNCOI Material, DAR-OTP-0043-0099 at 0105.

¹⁵⁹ Public Source, DAR-OTP-0136-0263 at 0298; Public Source, DAR-OTP-0147-0931 at 0943.

¹⁶⁰ Public Source, DAR-OTP-0136-0163 at 0180.

¹⁶¹ Video Material, DAR-OTP-0106-0019 running time 04mins 07secs - 05mins 32secs.

¹⁶² Public Source, DAR-OTP-0139-0033 at 0338; Public Source, DAR-OTP-0002-0033 at 0035.

¹⁶³ UNCOI Material, DAR-OTP-0043-0099 at 0104.

¹⁶⁴ UNCOI Material, DAR-OTP-0043-0099 at 0104.

at least one million of those who have been displaced by fighting.¹⁶⁵ [TEXT REDACTED]¹⁶⁶ [TEXT REDACTED].

167. In 2007, a [TEXT REDACTED] study of the psychosocial effects of war experiences in Southern Darfur focused on 331 children between six and 17 years old. Seventy-five percent of the children met the criteria for post traumatic stress disorder and 38% exhibited symptoms of clinical disorder.¹⁶⁷

168. In assessing the mental harm caused to the victims, the Prosecution notes that the crimes have now been pursued for at least five years. In 2008, thus far, crimes have resulted in a further 100,000 individuals being newly displaced. Nearly 60,000 were displaced in West Darfur alone.¹⁶⁸ Civilians are forced to leave for camps where they know they will face harassment, beatings, unlawful detentions and killings, against a climate of total impunity for perpetrators guaranteed by **AL BASHIR**.

169. Not only are victims attacked by those very officials who are supposed to protect them, but their own Government regularly issues official statements denying the gravity of the situation in Darfur.¹⁶⁹ On 5 December 2007, the GoS Ambassador to the UN expressed disagreement with the notion that people were still dying in Darfur,¹⁷⁰ echoing a similar remark made by **AL BASHIR** in an open cabinet meeting sometime in July 2007 that “[m]ost of Darfur is now secure and enjoying real peace” and that “people are living normal lives.”¹⁷¹

170. Unable to rely on their own Government for protection, victims can only turn to their local leadership for support. However, as soon as leaders emerge and speak up, they become targets themselves. This further impedes the development of any form of organization that could help the displaced persons. In [TEXT REDACTED] tribal leaders were arrested by **AL BASHIR**’s forces and agents, amid rumours that Ahmad Harun was organizing the militia to infiltrate the camp. Again in October 2007, after a shooting [TEXT REDACTED], allegedly between supporters of GoS adviser Minni Minawi and supporters of SLA-Abdul Wahid al-Nour, police [TEXT REDACTED] and arrested 9 people [TEXT REDACTED]. On 20-21 October 2007, following an incident in [TEXT REDACTED] camp where IDPs allegedly killed members of

¹⁶⁵ Public Source, DAR-OTP-0142-0472 at 0489.

¹⁶⁶ [FOOTNOTE REDACTED]

¹⁶⁷ Public Source, DAR-OTP-0145-0526 at 0534 and 0543.

¹⁶⁸ Public Source, DAR-OTP-0147-1057 at 1061.

¹⁶⁹ Public Source, DAR-OTP-0139-0033 at 0314; Video Material, DAR-OTP-0136-0018; Video Material, DAR-OTP-0136-0018; Video Material, DAR-OTP-0098-0030; Video Material, DAR-OTP-0149-0002; Public Source, DAR-OTP-0147-1090 at 1095-1096.

¹⁷⁰ [FOOTNOTE REDACTED].

¹⁷¹ Public Source, DAR-OTP-0147-1065 at 1065.

AL BASHIR's forces and agents, tribal leaders were arrested. These sequences of events suggest coordinated efforts to foster instability in the larger camps and erode the legitimacy of IDP camp leaders.

171. Although the precise number of those who have suffered serious mental harm is unknown, it is clear that many have been affected, and that the impact continues. [TEXT REDACTED]¹⁷²

iii. Genocide by deliberate infliction on each target group of conditions of life calculated to bring about the physical destruction of the group in whole or in part

172. Methods of destruction other than direct killings are an integral and prominent part of **AL BASHIR**'s genocidal plan. They include subjecting the group to destruction of their means of survival in their homeland; systematic displacement from their homes into inhospitable terrain where some died as a result of thirst, starvation and disease; usurpation of the land and denial and hindering of medical and other humanitarian assistance needed to sustain life in IDP camps.¹⁷³

173. Deliberations preceding adoption of the Genocide Convention concluded that "*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*".

(a) Destruction of means of survival of members of the target groups

174. The attacks carried out by **AL BASHIR**'s forces on towns and villages across Darfur from March 2003 to the date of filing this Application were designed, not only to kill members of the target groups and forcibly displace them from their lands, but also to destroy the very means of survival of the groups as such. **AL BASHIR** forces destroyed food, wells and water pumping machines, shelter, crops and livestock, as well as any physical structures capable of sustaining life or commerce.

175. The aim was to ensure that those inhabitants not killed outright would be unable to survive without assistance.¹⁷⁴ Given Darfur's hostile desert environment and lack of infrastructure, live-

¹⁷² Public Source DAR-OTP-0147-0859; see also Public Source, DAR-OTP-0147-1057.

¹⁷³ ICC Elements of Crimes, p. 3; Rutaganda Trial Judgment, para. 52.

¹⁷⁴ The Prosecution is in possession of a) video footage taken from different parts of Darfur which shows a consistent pattern of destruction of livelihoods and all means of survival: DAR-OTP-0106-0014 (showing Darunja village); DAR-OTP-0060-0002 (showing Kornoi); DAR-OTP-0060-0005 (showing Abu Gamra village); DAR-OTP-0098-0036; DAR-OTP-0093-0018 (showing Souba village) and satellite imagery of the villages of Isma, Donkey Deris, Angabo, Gereida, Ligeodiba, Um Sidir and Bir Masa which shows the state of devastation in these villages after they were attacked (DAR-OTP-0149-0369).

lihood strategies historically have centred on the village. It is difficult to survive outside the communal setting.¹⁷⁵

176. As an example, ensuring adequate access to water has long been an essential component of livelihood strategies. To facilitate access to water by both humans and animals, many villagers dug communal wells or maintained other communal water sources. Militia/Janjaweed and the Armed Forces repeatedly destroyed, polluted or poisoned these wells¹⁷⁶ so as to deprive the villagers of water needed for survival. In a number of cases, water installations were bombed.

(b) Forcible displacement into inhospitable terrain of members of the target groups

177. After attacking them in towns and villages, **AL BASHIR**'s forces pursued thousands of fleeing members of the target groups, and displaced them into harsh desert conditions, with no potable water or animals for food, milk or transport, and where, in the absence of assistance, many succumbed to starvation, dehydration, disease and death.¹⁷⁷

178. Many witnesses interviewed by the Prosecution stated that they saw or knew of civilians who had died in the hostile environment that they had been forced into while trying to reach places of safety.¹⁷⁸ Still others died of injuries sustained when, having been injured in the prior attacks, they were unable to access medical care.¹⁷⁹

(c) Usurpation of the land of members of the target groups

179. Usurpation of the land is often the final blow to the capacity of the target groups to survive in Darfur. Land has always been identified as a key issue, by **AL BASHIR** himself. In his April 2003 address to the Armed Forces and PDF¹⁸⁰ troops at Al Fashir airport, **AL BASHIR** declared, "*I only want land.*"¹⁸¹ The DPA also fully recognized the centrality of the issue (see paragraph 390 below).

180. Having removed the target groups from their land, and destroyed their means of survival, the GoS encouraged and facilitated resettlement of the land by other ethnic groups.

181. According to one study, 87 villages in west Darfur which were predominantly Fur or Masalit prior to 2003 have since been occupied by tribes other than the target groups.¹⁸²

¹⁷⁵ Public Source, DAR-OTP-0142-0190; Public Source, DAR-OTP-0119-0635.

¹⁷⁶ Video Material, DAR-OTP-0028-0199, running time 12min 50sec or 18min 35sec.

¹⁷⁷ Public Source, DAR-OTP-0119-0635 at 0637.

¹⁷⁸ [FOOTNOTE REDACTED]

¹⁷⁹ [FOOTNOTE REDACTED]

¹⁸⁰ The Popular Defence Forces (PDF), like Sudan's other paramilitary forces – the Popular Police Force (PPF) and the Border Intelligence Force (BIF) – have played a major role in the Darfur counterinsurgency, in part through their role in integrating Militia/Janjaweed fighters into the formal state security structure.

¹⁸¹ [FOOTNOTE REDACTED]

¹⁸² Public Source, DAR-OTP-0145-0237.

182. According to [TEXT REDACTED], a document from the office of the commissioner of Kutum province, North Darfur State, dated 12 February 2004, confirms that the GoS had a plan to resettle lands from which the original inhabitants had been displaced. [TEXT REDACTED] In 2004, a Masalit [TEXT REDACTED] that the Militia/Janjaweed told him “*This land is liberated and you have no land and no right to cultivate on liberated areas*”.

183. Resettlement of others on land previously occupied by members of the target groups locked in ethnically-based land transfers. In South and West Darfur since 2003, tribes other than the target groups have settled, often with GoS acquiescence or active support,¹⁸³ on Fur and Masalit traditional lands. Some members of **AL BASHIR**'s forces, in particular members of the Militia/Janjaweed, were rewarded with land previously inhabited by members of the target groups. Some IDPs were informed by the GoS that their lands had been demarcated for new settlement. Members of the target groups who have tried to return to their homes have been attacked.¹⁸⁴

184. In [TEXT REDACTED], IDPs of predominantly [TEXT REDACTED] ethnicity (see Annex 1) reported in June 2006 that “Arabs” had settled on their farms.¹⁸⁵ Some of them reportedly saw the resettlements ongoing. In Fur areas of [TEXT REDACTED] Darfur and [TEXT REDACTED] Darfur, [TEXT REDACTED] reported in 2007 that the NCP allowed land occupation by Arab nomadic groups, particularly the Abbala and other non-land owners. [TEXT REDACTED] further reported that in [TEXT REDACTED], over 2,000 brick-houses were destroyed by Militia/Janjaweed, who built small villages in their place.¹⁸⁶

(d) Hindering of humanitarian aid to persons displaced - Subjecting members of each target group to protracted malnutrition and lack of medical care

185. Although the Sudan has grown increasingly prosperous over recent years,¹⁸⁷ and notwithstanding his knowledge of the dire conditions in the desert and the IDP camps, **AL BASHIR** has refused to provide any meaningful humanitarian assistance to the forcibly displaced since the inception of his criminal plan in 2003¹⁸⁸. On 25 June 2008, in an interview with Italian Panorama Magazine, **AL BASHIR** stated that “*Sudan is bestowed with huge natural and human resources besides the accumulated expertise a matter that enables it to help end the food*

¹⁸³ [SOURCE REDACTED]; UNCOI Material, DAR-OTP-0016-0080 at 0086; Public Source, DAR-OTP-0141-0102 at 0112.

¹⁸⁴ Public Source, DAR-OTP-0003-0005 at 0006.

¹⁸⁵ Public Source, DAR-OTP-0148-0306 at 0404.

¹⁸⁶ Public Source, DAR-OTP-0148-0461 at 0476.

¹⁸⁷ Public Source, DAR-OTP-0147-1057 at 1063.

¹⁸⁸ [FOOTNOTE REDACTED]

crisis in the world.”¹⁸⁹ Despite these huge resources and **AL BASHIR**’s claim, he denied any meaningful assistance of its own to the IDPs and consistently obstructed the provision of humanitarian aid by others.

186. In early November 2003, as mortality rates in North and West Darfur, including IDP camps, were going beyond the highest standards (between October 2003 and March 2004 the estimated mortality rates were “Low 5.9/10,000/day and High 9.5”),¹⁹⁰ [TEXT REDACTED] urged the GoS to grant full access to humanitarian organizations. [TEXT REDACTED]¹⁹¹ [TEXT REDACTED] during a visit to Darfur, [TEXT REDACTED] expressed “*shock*” at the conditions in IDP camps, and observed that denial of access was the single [greatest] impediment to humanitarian efforts in Darfur.¹⁹²

187. Two months later, when mortality remained very high, the GoS continued to insist falsely that humanitarian aid was being delivered satisfactorily.¹⁹³ However at this time, [TEXT REDACTED] only 15% of those in need were in areas that humanitarian aid could access.¹⁹⁴ In sum, between October 2003 and January 2004 the GoS almost entirely obstructed international assistance to displaced civilians and provided no aid of its own.¹⁹⁵

188. In February 2004, **AL BASHIR** finally agreed to grant access to Darfur to humanitarian organizations,¹⁹⁶ implicitly acknowledging that he had previously blocked it. But even then, aid groups were restricted to the capitals of the three Darfur States, and thus severely limited in their ability to reach vast numbers of civilians, including members of the target groups.¹⁹⁷ At that time, the GoS was still stopping international aid workers from boarding humanitarian aid flights, even though they had the requisite travel permits;¹⁹⁸ it repeatedly denied access to the affected population;¹⁹⁹ and the HAC consistently failed to deliver any meaningful aid of its own.²⁰⁰

¹⁸⁹ Public Source, DAR-OTP-0150-0240.

¹⁹⁰ Public Source, DAR-OTP-0080-0542 at 0570-0571.

¹⁹¹ Public Source, DAR-OTP-0115-0742; Public Source, DAR-OTP-0141-0160.

¹⁹² Public Source, DAR-OTP-0141-0159.

¹⁹³ Public Source, DAR-OTP-0141-0175.

¹⁹⁴ Public Source, DAR-OTP-0141-0175.

¹⁹⁵ Public Source, DAR-OTP-0003-0185.

¹⁹⁶ Public Source, DAR-OTP-0003-0185.

¹⁹⁷ Public Source, DAR-OTP-0141-0179.

¹⁹⁸ Public Source, DAR-OTP-0107-1076.

¹⁹⁹ Public Source, DAR-OTP-0141-0165.

²⁰⁰ Public Source, DAR-OTP-0141-0162; Public Source, DAR-OTP-0141-0177.

189. **AL BASHIR** has also denied humanitarian workers basic security, and needed protection for aid to be delivered.²⁰¹ [TEXT REDACTED]²⁰² [TEXT REDACTED]²⁰³ In March 2005, Foreign Minister Mustafa Osman Ismail threatened the 800 to 1,000 international humanitarian workers in Darfur by warning that referrals to a criminal court could lead to “*a direct threat to the foreign presence... Darfur may become another Iraq in terms of arrests and abductions.*”²⁰⁴

190. On 4 August 2005, a Presidential decree entitled “Organisation of Humanitarian Voluntary Work Act, 2005” was signed by **AL BASHIR** which significantly restricted the work of NGOs, requiring them to obtain approval from the Minister of Humanitarian Affairs in order to receive money from abroad, and allowing the Minister to refuse them registration for no reason at all. The decree was adopted by the Sudanese Parliament on 18 February 2006.

191. Even subsequently, after **AL BASHIR** had promised to allow greater access for humanitarian agencies, obstructions continued and those denouncing them were systematically targeted. [TEXT REDACTED]²⁰⁵ [TEXT REDACTED]

192. On 31 August 2007, notwithstanding that the humanitarian operation in Darfur was the world’s largest,²⁰⁶ involving more than 12,000 aid workers;²⁰⁷ [TEXT REDACTED]²⁰⁸ Also in August 2007, [TEXT REDACTED] reported that malnutrition in Darfur was increasing.²⁰⁹

193. [TEXT REDACTED]²¹⁰

194. [TEXT REDACTED]²¹¹ [TEXT REDACTED]²¹²

195. [TEXT REDACTED]²¹³ [TEXT REDACTED] many as 300,000 people may have died.²¹⁴

196. [TEXT REDACTED]²¹⁵

²⁰¹ Public Source, DAR-OTP-0141-0162; Public Source, DAR-OTP-0141-0177.

²⁰² Public source, DAR-OTP-0080-0283.

²⁰³ Public source, DAR-OTP-0150-0037.

²⁰⁴ Public source, DAR-OTP-0148-0252 at 0252.

²⁰⁵ [FOOTNOTE REDACTED]

²⁰⁶ Public Source, DAR-OTP-0147-0891 at 0892; Public Source, DAR-OTP-0147-0889 at 0889-0890.

²⁰⁷ Public Source, DAR-OTP-0147-0891 at 0891.

²⁰⁸ Public Source, DAR-OTP-0147-0889 at 0889; Public Source, DAR-OTP-0147-0891 at 0891.

²⁰⁹ Public Source, DAR-OTP-0147-0891 at 0891.

²¹⁰ Public Source, DAR-OTP-0141-0552 at 0567.

²¹¹ Public Source, DAR-OTP-0147-1099 at 1099-1101.

²¹² Public Source, DAR-OTP-0147-1057 at 1063.

²¹³ Public Source, DAR-OTP-0147-1057 at 1061.

²¹⁴ Public Source, DAR-OTP-0147-1068; Public Source, DAR-OTP-0147-1069; see also Public Source, DAR-OTP-0147-1072.

²¹⁵ Public Source, DAR-OTP-0147-1074; Public Source, DAR-OTP-0147-1076.

197. In [TEXT REDACTED], in May 2008, it was noted that nutritional indicators were above emergency thresholds for the first time since 2005.²¹⁶

198. [TEXT REDACTED] The Sudanese Media Centre reported that the decision to cease the activities of these humanitarian organizations was on the grounds that “*these organizations don’t have a technical agreement which entitles them to exercise basic activities in the province, and that some of the organisations conduct missionary activities.*”

The following are examples of conditions of life imposed on IDPs:

Infliction on the Fur group of conditions calculated to bring about its destruction

*Kailek, South Darfur - 2004*²¹⁷

199. Kailek is a small town in Kass Locality, South Darfur, with a predominantly Fur population of approximately 5,000 (see Annex 1). In February 2004 members of the Armed Forces and Militia/Janjaweed carried out a series of attacks on nearby Shattaya town and its surrounding villages displacing thousands of civilians to Kailek, such that by March 2004 the population of Kailek had swelled to 17,000 inhabitants.²¹⁸

200. On or around 9 March 2004 members of the Armed Forces and Militia/Janjaweed, supported by military airplanes also attacked Kailek. The attacking forces shot and killed some civilians while others were captured or surrendered and were summarily executed. The conditions that **AL BASHIR**’s forces and agents imposed in Kailek, following this attack, exemplified the conditions of life that were inflicted on victims of other attacks in Darfur once they had been displaced from their towns and villages. After the attack, the attackers went through the town systematically destroying properties, vegetation and water sources.²¹⁹ For approximately 2 months, they confined the displaced civilians to a small square in the centre of Kailek surrounded by Militia/Janjaweed in deplorable conditions. Many of the Militia/Janjaweed were in military uniforms.

201. In April 2004, a [TEXT REDACTED] reported that basic amenities like food, water and firewood were located far from the square (location where the IDPs were confined) and IDPs had to pay their captors to access them. The IDPs had to urinate and defecate in the same place which had become infested with maggots and worms. Men were harassed, tortured and beaten while women and girls were abducted and taken away to be raped. Hundreds of these women and girls subsequently became pregnant or died as a result of the brutality that accompanied the

²¹⁶ Public Source, DAR-OTP-0147-1077 at 1080.

²¹⁷ UNCOI Material, DAR-OTP-0018-0010 at 0078; UNCOI Material, DAR-OTP-0012-0105 at 0105-0107.

²¹⁸ UNCOI Material, DAR-OTP-0030-0066 at 0067.

²¹⁹ [SOURCE REDACTED]; Public Source, DAR-OTP-0010-0183 at 0185.

rape. A witness subsequently spoke [TEXT REDACTED], who had been raped during this period and had given birth to “Janjaweed babies”.²²⁰ The [TEXT REDACTED] found the death rates in Kailek to be 40 to 150 times higher (by age group) than those denoting an “*emergency*.”²²¹ An official [TEXT REDACTED] described that the mortality rate for children under five years of age was astronomical, with five children dying daily.²²² At the same time, humanitarian aid was being restricted.

202. Many civilians were executed throughout this period and others died of starvation daily. **AL BASHIR**'s forces and agents took control of the wells, preventing villagers from accessing them. [TEXT REDACTED]. 76 women were raped, 680 civilians killed and a further 330 had died from diseases over this period.²²³ He stated that approximately 1,700 people were killed or missing presumed dead following the attack.²²⁴ After Kailek was attacked, IDPs who had taken refuge there were displaced yet again, many internally to surrounding towns like [TEXT REDACTED].²²⁵

Infliction on the Zaghawa group of conditions calculated to bring about its destruction
Kutum, North Darfur - 2003

203. Kutum town is located in Kutum Locality, North Darfur and had a mixed population of 33,000²²⁶ comprising mainly Zaghawa, Tunjur, Fur, Kanein, and Fellata (see Annex 1). Some Arab tribes also lived there, although they were mainly nomadic and lived outside the town.²²⁷ Witness JPL-640, [TEXT REDACTED]. He related to the Prosecution that following a rebel attack on military and other GoS locations on or about 2 August 2003; the Armed Forces based in Kutum were forced to retreat. The rebels stayed on in the town for a day or so and then left.²²⁸

204. A few days later, on or about 4 August 2003, members of the Armed Forces accompanied by Militia/Janjaweed attacked the town. Witness JPL-640 [TEXT REDACTED].²²⁹ Witnesses later testified [TEXT REDACTED] that 42 civilians were killed and at least 18 wounded dur-

²²⁰ [FOOTNOTE REDACTED]

²²¹ Public Source, DAR-OTP-0030-0066.

²²² [FOOTNOTE REDACTED]

²²³ [SOURCES REDACTED]; see also UNCOI Material, DAR-OTP-0014-0293 at 0095-0098; see also UNCOI Material, DAR-OTP-0012-0112).

²²⁴ [FOOTNOTE REDACTED]

²²⁵ [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0030-0058 at 0060; DAR-OTP-0001-0004; DAR-OTP-0017-0012.

²²⁶ NCOI Material, DAR-OTP-0036-0348, translation at DAR-OTP-0036-0353.

²²⁷ [FOOTNOTE REDACTED]

²²⁸ [FOOTNOTE REDACTED]

²²⁹ [FOOTNOTE REDACTED]

ing the attack on Kutum town.²³⁰ [TEXT REDACTED] reported that thousands of civilians who fled Kutum following the attack either took refuge in surrounding villages or tried to reach Al Fashir some 80 kilometres away. Only few got as far as Al Fashir and most were stranded halfway between both towns, *“living under trees, without any means of subsistence and were in desperate need of food, shelter and clothing”*.²³¹ A witness visited Kutum in April 2004 and related that a woman IDP expressed her fear of leaving the camp in the following terms: *“Young girls can't leave the camp. We are scared to send them out. They rape them. We can't send the young men out because they will kill the men”*.²³² [TEXT REDACTED]²³³

205. In August 2007 an assessment of the livelihoods of IDPs in [TEXT REDACTED] camps, all within proximity of [TEXT REDACTED] town,²³⁴ revealed that although the camps were far from [TEXT REDACTED] town, all had IDPs from [TEXT REDACTED] and surrounding villages. All the camps had sizeable Zaghawa IDP populations: [TEXT REDACTED] - 10%; [TEXT REDACTED] - 25% and [TEXT REDACTED] - 30%. The report further found that above emergency levels of Global Acute Malnutrition (“GAM”) had been reported in [TEXT REDACTED] camps since 2004. In June 2004, the reported GAM was 39 percent, above the emergency threshold of 15 percent, and in June 2007 it was 30.4 percent. The Crude Mortality Rate (“CMR”) in June 2004 exceeded 2/10,000/day (above the benchmark of 1, indicating an emergency situation), and the Under-five mortality rate (“U5MR”) in June 2004 was near 7/10,000/day, far from the emergency threshold of 2/10,000/day (The average U5MR for Sub-Saharan Africa is 1.2/10,000 children/day). The report stated: *“Of more concern is the rate among children 6–29 months which is significantly higher at above 40%. Without prompt response, the effects of this situation may become irreversible.”* It found that one of the factors contributing to this high malnutrition was *“insecurity resulting from increased fighting which meant that IDPs cannot pursue some of their income earning livelihood strategies such as employment outside of [TEXT REDACTED] town, collection of firewood also affected by denuding in the perimeter around the camps.”*²³⁵

Infliction on the Masalit group of conditions calculated to bring about its destruction
[TEXT REDACTED]. *West Darfur*

²³⁰ NCOI Material, DAR-OTP-0063-0417.

²³¹ Public Source, DAR-OTP-0002-0207 at 0243.

²³² [FOOTNOTE REDACTED]

²³³ Public Source, DAR-OTP-0006-0182 at 0188-0189.

²³⁴ Public Source, DAR-OTP-0150-0157.

²³⁵ Public Source, DAR-OTP-0150-0157 at 0194.

206. [TEXT REDACTED].a predominantly Masalit town in [TEXT REDACTED].West Darfur (see Annex 1). By December 2003, the inhabitants [TEXT REDACTED]. comprised mainly of internally displaced persons [TEXT REDACTED].and civilians fleeing attacks on neighbouring towns and villages. The main languages spoken in the camp were Arabic, Masalit, Fur, Tama and Daju.²³⁶ On 21 June 2004 [TEXT REDACTED] reported that prior to December 2003 the population [TEXT REDACTED] was 5,000. However the population later swelled considerably due to the influx of 75,000 displaced persons.

207. The Prosecution is in possession of video footage [TEXT REDACTED]²³⁷ narrated by [NAME REDACTED] which portrayed living conditions of IDPs in a number of IDP camps across Darfur. [TEXT REDACTED] 2004, [NAME REDACTED] documentary shows numerous IDPs and the desperate conditions within the camp. From the documentary, the IDPs' homes appear to have been constructed from very basic materials like plastic sheeting propped up with sticks. [NAME REDACTED] commented that at the time of recording, the IDPs were receiving food aid for the first time in weeks. In particular, the documentary depicts the experience of an IDP woman [NAME REDACTED] and her 10 month-old daughter, [NAME REDACTED]. [NAME REDACTED] was visibly malnourished and [NAME REDACTED] commented that she was in pain as a result of slow starvation. [NAME REDACTED] herself related through an interpreter that she was displaced to Mornei camp after Arabs attacked her village, killed children and burnt everything. She said her brother was also shot as he tried to escape. The documentary shows other malnourished children within the camp and [NAME REDACTED] commented that the GoS was using bureaucracy as a tool to block the delivery of foreign aid. She stated that a quarter of the children in the camp were malnourished and that the GoS was well aware of this. According to her, a child was dying every night and as darkness fell, she could hear the screams of the children's mothers.

208. In [TEXT REDACTED] 2004, a [TEXT REDACTED] visited [TEXT REDACTED] and reported that the number of displaced persons in the camp was 64,000, with a resident population of 10,000.²³⁸ Also in [TEXT REDACTED] 2004, [NAME REDACTED] returned to [TEXT REDACTED].She narrated that most of the IDPs she had met on her earlier visit had since died. According to her, the IDPs were now dying at the rate of 40 every week. [TEXT REDACTED]²³⁹ The same month, [TEXT REDACTED] reported that the results of health and

²³⁶ [FOOTNOTE REDACTED]

²³⁷ [FOOTNOTE REDACTED]

²³⁸ [FOOTNOTE REDACTED]

²³⁹ Video Material, DAR-OTP-0028-0201 running time 15:40-19:36.

nutrition surveys conducted among the IDPs were alarming. His report quoted [TEXT REDACTED]²⁴⁰ [TEXT REDACTED] also stated that as of June 2004 up to 200 people were dying in [TEXT REDACTED] every month from violent acts, starvation and disease.²⁴¹ In August 2006, the critical water and sanitation condition in [TEXT REDACTED] became so severe that it led to an outbreak of diarrhoea. Four IDPs died and twenty were being treated at the camp.²⁴² A week later, [TEXT REDACTED] reported that the number of deaths caused by the acute watery diarrhoea reached 6 out of 36 people affected.²⁴³ In September 2004, [TEXT REDACTED] also reported that the [TEXT REDACTED] was surrounded by Janjaweed, causing general insecurity around the camp. On 15 September 2004, human rights monitors from [TEXT REDACTED] interviewed four women IDPs in the camp - three Masalit and one Fur – who said that they had been whipped by armed men when they left the camp to collect firewood.²⁴⁴ In January 2006, in a meeting with [TEXT REDACTED], some Sheikhs in the camp reported that Militia/Janjaweed were patrolling all of the areas outside the camp and threatening IDPs who ventured out to farm or collect firewood and grass.²⁴⁵ And in March 2007, [TEXT REDACTED] raised concern about the continued insecurity outside [TEXT REDACTED] and the attacks and rapes of women IDPs. [TEXT REDACTED]

1.4. The conduct took place in the context of manifest pattern of similar conduct directed against each group and was conduct that could itself effect such destruction

209. The Prosecution must show that, as to each genocidal *actus reus*, the conduct took place in the context of a manifest pattern of similar conduct directed against each target group. The magnitude, consistency and planned nature of the crimes detailed in this Application unequivocally demonstrate that the alleged acts of genocide took place in the context of a manifest pattern of similar conduct, in furtherance of **AL BASHIR**'s plan to destroy in substantial part each of the target groups.

2. Crimes Against Humanity

210. The criminal conduct which forms the basis of charges of genocide in this Application simultaneously constitutes a basis for crimes against humanity charges.²⁴⁶

²⁴⁰ Public Source, DAR-OTP-0149-0537.

²⁴¹ Public Source, DAR-OTP-0149-0529 at 0529.

²⁴² [FOOTNOTE REDACTED]

²⁴³ [FOOTNOTE REDACTED]

²⁴⁴ Public Source, DAR-OTP-0011-0280 at 0282-0283.

²⁴⁵ [FOOTNOTE REDACTED]

²⁴⁶ The jurisprudence of the International Criminal Tribunals permit charging the same set of facts simultaneously as genocide and crimes against humanity.

2.1. Applicable Law

211. In order to establish that a crime against humanity has been committed under Art. 7 of the Statute, the Prosecution must prove that (i) the perpetrator committed a prohibited act under Art. 7(1); (ii) the conduct was committed as part of a widespread or systematic attack directed against a civilian population, and (iii) the perpetrator knew that the conduct was part of, or intended to be part of, such an attack. This section addresses elements (i) and (ii) above. Element (iii), concerning knowledge and intent, is addressed, in section VI.6 *infra*.

2.2 Prohibited Acts under Art. 7(1)

212. The following are examples of attacks carried out by members of the Armed Forces and Militia/Janjaweed against the civilian population in Darfur between 2003 and 2008. While these attacks are evidence of genocide, they support as well the following crimes against humanity charges: murder (Art. 7(1)(a)); extermination (Art. 7(1)(b)); forcible transfer of population (Art. 7(1)(d)); torture (Art. 7(1)(f)); and rape (Art. 7(1)(g)).

Attacks in 2003, West Darfur: August - December 2003

213. From early August 2003 to in or around December 2003, the Armed Forces and Militia/Janjaweed carried out attacks on several predominantly Fur towns and villages in Wadi Salih, Mukjar and Garsila-Deleig Localities of West Darfur (see Annex 1). Forces led by Kushayb and Lt. Hamdi attacked Kodoom,²⁴⁷ Bindisi²⁴⁸ and Mukjar town²⁴⁹ and surrounding villages in August 2003. They also attacked Arawala in December 2003.²⁵⁰ During these attacks, the members of the Armed Forces and Militia/Janjaweed killed members of the civilian population from these towns and villages, raped the women, burnt down the villages and looted properties of the inhabitants including their livestock. There were no rebel forces in these villages when they were attacked.²⁵¹ These attacks already form the basis of charges contained in the Arrest Warrants issued by PTC I against Harun and Kushayb on 27 April 2007. In issuing those Arrest Warrants, PTC I found that the information about these attacks contained in documents provided by the Prosecution provided “reasonable grounds to believe that during the period relevant to the Prosecution Application [i.e., from in or about 15 August 2003 to in or about March 2004], the specific elements of crimes against humanity within the jurisdiction of the

²⁴⁷ [SOURCE REDACTED]; Public Source, DAR-OTP-0090-0173 at 0182; [SOURCE REDACTED].

²⁴⁸ [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0014-0213 at 0213; UNCOI Material, DAR-OTP-0015-0116 at 0120; [SOURCES REDACTED].

²⁴⁹ Public Source, DAR-OTP-0002-0068 at 0090; UNCOI Material, DAR-OTP-0021-0209 at 0212.

²⁵⁰ [SOURCES REDACTED]; NCOI Material, DAR-OTP-0116-0568 at 0604; UNCOI Material, DAR-OTP-0014-0208 at 0209-0210; [SOURCE REDACTED].

²⁵¹ [SOURCES REDACTED]; Public Source, DAR-OTP-0090-0173 at 0180.

Court were met under [inter alia] Art. 7(1)(a) [murder], 7(1)(d) [forcible transfer of population], 7(1)(f) [torture] ... [and] 7(1)(g) [rape] of the Statute.”²⁵²

(a) Murder

214. Kodoom - At least 32 civilians were killed during the two attacks on the four Kodoom villages on or about 15 August and on or about 31 August 2003. Those killed include [NAMES REDACTED].²⁵³

215. Bindisi was also attacked on or about 15 August 2003. The attacking forces went from house to house searching for residents and killed over 100 civilians²⁵⁴ including thirty children including [NAMES REDACTED]²⁵⁵.

216. Mukjar town was attacked on or about 17 August 2003, when the attacking forces shot and killed at least seventy civilians.²⁵⁶ Between August 2003 and March 2004, Kushayb and members of the Armed Forces also executed at least 73 men comprising teachers, civil servants and local sheikhs who were arrested and detained in Mukjar including [NAMES REDACTED].²⁵⁷ A witness compiled a list of 185 names of those executed in and around Mukjar during this period. On one occasion between August and September 2003, a Sudanese military aircraft dropped bombs on the town killing at least forty civilians.²⁵⁸

217. Arawala was attacked on or around 10 December 2003. The attackers killed at least 26 civilians including [NAMES REDACTED].

(b) Rape

218. Bindisi - During the attack on Bindisi, the attackers raped at least 17 women. A witness saw three girls – [NAMES REDACTED] being raped.²⁵⁹ Another witness, Witness ZPX-742, who was also raped witnessed other girls being raped including [NAMES REDACTED] all aged between 17 and 22 years old.²⁶⁰

219. Arawala. The attacking forces captured and detained a group of women, including Witness TFM-320, [NAMES REDACTED] at the local military garrison where they stripped the women naked and Ali Kushayb came to inspect them. The soldiers then raped the women con-

²⁵² Decision of Pre-Trial Chamber I, 27 April, 2007, ICC-02/05-01/07-1, para. 75.

²⁵³ [FOOTNOTE REDACTED]

²⁵⁴ [FOOTNOTE REDACTED]

²⁵⁵ [FOOTNOTE REDACTED]

²⁵⁶ Public Source, DAR-OTP-0002-0068 at 0090; UNCOI Material, DAR-OTP-0021-0209 at 0212.

²⁵⁷ [FOOTNOTE REDACTED]

²⁵⁸ [FOOTNOTE REDACTED]

²⁵⁹ [FOOTNOTE REDACTED]

²⁶⁰ [FOOTNOTE REDACTED]

tinuously over several days. Three of the women - [NAMES REDACTED] - died while they were in captivity²⁶¹ (see paragraphs 138-139 above).

(c) Torture

220. Following the attack on Mukjar town, civilians were arrested and detained in various locations in Mukjar town on suspicion of involvement in rebel activities. They were beaten and tortured and some subsequently executed. Some were taken to Ali Kushayb's base at the old police station in Mukjar town where they were verbally abused during interrogation, beaten and tortured. [TEXT REDACTED].was detained and tortured at the "new" police station following his arrest on 25 August 2003 and related that he was detained by the Armed Forces in a room with about sixty other men. All of the men were restrained in different ways. Some of them, [TEXT REDACTED] were bound with ropes hanging from the ceiling leaving them suspended in the air with arms outstretched. Her uncle had a stove left burning between his legs. Other detainees were restrained in similar ways. They all had whip marks on their bodies and their clothes were torn and blood-stained.²⁶²

(d) Forcible Transfer

221. During the attack on Kodoom on or about 15 August the attacking forces burnt approximately 116 houses. In Bindisi and in Arawala, they destroyed the villages. In addition, in Kodoom, Bindisi, Mukjar and Arawala, the attacking forces looted property and personal belongings of the inhabitants including their livestock. As a result of the attacks on Kodoom and other surrounding villages many of the civilians fled to Bindisi, which was also attacked on or about the 15 and 16 August 2003 – forcing a total of approximately 34,000 civilians to flee to the hills and to nearby towns like Mukjar town.²⁶³ On 17 August 2003, Mukjar town was also attacked, when its population had swelled from about 7,000 to about 40,000. When Arawala was also attacked in December 2003, the inhabitants were forced to flee to Mukjar, Garsila and Deleig towns leaving Arawala deserted.²⁶⁴

Attacks in 2004 - South Darfur: February – March 2004 (see paragraphs 199-202)

Attacks in 2005-2006 - South Darfur: November 2005 - September 2006

222. Buram Locality is in South Darfur (see Annex 1) and in November 2005 had a mixed population of Arab Habania, Falata, Zaghawa, Masalit, Misserya Jebel, Tama and Fur. Be-

²⁶¹ [FOOTNOTE REDACTED]

²⁶² [FOOTNOTE REDACTED]

²⁶³ UNCOI Material, DAR-OTP-0038-0060 at 0065, Video Material, DAR-OTP-0124-0715.

²⁶⁴ NCOI Material, DAR-OTP-0116-0568 at 0604.

tween November 2005 and September 2006, Militia/Janjaweed and members of the Armed Forces carried out at least 11 separate attacks on between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality.²⁶⁵ Some attacks were by Militia/Janjaweed alone, while others were joint with the Armed Forces. One such attack was by Militia/Janjaweed on 6 Masalit villages south of Gereida on or about 16 February 2006. From on or about 28 August 2006 to on or about 30 August 2006, heavily armed Militia/Janjaweed and members of the Armed Forces also attacked approximately 47 mainly Zaghawa, Masalit and Misserya Jebel villages, systematically killing and looting livestock and displacing the population.

(a) Murder

223. At least 512 civilians were killed in the course of the attacks on towns and villages in Buram Locality during this period. Civilians attempting to flee the villages were shot at and in some cases captured and then killed.

(b) Forcible Transfer

224. Villages and towns were pillaged and destroyed following these attacks displacing approximately 60,000 civilians to IDP camps in Gereida and other areas.²⁶⁶

Attacks in 2007-2008

South Darfur: October 2007

225. Muhajeria town is located in the Yasin locality in South Darfur (see Annex 1) and had a mixed population of Reizegat, Baggara, Abbala, Ma'alia Bergid, Berti, Dajo, Zaghawa and Dinka. On or about 8 October 2007, Militia/Janjaweed and members of the Armed Forces supported by military airplanes attacked Muhajeriya, killing approximately 40 civilians. They burned houses and the market and looted the western part of the town and displaced the civilian population.

(a) Murder

226. Approximately 40 civilians were killed during the attack on Muhajeriya.

(b) Forcible Transfer

227. The attacking forces burned the houses and the market and looted the western part of the town. Approximately 15,000 people were forced to flee Muhajeria. Several thousands of people sought refuge on the outskirts of the town and its surrounding bush. Approximately 900 civil-

²⁶⁵ Public Source, DAR-OTP-0138-0024.

²⁶⁶ DAR-OTP-0108-0562, para 32.

ians from Muhajeria ended up in Zam Zam IDP camp in Al Fashir, while others went to Shangil Tobayi and Farshar village.

Kulbus locality, West Darfur: January - February 2008

228. Kulbus locality is in West Darfur (see Annex 1). On 7, 12 and 24 January 2008, respectively, members of the Armed Forces, supported by military airplanes, together with the Militia/Janjaweed led by Col. Shukurtallah, carried out attacks around Saraf Jidad, a town of about 15,000 inhabitants. In early February 2008, Minister of Defence Hussein visited the BIU/B base in Al Geneina and promised the forces weapons and funds. A few days later, on 8 February 2008, Col. Shukurtallah led Militia/Janjaweed and members of the Armed Forces supported by military aircraft and launched an attack on three major towns of the 'northern corridor' - from Al Geneina to Jebel Moon - Abu Suruj, Sirba and Silea, resulting in at least 90 deaths and displacement of 40,000 people to Jebel Moon and across the border to Chad.

229. Abu Suruj is a town with a population of 18,000, located about 30 kilometres northwest of Al Geneina. The attack started around 8 a.m. with an aerial bombardment supported by at least two helicopters which dropped bombs in and around the town, forcing many civilians to flee to Jebel Moon.²⁶⁷ Around one hour and a half later, the soldiers and Militia/Janjaweed entered the town shooting in the air and directly at people, setting fire to houses, and looting livestock and property.²⁶⁸ On the same day, members of the Armed Forces and Militia/Janjaweed raided Sirba, about 15 kilometres east of Abu Suruj, on horses and camels and in military vehicles. Upon entering the village the attackers started firing indiscriminately at civilians and then proceeded to systematically loot and set houses ablaze.²⁶⁹ On the evening of 8 February, the GoS aircraft bombed Silea, a predominantly Erenga and Messeriya Jebel town northeast of Sirba (65 kilometres north of Al Geneina), with a population of approximately 10,000. Following the aerial bombardment, attackers wearing green camouflage uniforms entered the village on horses, camels and in cars, and began shooting at people, looting homes and shops and setting them on fire.²⁷⁰

230. While at the end of December 2007, JEM forces had taken control of Sirba, Silea, Abu Suruj and Saraf Jidad area, their occupation of the area had been very brief. Residents of Saraf Jidad attest that JEM never maintained a presence inside the village.²⁷¹ Inhabitants of Abu Suruj

²⁶⁷ Public Source, DAR-OTP-0136-0369 at 0373.

²⁶⁸ Public Source, DAR-OTP-0143-0273 at 0291; Public Source, DAR-OTP-0136-0369 at 0373.

²⁶⁹ Public Source, DAR-OTP-0136-0369 at 0374; Public Source, DAR-OTP-0143-0273 at 0292-0294.

²⁷⁰ Public Source, DAR-OTP-0136-0369 at 0375; Public Source, DAR-OTP-0143-0273 at 0294-0296.

²⁷¹ Public Source, DAR-OTP-0136-0369 at 0371.

similarly relate that JEM forces remained in town for only two days.²⁷² Likewise, JEM's occupation of Silea had lasted for about a week only.²⁷³ Thus, the eyewitness accounts suggest that there was no rebel presence in these towns at the time of the attacks and the attacks were exclusively aimed at destroying the villages and targeting and terrorizing the civilian population inhabiting the area.²⁷⁴

231. Ten days later, between 18 and 22 February 2008 the Armed Forces attacked rebel positions and civilian centres in Jebel Moon and nearby areas which were hosting displaced civilians from the 8 February attacks on Abu Suruj, Sirba and Seleia.²⁷⁵ During the aerial bombardments, the GoS Antonov aircraft dropped at least five bombs in Aro Sharow, and an additional eight bombs on Kandare and Kurlongo. During these attacks, at least 11 villages were aerially bombed.

(a) Murder

232. In Saraf Jidad – between 24²⁷⁶ and 26²⁷⁷ civilians, including women, children and the Umdah were killed. Of these, 6 were burned alive in their houses.

- In Silea – at least 20 civilians including women and children were killed.²⁷⁸ The attackers shot and killed a pregnant woman [NAME REDACTED], who lost her unborn twins as a result.
- In Abu Suruj – the attackers killed from 28²⁷⁹ to at least 30²⁸⁰ civilians, including a woman, two children and a 75-year-old blind woman.
- In Sirba – the attackers killed from 42²⁸¹ to 45²⁸² civilians, including the Umdah, the local school head, the elderly, women and children.
- In Jebel Moon – the attackers killed at least 20 civilians including women, children and babies. Among those killed were [NAME REDACTED] baby and her father.²⁸³

(b) Rape / other sexual violence

- In Sirba – the attackers raped at least 10 girls aged between 9 and 18 years old. A witness saw four girls taken to an abandoned hut and raped at gun point by a group of soldiers.²⁸⁴

²⁷² Public Source, DAR-OTP-0136-0369 at 0371.

²⁷³ Public Source, DAR-OTP-0143-0273 at 0286.

²⁷⁴ Public Source, DAR-OTP-0143-0273 at 0279 and 0290.

²⁷⁵ Public Source, DAR-OTP-0136-0369 at 0375.

²⁷⁶ Public Source, DAR-OTP-0143-0273 at 0287.

²⁷⁷ Public Source, DAR-OTP-0136-0369 at 0372.

²⁷⁸ Public Source, DAR-OTP-0143-0273 at 0294.

²⁷⁹ Public Source, DAR-OTP-0147-0960 at 0960-0961.

²⁸⁰ Public Source, DAR-OTP-0143-0273 at 0277; Public Source, DAR-OTP-0136-0369 at 0373.

²⁸¹ Public Source, DAR-OTP-0147-0960 at 0961.

²⁸² Public Source, DAR-OTP-0136-0369 at 0374.

²⁸³ Public Source, DAR-OTP-0143-0273 at 0297-0299.

- Silea – After the attack on Silea, GoS soldiers who had been deployed in the town raped an 11 year old girl on 14 March 2008.

(c) Torture

- Jebel Moon – the attackers arrested 20 men from Aro Sharow, Goz Minu and other locations in the mountain, beat them severely and transported them to Silea. Security officials took the group to Al Geneina and Al Fashir, and interrogated them. They were released without being charged a month later.

(d) Forcible transfer

- Saraf Jidad – the attackers looted and destroyed property, pillaged, and vandalized the local clinic. They also set houses, shops and milling machines on fire and burned food reserves. Almost half the village was burned down and most of the villagers forced to flee to Tendelti, Geneina and Armankol and the village was abandoned.²⁸⁵
- Sirba – the attackers looted goods, supplies, milling machines, vehicles and the offices of four NGOs. They burned shops, huts and almost half of the town; several thousand civilians fled Sirba.²⁸⁶ An estimated 160 shops were looted and burned.²⁸⁷
- Silea – almost entire population of Silea, about 10,600 people, was forced to flee to Jebel Moon or Chad.²⁸⁸ An estimated 40 percent of the village was burned down; [TEXT REDACTED].²⁸⁹
- Abu Suruj – the attacking forces burned huts, looted livestock and property and an INGO medical centre, and stole two of the [TEXT REDACTED] vehicles. Over 75 percent of the town was burnt down and approximately 13,600 civilians were forced to flee to Jebel Moon or to Birak area in Chad.²⁹⁰
- Jebel Moon – the attackers looted properties, livestock and food supplies and burned houses. Approximately 3,000 civilians were displaced to Chad and the mountains.²⁹¹

Shegeg Karo and al-Ain areas, North Darfur - 5 May 2008

233. Shegeg Karo is a town in North Darfur (see Annex 1). On 5 May 2008, a market day, the Armed Forces launched an aerial attack on the town. They dropped approximately 30 bombs on

²⁸⁴ Public Source, DAR-OTP-0136-0369 at 0374.

²⁸⁵ Public Source, DAR-OTP-0136-0369 at 0372 -0373; Public Source, DAR-OTP-0143-0273 at 0287.

²⁸⁶ Public Source, DAR-OTP-0147-0960 at 0961; Public Source, DAR-OTP-0136-0369 at 0374.

²⁸⁷ Public Source, DAR-OTP-0143-0273 at 0294.

²⁸⁸ Public Source, DAR-OTP-0136-0369 at 0375 .

²⁸⁹ Public Source, DAR-OTP-0136-0369 at 0375.

²⁹⁰ Public Source, DAR-OTP-0136-0369 at 0373.

²⁹¹ Public Source DAR-OTP-0150-0027 .

the market and near the primary school, killing 11 civilians, including 7 children and wounding 27 civilians, including 4 children and 2 women. On the same day the Armed Forces bombed the market area of al-Ain, east of Jebel Midoub, in al-Malha district killing 3 children and wounding 10 others. The villages of Um Sidir and Ein Bassar were also bombed in the course of this attack.

234. On [TEXT REDACTED] the bombings of Umm Siddir, Ein Bassar and Shegeg Karo villages in North Darfur [TEXT REDACTED] stated that in particular “*the bombing of a school, water installations and a market ...* [TEXT REDACTED].”

Extermination arising from attacks 2003 – 2008

235. The prohibited act of extermination requires proof of two distinct elements: (i) one or more persons were killed, including by inflicting conditions of life calculated to bring about the destruction of part of a population; and (ii) the conduct constituted, and took place as part of, a mass killing of members of a civilian population. The evidence summarized in Section VI.2.2, supra, fully satisfies these requirements. Specifically, it makes clear that, between March 2003 and the date of filing of this Application, **AL BASHIR**’s forces and agents, through a combined policy involving killings, torture, rapes, destruction of the means of livelihood, forcible transfer into harsh desert conditions and/or IDP camps, obstruction of humanitarian aid, and the affirmative fostering of insecurity among those forcibly displaced – inflicted conditions of life which were calculated to, and which did, result in the deaths of at least 100,000 additional civilians. By any measure, violent deaths on this scale amounted to mass killing.

236. Unlike with respect to genocide, for the purposes of the crime against humanity of extermination, the “population” or “civilian population” killed need not be linked by any shared characteristics such as racial or ethnic origin.²⁹² In the instant Application, the Prosecution respectfully submits that the “population” upon whom conditions of life were inflicted in a manner calculated to bring about their destruction in part, like the “civilian population” whose mass

²⁹² See Triffterer, Otto, ed., *Commentary on the Rome Statute of the International Criminal Court*, Observer’s note, article by article, (1999), p. 132 (For purposes of the crime against humanity of extermination, “[t]he members of the group would not have to share common characteristics and, perhaps, could simply be groups that existed as groups only in the mind of the person responsible, such as all persons believed to be traitors to the State or ‘subversives’”); *Prosecutor vs. Stakić*, Case No. IT-97-24-T, Trial Chamber Judgment, 31 July of 2003, para. 639 (“in contrast to genocide, the offender need not have intended to destroy the group or part of the group to which the victims belong,’ and it is not required that the victims share national, ethnical, racial or religious characteristics.... It suffices that the victims be defined by political affiliation, physical attributes or simply the fact that they happened to be in a certain geographical area. Moreover, the victims may be defined in the negative, i.e. as not belonging to, not being affiliated with or not loyal to the perpetrator or the group to which the perpetrator belongs”), quoting *Prosecutor vs. Vasiljevic*, Case: IT-98-32-T, Trial Chamber Judgment, 29 November 2002, para. 227.

killing the conduct at issue constituted, included members of the target groups²⁹³ as well as other civilians present in the same areas.²⁹⁴

2.3 Widespread and Systematic Attack Directed against a Civilian Population

237. Pursuant to Art. 7(1) of the Statute, in order to constitute a crime against humanity, the acts must have been committed as part of a widespread or systematic attack. Pursuant to Art. 7(2)(a) of the Statute, an attack directed against a civilian population is defined as a “course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack.”²⁹⁵ The acts alleged in this application clearly show that from March 2003 to the date of the filing of this application, **AL BASHIR** used the apparatus of the State, the Armed Forces and Militia/Janjaweed, to carry out hundreds of attacks against civilian towns and villages in Darfur, resulting in mass killings, rapes, and torture, forcible transfer of hundreds of thousands civilians and destruction of their means of survival. The evidence collected by the Prosecution has also confirmed previous authoritative reports – *inter alia* from [TEXT REDACTED] the media, the UNCOI and NCOI – that the Armed Forces indeed participated in, or provided material support to Militia/Janjaweed in attacks involving killings, rape and forcible transfer against the civilian population with knowledge of the character of the attacks.

238. The reference to a widespread or systematic attack has been interpreted as excluding random or isolated acts of violence from the notion of crimes against humanity.²⁹⁶ “Widespread” refers to “the large-scale nature of the attack and the number of targeted persons”, while “systematic” refers to “the organised nature of the acts of violence and the improbability of their random occurrence.”²⁹⁷

²⁹³ Members of the targeted groups may be victims of both genocide and crime against humanity of extermination. See Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court, Observer’s note, article by article, (1999), p. 132 (“Killings of members of protected groups which amount to genocide under Art. 6(a) would, if committed on a large scale, constitute extermination within the meaning of Art. 7 para. 1 (b)... Acts of genocide under Art. 6(c) of “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” when committed with an intent to destroy, in whole or in part, certain groups would also constitute extermination within the meaning of Art. 7 para. 1. (b), which protects a broader range of groups....”).

²⁹⁴ Apart from the targeted groups, other tribes who have experienced systematic attack, though not as yet on a genocidal scale, include the Tunjur, Erenga, Birgid, Dajo, and Miseriya Jebel.

²⁹⁵ Decision of Pre-Trial Chamber I, 27 April, 2007, ICC-02/05-01/07-1, para. 61.

²⁹⁶ Decision of Pre-Trial Chamber I, 27 April, 2007, ICC-02/05-01/07-1, para. 62. Prosecutor v. Dusko Tadić, Judgment, Trial Chamber, Case No. IT-94-1-T, 7 May 1997, para. 648.

²⁹⁷ Kordić & Čerkez Appeal Judgment, para. 94; Blagojević & Jokić Trial Judgment, paras 545-546.

239. The massive scope, frequency and large scale of the attacks²⁹⁸ described above and the number of victims, amply demonstrate that they were widespread. They were also systematic, because they were carried out in furtherance of a plan or policy to commit such attacks.

3. War crimes

3.1 Armed Conflict

240. From March 2003 to the date of filing this Application, the Government of the Sudan has been engaged in a military campaign conducted in Darfur against rebel armed forces including the SLM/A and the JEM.²⁹⁹

241. The SLM/A eventually split into two factions under two leaders - Minni Manawi and Abd-al-Wahid respectively.³⁰⁰ Those forces under Abd-al-Wahid were mostly active in the Jebel Marra area of West Darfur.³⁰¹

242. The JEM is a political movement under the Chairmanship of Dr. Khalil Ibrahim. It also has a military wing.³⁰²

243. The Prosecution presents those allegations involving deliberate attacks against civilians and pillaging mentioned in paragraphs 213-234.

4. Evidence and other information establishing AL BASHIR's individual responsibility for the crimes charged

a. Applicable Law on Modes of Liability

244. Without excluding any other applicable mode of liability, **AL BASHIR** is charged pursuant to Art. 25 (3) (a) of the Statute with committing the crimes alleged in this Application through persons-including the state apparatus, the members of the Armed Forces and Militia/Janjaweed.

245. This Court has established that, for the purposes of determining individual criminal responsibility under Art. 25(3)(a), the "concept of control over the crime" is "the distinguishing

²⁹⁸ ICTR case, Akayesu Judgment, Trial Chamber, Case No. ICTR-94-4-T, para. 580.

²⁹⁹ Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3-4 September 2003, DAR-OTP-0116-0433); N'djamena Humanitarian Ceasefire Agreement on the Conflict in Darfur, 8 April 2004, DAR-OTP-0043-0045; Protocol on the Establishment of Humanitarian Assistance in Darfur, 8 April 2004, DAR-OTP-0043-0053; Agreement with the Sudanese parties on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in the Darfur, 28 May 2004, DAR-OTP-0005-0308 and DAR-OTP-0043-0016; Comprehensive Peace Agreement, 5 May 2006, DAR-OTP-0115-0563.

³⁰⁰ Public Source, DAR-OTP-0120-0678 at 0772-0775; Public Source, DAR-OTP-0120-0380 at 0385 and 0392.

³⁰¹ Public Source, DAR-OTP-0120-0678 at 0773.

³⁰² Public Source, DAR-OTP-0120-0258; UNCOI Material, DAR-OTP-0018-0010 at 0042, paras 133-137.

criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons.”³⁰³

246. This Court also stated that the commission of a crime “through another person” is “the most typical manifestation of the concept of control over the crime” and is “expressly provided for in Art. 25(3)(a).”³⁰⁴ As the Court has affirmed, the statutory text³⁰⁵ indicates that liability “extends to the commission of a crime not only through an innocent agent (that is, through another person who is not criminally responsible), but also through another person who is fully criminally responsible.”³⁰⁶

247. This form of liability has been applied by many national courts and is also known as “*perpetration by means*” or “*indirect perpetration*”.³⁰⁷ This mode of responsibility embodies the principle that the person in control, the “*principal*”, is the person who is responsible for the crimes: “*Whoever controls the system, also controls the anonymous will of all its human components*”.³⁰⁸

248. The mode of liability has three elements:³⁰⁹

- (a) First, the Prosecution must establish the existence of a relationship such that the indirect perpetrator may impose his dominant will over the direct perpetrator to ensure that the

³⁰³ The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-796-Conf-tEN (hereafter “Lubanga II”), paras 327, 330 “The notion underpinning this ... approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control of mastermind its commission because they decide whether and how the offence will be committed.”. *Id.*, para. 330.

³⁰⁴ *Id.* para. 339.

³⁰⁵ Art. 25(3)(a) imposes individual criminal responsibility on a person who commits a crime “through another person, regardless of whether that other person is criminally responsible.”

³⁰⁶ Lubanga II, para. 339.

³⁰⁷ Kai Ambos, Commentary to Art. 25, in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, p. 480. Eser, p. 797. Claus Roxin, *Täterschaft und Tatherrschaft*, 6th ed., Walter De Gruyter, Berlin/New York, 1994, p. 243. Such a theory has also been applied by the Federal Supreme Court of Germany BGHSt, NJW 1994, pp. 2703-2707; NJW 1996, pp. 2042-2044. See also the Judgment of the Regional Court of Berlin (531) 26 JS 1/95 KS (9/95).

³⁰⁸ Federal Criminal Court of Appeals for the Federal District of Buenos Aires, Case No. 13 (Juntas Trial), Judgment, 9 December 1985, 8 Human Rights Law Journal, 415-17 (emphasis added). *Ibid.* See also van Sliedregt (2003), pp. 69 et seq.

³⁰⁹ No person has yet been charged in this Court with crimes under the mode of liability of indirect perpetration under Art. 25(3)(a). Nonetheless, Pre-Trial Chamber I in Lubanga found “reasonable grounds to believe that ... the concept of indirect perpetration ... could be applicable” to the accused’s alleged role in the crimes charged in that case. The Prosecutor v. Thomas Lubanga Dyilo, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-US-Corr, 24 February 2006 (hereafter “Lubanga I”), para. 96. Although in the case of The Prosecutor v. Lubanga the Prosecution ultimately pursued a theory a co-perpetration “jointly with ... another person”, Pre-Trial Chamber I explained the main components of the mode of liability of indirect perpetration under the Statute.

crime is committed.³¹⁰ Where, as in this Application, the indirect perpetrator is alleged to have committed the crime through an organization or group, that institution must be “hierarchically organized.”³¹¹

(b) Second, the indirect perpetrator must have sufficient authority within the organization such that he has “the final say about the adoption and implementation” of the policies and practices at issue.³¹²

(c) Third, the indirect perpetrator must be “aware of his unique role within the [organisation] and actively use it” in furtherance of the crimes charged.³¹³

249. The following analysis addresses these elements and shows how **AL BASHIR**’s conduct satisfies the requirements of this mode of responsibility.

b. AL BASHIR held supreme authority in the hierarchically organized structure of the GoS

250. **AL BASHIR** committed the crimes through the control he exerts on the members of the state apparatus. As such, the Prosecution does not allege that **AL BASHIR** physically carried out any of the crimes. At all times relevant to this Application, **AL BASHIR** sat at the apex of, and personally directed, the state’s hierarchical structure of authority and the Militia/Janjaweed. **AL BASHIR** is the President of the Republic of the Sudan, exercising both *de jure* and *de facto* sovereign authority, the Head of National Congress Party and Commander in Chief of the Armed Forces.

De jure authority as Head of State

251. At all times relevant to this Application, **AL BASHIR** has been President of the Republic of the Sudan, serving as Head of State, and exercising supreme authority.³¹⁴ In this position, **AL BASHIR** held the final executive decision making power.³¹⁵

³¹⁰ Eser (2002), in: Cassese et al. (eds.), vol. 1, pp. 793-94.

³¹¹ Lubanga I, para. 95. Indirect perpetration “is especially characteristic for hierarchically organized power structures. As this is not only typical for mafia-like organizations but for military systems as well, this type of perpetration may easily occur with war crimes or other state-supported criminal acts.” Albin Eser, Individual Criminal Responsibility, in Cassese, et al., eds., *The Rome Statute of the International Criminal Court: A Commentary* (2002), p. 795. See also Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 479 (indirect perpetration has been upheld as a mode of liability in cases of “systematic or mass criminality organized, supported or tolerated by the state” where the indirect perpetrator “dominates the direct perpetrator by way of a hierarchical organizational structure”).

³¹² *Id.*, paras 94-95.

³¹³ *Id.*, para. 95.

³¹⁴ Art. 42, Constitution of the Republic of the Sudan of 1998, DAR-OTP-0139-0003 at 0009; Art. 58(1), 2005 Interim Constitution of the Sudan, DAR-OTP-0136-0506, translation – DAR-OTP-0136-0605 at 0625.

³¹⁵ Soon after taking over power in 1989, AL BASHIR abolished the post of Prime Minister. Public Source, DAR-OTP-0138-0311, Translation DAR-OTP-0150-0081.

- a. Two Vice Presidents reported to **AL BASHIR**, one of whom, Ali Osman Taha,³¹⁶ played an important role in implementing **AL BASHIR**'s plan, in particular by assisting in the mobilisation of Militia/Janjaweed.³¹⁷
- b. **AL BASHIR** chaired the National Security Council (hereafter "NSC"), the principal policy-making body for national defence and security issues.³¹⁸ The Council comprised the chiefs of all national security institutions and relevant Government Ministers, with direct responsibility for Darfur. This structure was replicated at the state and locality levels
- c. The various federal line ministries³¹⁹ that played critical roles in implementing various aspects of **AL BASHIR**'s genocidal plan in Darfur report directly to **AL BASHIR**.
- d. **AL BASHIR** retained direct control over the intelligence system. The NISS, which has an elaborate structure with a network of representatives at both state and locality levels, played a significant role, not just by covering up the crimes committed in Darfur, but also by providing intelligence information which facilitated the commission of the crimes charged in this Application.
- e. **AL BASHIR** appointed the Governors³²⁰ of all the 26 states of the Sudan and they reported to him directly.³²¹ At all times relevant to this Application, the Governor of each of the three Darfur states simultaneously served as chairman of his respective State Security Committee.³²²

Authority as Commander in Chief

252. An army officer himself, **AL BASHIR** exercised tight control over the army and security forces. At all times relevant to this Application, **AL BASHIR** has been Commander in Chief of

³¹⁶ Until the signing of the CPA in 2005, Taha served as the sole Vice President.

³¹⁷ Taha was "demoted" from the position of 1st Vice President to 2nd Vice President in 2005. The 1st Vice President position was given to the Southern representative. [SOURCE REDACTED]

³¹⁸ The NSC is a single integrated structure comprised of the chiefs of all national security institutions and relevant Government Ministers. The structure of the NSC at the federal level is replicated at the state and locality levels. The National Security Force Act of 1999, Art. 34(1)(a) and (2), (English translation) DAR-OTP-0021-0412 at 0421; The Interim National Constitution of the Republic of the Sudan of 2005, Art. 150 (1) to (3), DAR-OTP-0136-0605 at 0663; the National Security Force Act of 1999, Art. 5(3), DAR-OTP-0021-0412 at 0424; [SOURCE REDACTED].

³¹⁹ According to the 2005 Draft Constitutional Text dated 16 March 2005 (DAR-OTP-0150-0002), the Sudan has 9 Ministries of Sovereignty, 11 Ministries in the Economic Sector and 10 in the Service Sector.

³²⁰ **AL BASHIR** also appointed Commissioners. A witness indicated that **AL BASHIR** appointed Jaafar Abdal Hakam as Commissioner for Garsila and also head of the Locality Security Committee, [SOURCE REDACTED]; Art. 56, 57 and 62 of the 1998 Constitution of the Republic of the Sudan, DAR-OTP-0012-0013.

³²¹ Arts. 42, 61 and 62 of the 1998 Constitution of the Republic of the Sudan; [SOURCES REDACTED].

³²² Police Forces Act of 1999, DAR-OTP-0103-0598; [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0016-0139 at 0171.

the Armed Forces, the police and all other military and security forces.³²³ As Commander in Chief, **AL BASHIR** directly instructed the Minister of Defence, who oversaw implementation of military policy, established or modified conditions of military service, and was responsible for all matters of military discipline. The Army Chief of Staff also reported directly to **AL BASHIR** as well as to the Minister of Defence. Among other things, the Army Chief of Staff is responsible for issuing operational instructions, implementing the strategic directive for deployment of the Armed Forces, preparing proposals for build-up and preparation for war and specifying the arms, equipment and specialist resource requirements for the Armed Forces in war and at peace.³²⁴

253. As Commander in Chief, **AL BASHIR** also ordered the incorporation of most of the Militia/Janjaweed into the reserve forces, and exercised both formal and informal control over such forces, including:

- i.* The Popular Police Force,³²⁵ which is a reserve force of local citizens, raised to augment the regular Police. It participated in the conflict in Darfur.
- ii.* The Central Reserve Force (“CRF”) under the control of the Ministry of Interior and headed by Abdelraheem Mohammed Hussein (up to September 2005) reported to **AL BASHIR**. This force also participated in the conflict in Darfur.
- iii.* The Popular Defence Force,³²⁶ which is the reserve component of the Armed Forces. The PDF is generally described as a citizen force which is provided with military training and mobilised on the demand of the army.³²⁷
- iv.* The BIU/B was managed through the Military Intelligence Section within the Armed Forces. The head of Military Intelligence, Gen. Awad Ibn Auf,³²⁸ reported to the Chief of Staff of the Army as well as directly to **AL BASHIR**.³²⁹

³²³ Art. 42 of the 1998 Constitution of the Republic of the Sudan and Art. 65(a) of the 2005 Interim National Constitution of the Republic of the Sudan, DAR-OTP-0136-0506, translation – DAR-OTP-0136-0605. “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.” Unofficial version of the Armed Forces Memorandum concerning the ICC’s inquiries – Military Operations summary since January 2002 – Armed Forces and Rebels (30 April 2006), para. 24(c), DAR-OTP-0099-0473 at 0490, Translation, DAR-OTP-0116-0721). **AL BASHIR** holds the rank of Field Marshal in the Sudanese Armed Forces.

³²⁴ People’s Armed Forces Act of 1986, DAR-OTP-0118-0075 at 0084.

³²⁵ [FOOTNOTE REDACTED]

³²⁶ [SOURCE REDACTED]; Arts. 4 to 6 of the People’s Defence Forces Act 1989, DAR-OTP-0116-0889; “Unofficial version of the Armed Forces Memorandum concerning the ICC’s inquiries – Military Operations summary since January 2002 – Armed Forces and Rebels” (30 April 2006), para. 29(b), DAR-OTP-0099-0473 to DAR-OTP-0099-0500.

³²⁷ UNCOI Material, DAR-OTP-0107-0627 at 0629; [SOURCE REDACTED]; The People’s Defence Forces Act 1989, DAR-OTP-0116-0889.

Authority over the Security Committees

254. **AL BASHIR** directly and through his subordinates ensured the coordination of the attacks against the target groups in their villages through the Locality and State Security Committees. The Security Committees played a leading role in particular during 2003 and 2004.

255. The Memorandum referred to in paragraphs 50-51 establishes that the Army in accordance with Presidential decisions executed the instructions provided by the Security Committees in Darfur: “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.”³²⁸

256. The Security Committees were composed of representatives of the Armed Forces, the Police, the NISS and the Militia/Janjaweed.³²⁹

257. At all times relevant to this Application, the Governor of each of the three Darfur states – all appointed by, and reporting to, **AL BASHIR** – served as chairman of his respective State Security Committee.³³⁰ The State Security Committees reported to Ahmed Harun, and coordinated the activities of the Sudanese Armed Forces, the Sudanese Police, and other Sudanese Government forces in pursuing **AL BASHIR**’s plan.³³¹

258. The decisions taken by the State Security Committees were binding. All members of the State Security Committee, with the exception of the Armed Forces representative, were obliged to implement Committee decisions. The Armed Forces representative could do so after obtaining permission from his chain of command.³³²

³²⁸ [FOOTNOTE REDACTED]

³²⁹ [SOURCE REDACTED]; Art. 14 of the Peoples Armed Forces Act of 1986, DAR-OTP-0118-0075 at 0084.

³³⁰ Unofficial version of the Armed Forces Memorandum concerning the ICC’s inquiries – Military Operations summary since January 2002 – Armed Forces and Rebels” (30 April 2006), DAR-OTP-0099-0473 to DAR-OTP-0099-0500, Translation DAR-OTP-0116-0721.

³³¹ Arts. 42, 61 and 62 of the 1998 Constitution of the Republic of the Sudan; UNCOI Material, DAR-OTP-0016-0013 at 0013; Police Forces Act (1999), Art. 17, DAR-OTP-0116-0895 at 0906-0907; [SOURCE REDACTED]. Unofficial version of the Armed Forces Memorandum concerning the ICC’s inquiries – Military Operations summary since January 2002 – Armed Forces and Rebels (30 April 2006), para. 3(a), DAR-OTP-0099-0473 to DAR-OTP-0099-0500, Translation DAR-OTP-0116-0721.

³³² [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0016-0139 at 0171; [SOURCE REDACTED]; UNCOI Material, DAR-OTP-0016-0013 at 0013; Art. 17 of the 1999 Police Forces Act, DAR-OTP-0103-0598; [SOURCE REDACTED].

³³³ UNCOI Material, DAR-OTP-0016-0013 at 0013; [SOURCE REDACTED].

³³⁴ [FOOTNOTE REDACTED]

259. Locality Security Committees reported to the State Security Committees³³⁵ and had a similar composition.³³⁶ At the Locality level a representative of the PDF also sat on the Committee.³³⁷ In Darfur, this representative was responsible for coordinating with Militia/Janjaweed.³³⁸

260. Minutes of the meetings of the various Security Committees in West Darfur from the period between August 2003 and April 2004 were made available to the Prosecution by the UNCOI. Their significance was highlighted by a witness interviewed by the UNCOI who confirmed that Harun had 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).³³⁹

261. The minutes show the authority and coordination powers of the West Darfur Security Committees extending to ordering reconnaissance missions, creating reserve forces, monitoring weapons supplies to rebels, ensuring sufficient levels of patrol activities, mobilising PDF, increasing the Police presence in villages to be targeted (Mukjar), ordering "tribal levies" to ensure the participation of Militia/Janjaweed, ordering Militia/Janjaweed to support the police or reinforce the PDF, and creating joint forces comprised of army, police and security services.

262. The state-level committees which took these actions – and hundreds of other similar decisions – reported to Harun. Harun himself acknowledged, when interviewed by the UNCOI that he received the minutes of the State Security Committees of Darfur and that he could call on the State Governors and Chiefs of Police in each state for additional oral briefings about security matters in the state. The minutes illustrate the above, by showing that the State Security Committees recognised the need to report to Harun. They referred "*the matter of troop rations to the State Minister of the Interior*", and in November 2003 noted preparation of "*a quick report for the Governor (in Khartoum) on the security situation in the State so that he may inform the Deputy Interior Minister*".

263. The State Security Committees also acted in accordance with “*a national security plan disseminated from Khartoum*”.³⁴⁰

³³⁵ Art. 19, para. 3 of the 2003 Local Government Act, DAR-OTP-0103-0539; [SOURCE REDACTED]; UNCOI Material, 14 November 2004, DAR-OTP-0016-0080 at 0105.

³³⁶ Art. 18 of the 1999 Police Forces Act, DAR-OTP-0103-0598; Unofficial version of the Armed Forces Memorandum concerning the ICC’s inquiries – Military Operations summary since January 2002 – Armed Forces and Rebels (30 April 2006), para. 3 (a), DAR-OTP-0099-0473 to DAR-OTP-0099-0500, Translation DAR-OTP-0116-0721.

³³⁷ [FOOTNOTE REDACTED]

³³⁸ [SOURCE REDACTED]; UNCOI Material, DAR-OTP-0014-0213 at 0214; UNCOI Material, DAR-OTP-0011-0111 at 0112.

³³⁹ [FOOTNOTE REDACTED]

³⁴⁰ UNCOI Material, DAR-OTP-0016-0013; [SOURCE REDACTED].

De facto authority

264. **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 (see Annex 6). This myriad system of direct reporting to **AL BASHIR** ensured his control of the implementation of his plan.

265. The evidence shows that **AL BASHIR** received regularly reports from, among others, Abdelraheem Hussein, Minister of Interior until September 2005 and then Minister of Defence from September 2005 to the present; Ahmed Harun, who served from 10 May 2003 as State Minister of Interior and was responsible for the "Darfur Security Desk" in which capacity he oversaw the States Security Committees for Darfur and from September 2005 to the present as State Minister for Humanitarian Affairs; Bakri Hassan Saleh, Minister of Defence until September 2005; Salah Gosh, Director General of the NISS - at all times relevant to this Application; Awad Ibn Auf, Deputy Chief of Staff³⁴¹ and Head of Military Intelligence - at all times relevant to this Application; the respective State Governors from the three states of Darfur; and Abbas Arabi Abdallah, Chief of Staff of the Armed Forces until 2006.

266. **AL BASHIR**'s control of the state apparatus was not only formal; it was absolute. On 3 September of 2006, **AL BASHIR** in a cabinet meeting informed his Government that UNSC Resolution 1706 – which provided for the deployment of peacekeepers in Darfur – was to be rejected. In accordance with this instruction, the peacekeeping force indeed terminated deployment at the end of that month, and the army deployed to resolve the situation. **AL BASHIR** did not consult his First Vice President (the SPLM leader, Salva Kiir) or other cabinet members. He simply announced his decision and allowed no discussion.³⁴²

267. In the same way, **AL BASHIR** has always addressed the issue of criminal responsibility of his subordinates without deference to the Judiciary, repeatedly stating that Ahmad Harun in particular "was not guilty" and vetoing a decision by then Minister of Justice Al Mardi in 2007 to re-investigate Harun following the Court's decision.³⁴³

268. In sum, at all times relevant to this Application, **AL BASHIR** has enjoyed both *de jure* and *de facto* authority and final control over the entire political, military and security apparatus of the Sudan who he used to implement his plan.

c. AL BASHIR was aware of, and actively used, his supreme authority within the hierarchical structure of the GoS in furtherance of the crimes charged

³⁴¹ He was appointed to this post since March 2006.

³⁴² Public Source, DAR-OTP-0150-0266.

³⁴³ Public Source, DAR-OTP-0148-0236.

269. **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 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 target groups;
- (iii) the Ministry of Interior - to mobilize the Militia/Janjaweed into the PPF and the CRF and to ensure that the police would not intervene to protect the civilians;
- (iv) the Ministry of Defence, including the Armed Forces and Militia/Janjaweed, most of whom would be integrated in other reserve forces such as the PDF and the BIU/B - to carry out the attacks against the target groups;
- (v) 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 devised by the intelligence services; censor or suppress media coverage exposing the roles of **AL BASHIR**, the state apparatus and his forces in the crimes, and disseminate misinformation aimed at distorting and/or minimizing the extent of their responsibility for these 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 Darfurians;
- (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 that followed **AL BASHIR**'s genocidal orders.

d. AL BASHIR ordered the genocide

270. Through a series of public statements, **AL BASHIR** signalled the beginning of the operations and imposed his dominant will over the direct perpetrators to ensure that the crimes were committed.

271. In March 2003, **AL BASHIR** gave the first public instruction, directing the Armed Forces to quell the rebellion in two weeks and not to bring back any prisoners or wounded.³⁴⁴ He further stated that he “*didn't want any villages or prisoners, only scorched earth.*”³⁴⁵

272. In early 2003, **AL BASHIR** proclaimed that he would “*use the army, the police, the Mujahedeen, the horsemen*”³⁴⁶ to get rid of the rebellion”.³⁴⁷

273. In late April 2003, a few days after the attack in Al Fashir, **AL BASHIR** returned to Al Fashir and publicly gave orders to the military, police and intelligence to eliminate the opposition and leave no survivors. According to one witness who heard him, **AL BASHIR** explained that “*he had refused the principle of negotiating with the rebels of Darfur and he had set free the army in Darfur.*”³⁴⁸

274. On 30 December 2003, **AL BASHIR**, in a speech to Darfurians in Khartoum vowed to “*annihilate*” the “*hirelings, traitors, agents and renegades.*”³⁴⁹ A few days later his forces attacked hundreds of villages across Darfur, driving hundreds of thousands from rural areas.³⁵⁰

275. Speaking on national television in 2004, **AL BASHIR** 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.³⁵¹

276. The attackers expressed openly the instructions received from **AL BASHIR**. A [TEXT REDACTED] recounted that during an attack on his village, the Militia/Janjaweed said: “*You are blacks, no blacks can stay here, and no black can stay in Sudan....The power of AL BASHIR belongs to the Arabs and we will kill you until the end....*”³⁵²

277. They consistently told victimized members of the three target groups that “*the Fur are slaves, we will kill them*”;³⁵³ “*You are Zaghawa tribes, you are slaves*”;³⁵⁴ “*You are Masalit. Why do you come here, why do you take our grass? You will not take anything today*”³⁵⁵.

³⁴⁴ [FOOTNOTE REDACTED]

³⁴⁵ [FOOTNOTE REDACTED]

³⁴⁶ At various times, AL BASHIR and other GoS officials used different names to refer to the Militia/Janjaweed – including “Fursan”, “Mujaheddin”, “horsemen,” PDF, and “tribal levies.” This terminological dance helped further AL BASHIR’s aim of sowing broader confusion about his, and his Government’s, control over the Militia/Janjaweed. [SOURCES REDACTED]

³⁴⁷ Public Source, DAR-OTP-0020-0067 at 0099.

³⁴⁸ [FOOTNOTE REDACTED]

³⁴⁹ Public Source, DAR-OTP-0146-0035.

³⁵⁰ Public Source, DAR-OTP-0148-0002 at 0050.

³⁵¹ [FOOTNOTE REDACTED]

³⁵² Public Source, DAR-OTP-0020-0180 at 0203.

³⁵³ UNCOI Material, DAR-OTP-0018-0010, para. 245.

³⁵⁴ UNCOI Material, DAR-OTP-0018-0010, para. 511 and 333.

³⁵⁵ [FOOTNOTE REDACTED]

278. Perpetrators of crimes used language which is not just ethnically derogatory, but also shows an intention to destroy the objects of ethnic animus. Victims of rapes reported statements such as you “*would have Arab babies*” and if we “*could find any Fur woman ...we would rape them again to change the colour of their children.*”³⁵⁶

279. In addition victims have reported that during attacks the perpetrators addressed them with the following remarks: “*This is your end. The Government armed me*”.³⁵⁷

e. AL BASHIR appointed, dismissed, and reassigned key officials to reward supporters and punish opponents of the Darfur plan

280. **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. As no one other than **AL BASHIR** was indispensable to his plan, he readily changed and re-ordered the personnel to achieve the implementation of his plan.

281. **AL BASHIR** dismissed a number of officials who opposed his policy of using the Militia/Janjaweed and warned it would lead to crimes. He replaced them with officers who were loyal to him and were supportive of his plan. [TEXT REDACTED]³⁵⁸ [TEXT REDACTED]

282. [TEXT REDACTED]³⁵⁹ [TEXT REDACTED] has acknowledged³⁶⁰ that he participated in the mobilization and recruitment into the BIU/B of a notorious Militia/Janjaweed group under the leadership of Musa Hilal and Lt. Col Abd-al-Wahid Sa’id that became known for its brutality as the “Quick, Light and Horrible Forces of Misteriha.”

283. [TEXT REDACTED]³⁶¹ [TEXT REDACTED], **AL BASHIR** appointed General Abd-al-Rahman Zayn al-Abidin³⁶² (also known and hereafter referred to as “Gen. Ismat”) who was reassigned from Director of Operations. Gen. Ismat acknowledged to the Prosecution that he had fought alongside the *Murahileen*³⁶³ and Militias in Southern Sudan. In Darfur, Gen. Ismat encouraged the mobilization of the Militia/Janjaweed and provided weapons to them.³⁶⁴

284. [TEXT REDACTED]³⁶⁵

³⁵⁶ Public Source, DAR-OTP-0120-0004 at 0004.

³⁵⁷ UNCOI Material, DAR-OTP-0018-0010 para. 511 footnote 184.

³⁵⁸ [FOOTNOTE REDACTED]

³⁵⁹ [FOOTNOTE REDACTED]

³⁶⁰ [FOOTNOTE REDACTED]

³⁶¹ UNCOI Material, DAR-OTP-0014-0293 at 0301 para. 23.

³⁶² [FOOTNOTE REDACTED]

³⁶³ [SOURCE REDACTED]; Public Source, DAR-OTP-0115-0699 at 0715.

³⁶⁴ [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0107-0627 at 0627.

³⁶⁵ [FOOTNOTE REDACTED]

285. In June and December 2003, **AL BASHIR** also dismissed about 20,000³⁶⁶ members of the Armed Forces, most of who came from Darfur. [TEXT REDACTED]³⁶⁷ [TEXT REDACTED]³⁶⁸

286. **AL BASHIR** made other appointments to ensure effective implementation of his decisions. In May 2003, **AL BASHIR** appointed Abdulraheem Hussein as Minister of Interior, and Ahmad Harun as State Minister of Interior. Both men executed **AL BASHIR** instructions, in particular, by recruiting and organizing Militia/Janjaweed fighters. **AL BASHIR** was drawn to the experience which both Hussein and Harun had gained in mobilizing tribal fighters to attack civilians during the GoS counterinsurgency in South Sudan in the 1990s.³⁶⁹ Harun was responsible for the mobilisation of the Murahileen and for the planning and supply of military operations in Kordofan in the 1990s.³⁷⁰

287. From March 2003 until September 2005, Ahmad Harun was the Minister of State for Interior of the GoS. In early 2003, after the rebel attack on Al Fashir, **AL BASHIR** appointed Harun to head the “Darfur Security desk” and to oversee the State and Locality Security Committees in Darfur.

f. AL BASHIR used the Militia/Janjaweed to commit crimes

288. **AL BASHIR** systematically recruited and integrated the Militia/Janjaweed into the Sudanese structure of authority. This brought the Militia/Janjaweed under **AL BASHIR**’s control. In this way, he made the Militia/Janjaweed the third leg – together with the Armed Forces and the rest of the state apparatus – of the structure which implemented his plan.

289. Militia/Janjaweed were an essential substitute human resource for the thousands of Armed Forces soldiers whose ethnic affiliation and/or geographic origin placed in doubt their willingness to commit genocide in Darfur.³⁷¹ The roots of most Militia/Janjaweed in ethnic tribes different from the target groups, and the polarization he had promoted between the target groups and other tribes, gave **AL BASHIR** a pool of people who he could use as tools and who shared his determination to destroy the target groups.³⁷² In addition, **AL BASHIR** created the illusion of Militia/Janjaweed autonomy. This illusion, together with the reality of **AL BASHIR**’s control over their actions, helped him not only to conceal his criminal responsibility, but also gave

³⁶⁶ [FOOTNOTE REDACTED]

³⁶⁷ [FOOTNOTE REDACTED]

³⁶⁸ [FOOTNOTE REDACTED]

³⁶⁹ [FOOTNOTE REDACTED]

³⁷⁰ [FOOTNOTE REDACTED]

³⁷¹ [FOOTNOTE REDACTED]

³⁷² NCOI Material, DAR-OTP-0116-0610 at 0614; Public Source, DAR-OTP-0090-0173 at 0012.

him cover to continue to carry out the genocide in the face of international scrutiny. The mobilisation of local militia against the members of the target groups allowed **AL BASHIR** to disguise the conflict as a tribal one that had nothing to do with state forces.

290. From 2004 onwards, **AL BASHIR** also promised falsely to disarm the Militia/Janjaweed.³⁷³ The day after he had pledged, in a meeting in Khartoum [TEXT REDACTED] to “disarm the Janjaweed”, **AL BASHIR** clarified that this "*applied only to the bandits, not to the Popular Defence Forces, Popular Police or other tribesmen armed by the state to fight the rebels*".³⁷⁴

i. Mobilization and Recruitment of Militia/Janjaweed

291. Abundant evidence demonstrates the role of **AL BASHIR** personally, and of his subordinates, in recruiting Militia/Janjaweed. **AL BASHIR** issued a general call for the mobilization of fighters. From approximately the end of 2003, **AL BASHIR** repeatedly encouraged tribesmen to join the PDF,³⁷⁵ to form brigades, and head to Darfur to fight the rebellion.³⁷⁶ Several tribal leaders responded to **AL BASHIR**'s call by mobilizing their tribesmen. Those who responded were mobilized into PDF, PPF and BIU/B.

292. **AL BASHIR** offered tribal leaders and their fighters a payment akin to a salary,³⁷⁷ providing them with weapons, promising access to land, and permitting them to share in the spoils of war.

293. **AL BASHIR** arranged to use the leaders of several tribes in different capacities to implement his plan.³⁷⁸ In 2002, **AL BASHIR** appointed Safi Al Nour as Minister of State for the Council of Ministers,³⁷⁹ and in 2003 he appointed Abdallah Masar, a member of the notorious “Arab Gathering” which campaigned for the annihilation of “Zurga” tribes in Darfur, as Governor of River Nile State and later as Presidential Adviser for African Affairs.³⁸⁰ In order to secure their services in organizing the Militia/Janjaweed, and on **AL BASHIR**'s order,³⁸¹ GoS officials released from prison tribal leader Musa Hilal and Col. Shukurtallah. Vice President Taha instructed Hilal to mobilize his tribesmen into the force that became known as the

³⁷³ [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0018-0010 at 0038 para. 118; UNCOI Material, DAR-OTP-0016-0013 at 0015; Public Source, DAR-OTP-0138-0233.

³⁷⁴ Public Source, DAR-OTP-0004-0055 at 0063.

³⁷⁵ [FOOTNOTE REDACTED]

³⁷⁶ Public Source, DAR-OTP-0146-0035.

³⁷⁷ [FOOTNOTE REDACTED]

³⁷⁸ [FOOTNOTE REDACTED]

³⁷⁹ [FOOTNOTE REDACTED]

³⁸⁰ [FOOTNOTE REDACTED]

³⁸¹ [FOOTNOTE REDACTED]

“Quick, Light and Horrible Forces of Misteriha.”³⁸² After August 2003 Shukurtallah was incorporated into Military Intelligence by its chief, Awad Ibn Auf, and deployed to Al Geneina to mobilize,³⁸³ arm and fund Militia/Janjaweed and to lead them in operations in West Darfur. Col. Shukurtallah would later lead the BIU/B in West Darfur in attacks against the civilian population in the towns of Kulbus, Kornoi, Abu Gamra, Silea, Sirba, Jebel Moon and Abu Suruj.

294. **AL BASHIR**'s central role in the recruitment of the Militia/Janjaweed reflected their importance to his plan. And he used his subordinates for the same purpose. Many senior members of **AL BASHIR**'s Government participated in recruiting and mobilizing Militia/Janjaweed – including Second Vice President Ali Osman Taha,³⁸⁴ Director General of NISS Salah Gosh,³⁸⁵ Presidential Assistant and NCP Vice President Dr. Nafie Ali Nafie,³⁸⁶ Defence Minister and former Interior Minister Abdelraheem Hussein, who is also Special Representative of the President in Darfur,³⁸⁷ Head of Military Intelligence and Deputy Chief of Staff General Awad Ibn Auf,³⁸⁸ and State Minister for Humanitarian Affairs (formerly Minister of State of Interior) Ahmad Harun.³⁸⁹

295. **AL BASHIR**'s reliance on Militia/Janjaweed followed a precedent established in the 1990s, when he had used the Murahileen and other Militias to fight in South Sudan, Kordofan and the Nuba Mountains.³⁹⁰ **AL BASHIR** also used tribal militias (the *Fursan*) to crush the short-lived insurgency by Daud Bolad in Darfur in the 1990s.

296. Ahmad Harun played a critical role in recruiting the tribal militias. In implementing **AL BASHIR**'s plan, Harun travelled to Darfur many times and at one point in 2003 spent about four months in the region mobilizing, arming, funding and ensuring provisioning of the Militia/Janjaweed. Harun also managed numerous camps for the purpose of training Mili-

³⁸² Video Material, DAR-OTP-0028-0199; [SOURCES REDACTED].

³⁸³ [FOOTNOTE REDACTED]

³⁸⁴ [SOURCE REDACTED]; UNCOI Material, DAR-OTP-0119-0002 at 0015 and DAR-OTP-0011-0098 at 0101; UNCOI Material, DAR-OTP-0011-0098 at 0101; [SOURCES REDACTED].

³⁸⁵ [SOURCE REDACTED]; Public Source, DAR-OTP-0099-0064 at 0066, [SOURCES REDACTED], UNCOI Material, DAR-OTP-0119-0002 at 0015 and DAR-OTP-0011-0098 at 0101; UNCOI Material, DAR-OTP-0011-0098 at 0101.

³⁸⁶ [FOOTNOTE REDACTED]

³⁸⁷ [FOOTNOTE REDACTED]

³⁸⁸ [FOOTNOTE REDACTED]

³⁸⁹ UNCOI Material, DAR-OTP-0016-0013 at 0014; [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0014-0213 at 0213; [SOURCE REDACTED].

³⁹⁰ [FOOTNOTE REDACTED]

tia/Janjaweed who were mobilized into the PDF and PPF. He received progress reports from the region.³⁹¹

297. Abbas Arabi Abdallah (Chief of Staff of the Armed Forces until 2006) visited Darfur regularly together with Ahmed Harun in order to recruit Militia/Janjaweed.³⁹² **AL BASHIR** also recruited Militia/Janjaweed through the Border Intelligence Force headed by Ibn Auf, who reported directly to **AL BASHIR**.³⁹³

298. Ten days after the Al Fashir attack, fifteen Militia/Janjaweed commanders were sent to Al Fashir³⁹⁴ to meet with local and state officials, including Mohamed Suliman Rabeh (Commissioner of Al-Waha locality), Mohamed Yusuf Kibir (then newly appointed by **AL BASHIR** as Governor of North Darfur), and a group of NCP leaders from Al Fashir. They were told by Governor Kibir that Commissioner Rabeh would give them directives. The Commissioner then told the Militia/Janjaweed commanders, *“We as a Government will fulfil our duty to you Arabs. We will provide weapons and ammunition so that you can annihilate those Zurgas. This directive came from the General Commander in Khartoum³⁹⁵ and the first Vice President Ali Osman Taha.”*³⁹⁶ [TEXT REDACTED], in addressing the 15 Militia/Janjaweed commanders the next day, Vice President Taha said that the war in Darfur had been imposed upon them and that, as Arabs, they should preserve the unity of their land and religion. Taha continued, *“We are willing to supply weapons, ammunition, camels, salary and horses. Martyrs will get money. For every wounded personnel, we are ready to transport them to Khartoum and even send them abroad for medical treatment. Please also accept greetings from the President Omar **AL BASHIR**.”* Taha also said, *“I don’t want one single village of Zurgas in Darfur. All the Zurga lands are yours.”*³⁹⁷

299. Musa Hilal underscored the central role of **AL BASHIR** in the operations when he said: *“The war in Darfur is not in our hands. The decision to make war was taken by higher powers in the state. We leaders of the tribes, Arabs and others were charged by the Govern-*

³⁹¹ [FOOTNOTE REDACTED]

³⁹² [FOOTNOTE REDACTED]

³⁹³ [FOOTNOTE REDACTED]

³⁹⁴ [FOOTNOTE REDACTED]

³⁹⁵ AL BASHIR is the General Commander of the PDF.

³⁹⁶ [FOOTNOTE REDACTED]

³⁹⁷ [SOURCE REDACTED] Three months later, at the end of July 2003, Vice President Taha presided over a graduation ceremony at Al Fashir stadium, North Darfur for some 2,000 Militia/Janjaweed who had just completed their training. The recruits had been provided with arms, ammunition, money and uniforms, and given two days of indoctrination. The Vice President said, “Now you are well equipped, well trained, and you are ready to be deployed. We don’t want any villages left.”

ment to take part in the conscription effort and we only obeyed.”³⁹⁸ On other occasions, Hilal has made clear that the Militia/Janjaweed “get their orders from Khartoum.”³⁹⁹

ii. Funding

300. **AL BASHIR** funded the Militia/Janjaweed in Darfur directly⁴⁰⁰ and also through subordinates who reported to him.⁴⁰¹ Funding for the operations of the Militia/Janjaweed was provided in part from **AL BASHIR**’s own office.⁴⁰² A witness states that Harun received funding from “the palace funds”.⁴⁰³

301. Payments to the Militia/Janjaweed were carried out through several channels. [TEXT REDACTED]⁴⁰⁴

302. In sum, financing of the Militia/Janjaweed is a widespread and routine practice of **AL BASHIR** and a means by which he has exercised control over them. When announcing that they dissociate themselves from the GoS, Militia/Janjaweed explicitly refer to lack of payments as a cause for their move.⁴⁰⁵

iii. Arms, Ammunition and Equipment

303. **AL BASHIR** provided weapons to the Militia/Janjaweed in Darfur through senior army officers, military intelligence officers, tribal leaders and civilian authorities.⁴⁰⁶ Multiple witnesses have stated to the Prosecution that members of the Locality Security Committees in Darfur, including the Locality Commissioners themselves, provided weapons to the Militia/Janjaweed through tribal leaders.⁴⁰⁷ On 1 January 2004, a delegation of high-ranking officials led by Minister of Defence Bakri Hasan Salih arrived by helicopter in [TEXT REDACTED], West Darfur from Khartoum. According to a witness during the visit, Salih stated

³⁹⁸ [FOOTNOTE REDACTED]

³⁹⁹ Public Source, DAR-OTP-0149-0393.

⁴⁰⁰ [FOOTNOTE REDACTED]

⁴⁰¹ [SOURCE REDACTED]; UNCOI Material, DAR-OTP-0014-0213 at 0213. **AL BASHIR** also provided funding to the Militia/Janjaweed through his subordinates. Ahmed Harun played a significant role in this regard. One witness reported that Musa Hilal “is in charge of passing on the money to his troops; he himself receives the money from Ahmed Harun”. According to GoS funding to Militia/Janjaweed was transmitted “by cash transfers.” The witness [TEXT REDACTED] saw Harun in Darfur with “well guarded boxes accompanying them which from their weight we believed contained money.” [TEXT REDACTED]

⁴⁰² [FOOTNOTE REDACTED]

⁴⁰³ [FOOTNOTE REDACTED]

⁴⁰⁴ [FOOTNOTE REDACTED]

⁴⁰⁵ Video Material, DAR-OTP-0136-0100 at running time 07:18-07:29 and 09:24-09:40.

⁴⁰⁶ [FOOTNOTE REDACTED]

⁴⁰⁷ [FOOTNOTE REDACTED]

that he “*did not want to see Fur villages anymore,*” following which he “*distributed boxes of ammunition to the Janjaweed.*”⁴⁰⁸

304. When Militia/Janjaweed leader Musa Hilal was deployed to North Darfur in 2003 he was provided with Land Cruisers and weapons.⁴⁰⁹ [TEXT REDACTED]⁴¹⁰

g. AL BASHIR ensured that the different components of the state apparatus and the Armed Forces cooperated together and with Militia/Janjaweed in implementing his plan

305. The challenges involved in carrying out armed attacks by different forces in the environment of Darfur – including arranging the dropping of bombs by aircraft; the delivery of vehicles with adequate weaponry and fuel; and the provisioning, arming, and paying of regular troops and recruitment of Militia/Janjaweed fighters – required advance planning, guidance, coordination, communication, and logistical support. By issuing orders and guidelines, and securing daily reports from Harun and many others, including from amongst the Militia/Janjaweed, **AL BASHIR** ensured that his forces and agents worked together in carrying out the Darfur plan.

306. On 30 April 2003, immediately after **AL BASHIR** had ordered the Western Area Command to commence planning for operations in Darfur, senior GoS officials met in Al Fashir for a Darfur Security Coordination meeting under the leadership of Minister of Interior Hussein. At the end of the meeting, the group issued a declaration (the “Al Fashir Declaration”) in the name of **AL BASHIR** and the Governors of three Darfur states, proclaiming: “*We hereby remind everyone that all the preparations, equipment, vehicles and measures needed to complete the task and take matters in hand have been put in place ... Everything, from aircraft, armoured vehicles and riding animals, to weapons and supplies, has been made ready to resist and stand against the opposition. Indeed regular, peoples’ and armed volunteer forces are at the ready to stand firm and complete the task.*”⁴¹¹

307. After this declaration, integration and coordination were manifest. Military aircraft delivered replenishments of ammunition to groups of Militia/Janjaweed during attacks,⁴¹² and carried wounded Militia/Janjaweed away in their aftermath.⁴¹³ Militia/Janjaweed used GoS buildings

⁴⁰⁸ [FOOTNOTE REDACTED]

⁴⁰⁹ [FOOTNOTE REDACTED]

⁴¹⁰ Video Material, DAR-OTP-0136-0100, running time 14 min 20 till 16 min 40; see also Public Source, DAR-OTP-0138-0272.

⁴¹¹ DAR-OTP-0007-0578 at p. 4, Translation DAR-OTP-0149-0446 at 0051.

⁴¹² Public Source, DAR-OTP-0090-0173 at 0182.

⁴¹³ [FOOTNOTE REDACTED]

and facilities to detain civilians.⁴¹⁴ At times, Militia/Janjaweed used Armed Forces' trucks and other vehicles to transport looted property.⁴¹⁵ Even when they were present at the site of attacks by the Armed Forces or Militia/Janjaweed, or had bases nearby, police officers refrained from protecting or defending civilians.⁴¹⁶

308. Military Intelligence and NISS worked closely in Darfur to execute **AL BASHIR**'s policies. Coordination meetings were regularly held among NISS Chief Salah Gosh, Minister of Interior Hussein and Harun.⁴¹⁷

309. Armed Forces Chief of Staff Abbas Arabi and Harun regularly toured Darfur⁴¹⁸ and held meetings with local officials, members of the State and Locality Security Committees, the army, the police, the PPF,⁴¹⁹ the PDF, and leaders of the Militia/Janjaweed.⁴²⁰

310. **AL BASHIR** ensured that Militia/Janjaweed were incorporated into the reserve forces under the operational command of regular military officers, and assigned a military officer who commanded their operations.⁴²¹ The Aqid al Oqada⁴²² or the Emirs of Mujahideen⁴²³ who mobilized their tribesmen were made PDF Coordinators.⁴²⁴ In March 2004, in South Darfur, the Governor's office issued a directive to the Commissioner of Nyala instructing him to include a known Militia/Janjaweed commander, Mustafa Abu-Nubah, and a member of the "*Arab Gathering*", Muhammad Ya'qub al-'Umdah, in the Nyala Locality Security Committee and to speed up mobilization and provisioning of the Militia/Janjaweed.⁴²⁵ In addition to incorporating Militia/Janjaweed into the ordinary chain of command, **AL BASHIR** maintained a direct line of communication with certain key Militia/Janjaweed leaders. Thus, he issued orders to, and was in direct contact with, Ali Kushayb, Hamid Duwa'i, Musa Hilal and Mohammed Hamdan Himeiti. Himeiti, leader of a Militia/Janjaweed group from South Darfur, confirmed that he and his forces were mobilized by the GoS and provided with arms and ammunition. He stated that

⁴¹⁴ [FOOTNOTE REDACTED]

⁴¹⁵ [SOURCE REDACTED]; UNCOI Material, DAR-OTP-0054-0137 at 0139; African Union CFC Report, DAR-OTP-0050-0131 at 0138.

⁴¹⁶ [FOOTNOTE REDACTED]

⁴¹⁷ [FOOTNOTE REDACTED]

⁴¹⁸ [FOOTNOTE REDACTED]

⁴¹⁹ UNCOI Material DAR-OTP-0016-0013; [SOURCES REDACTED].

⁴²⁰ UNCOI Material, DAR-OTP-0014-0187 at 0187-0189; [SOURCES REDACTED].

⁴²¹ UNCOI Material, DAR-OTP-0014-0187 at 0187-0189; Video Material, DAR-OTP-0028-0201 at 34' – 37'.

⁴²² Aqid al Oqada: A rank in the structure of the "Militia/Janjaweed" in Darfur. Literally means "Colonel of Colonels".

⁴²³ Emir of Mujahideen: A rank in the structure of the "Militia/Janjaweed" in the Sudan. Literally means "leader of religious fighters".

⁴²⁴ Public Source, DAR-OTP-0142-0523 at 0539.

⁴²⁵ [FOOTNOTE REDACTED]

he met twice with **AL BASHIR**,⁴²⁶ including “*once at Bashir’s home to receive orders to carry out campaigns in Um Sidr and Kiryari in Northern Darfur after they had been taken by Darfur rebels*”.⁴²⁷ According to one witness, “*It is a well-known fact in Darfur that [Musa] Hilal used to meet with President al-BASHIR and Vice President Taha, and other top Government leaders secretly to take orders for implementing their political and military objectives in Darfur.*”⁴²⁸ In January 2004, one of Militia/Janjaweed leader Ali Kushayb’s deputies in Mukjar reported that the Militia/Janjaweed was receiving orders directly from **AL BASHIR** and other officials in Khartoum.⁴²⁹ In regard to one of the attacks between May and November 2003, another witness stated: “*after one of the attacks in my area, we gathered in a location and Hamid Daw’a’i and Muhammad Al-Mahdi were also there... Hamid Daw’a’i went some distance away and called ‘Umar AL-BASHIR. Al-Mahdi told us he [Hamid Daw’a’i] is speaking to the President and that we could not do anything to him. In every attack, when we complained in police stations and our people told Daw’a’i to end the conflict, he refused and said they had weapons, ammunition and vehicles and would hand over the land to ‘Umar AL-BASHIR. He said the Masalit are rebels and that the President had asked for the land to be handed over without us.*”⁴³⁰

h. AL BASHIR used state resources to attack, and deny humanitarian aid to members of the target groups forcibly relocated to IDP camps

311. In September 2005, **AL BASHIR** appointed Harun as Minister of State for Humanitarian Affairs,⁴³¹ which gave Harun authority over the HAC and a statutory mandate that required him to protect, coordinate, and supervise relief efforts for IDPs. Harun regularly reported to **AL BASHIR** and updated him on how he was implementing the tasks he had been assigned. He travelled to Darfur with **AL BASHIR** in June 2007.⁴³²

312. **AL BASHIR** used the Ministry for Humanitarian Affairs to deny domestic humanitarian assistance to IDPs in Darfur, to hinder delivery of aid by third parties,⁴³³ and to cover up crimes being committed by Armed Forces, Militia/Janjaweed and other GoS agents. He also used the Ministry for Humanitarian Affairs, and in particular the HAC within the Ministry, to gather intelligence in the camps and contribute to the organized insecurity, harassment and psychological abuse of the IDPs in and around camps. The Ministry of Humanitarian Affairs is composed

⁴²⁶ [FOOTNOTE REDACTED].

⁴²⁷ Public Source, DAR-OTP-0138-0272.

⁴²⁸ [FOOTNOTE REDACTED]

⁴²⁹ [FOOTNOTE REDACTED]

⁴³⁰ [FOOTNOTE REDACTED]

⁴³¹ Public Source, DAR-OTP-0115-0670 at 0671.

⁴³² Public Source, DAR-OTP-0141-0193.

⁴³³ [FOOTNOTE REDACTED]

of several departments, including the HAC; the Humanitarian Organizations Department; and the Peace and Conflict Resolution Department.⁴³⁴ According to witnesses interviewed by the ICC and other sources, HAC works in close association with the intelligence and security apparatus of the GoS and includes in its staff several members of the Intelligence. Hassabu Mohammed Abdel Rahman, Commissioner-General of HAC, became Commissioner-General in 2003. Prior to that he is reported to have been a General in the Sudanese Internal Security apparatus.⁴³⁵ One witness states that HAC was staffed by people from Military Intelligence and that *“since HAC was the GoS body that gave NGOs permission to live, work and operate in Sudan, that was the instrument the GoS used to control this... they were obstructionists with permits and registration. The way they controlled NGOs, it was clear it was not a humanitarian body.”*⁴³⁶ The Ministry of Humanitarian Affairs imposed excessive bureaucratic requirements on aid workers.⁴³⁷ HAC had the authority to issue the travel permits to UN and NGOs staff.

[TEXT REDACTED] 438

313. Journalists also suffer travel and camps’ access restrictions. Foreign crews have been detained on visa-issues grounds and local journalists are also arrested.⁴³⁹ A video in the possession of the Prosecution shows one of the roles of HAC office in the Kalma camp. The office is composed of intelligence officers who questioned [TEXT REDACTED].⁴⁴⁰

i. AL BASHIR used his control of the state apparatus to cover up and allow for continuation of crimes

314. Yet another way in which **AL BASHIR** actively used his absolute authority was by spearheading a campaign to deny, downplay and hide the crimes committed by his forces and agents. By preventing the truth about the genocide from being revealed, **AL BASHIR** was able to deflect national and international scrutiny, thereby enabling the continued commission of the genocide. In order to cover up his crimes, **AL BASHIR** made statements he knew to be false. On 19 March 2007, in an interview with an NBC journalist, **AL BASHIR** labelled as “fabrications” photographs of thousands of burned villages in Darfur. On the issue of rapes he said that rape

⁴³⁴ [FOOTNOTE REDACTED]

⁴³⁵ [FOOTNOTE REDACTED]

⁴³⁶ [FOOTNOTE REDACTED]

⁴³⁷ Public Source, DAR-OTP-0141-0107.

⁴³⁸ [FOOTNOTE REDACTED]

⁴³⁹ Public Source, DAR-OTP-0149-0418.

⁴⁴⁰ Video Material, DAR-OTP-0101-0062.

is not possible in Sudan, because it is a crime against God.⁴⁴¹ **AL BASHIR** stated that 99% of alleged cases of rape are fabricated in order to place blame on the Government.⁴⁴²

315. **AL BASHIR** also marshalled the resources of the Ministry of Information and Communication (“MIC”) – reported to have six media outlets⁴⁴³ carrying the same news stories quoting the SUNA state-run news agency - to censor media coverage or disseminate disinformation about crimes in Darfur.

316. **AL BASHIR** used the NISS to further manipulate local and international public opinion concerning Darfur through the NISS-controlled Sudan Media Centre (“SMC”)⁴⁴⁴, which was established in December 2002.

317. On 28 July 2004, Sudanese press reported that, earlier that month, the NISS had circulated a written directive instructing Sudanese news media how to report on the Darfur conflict so as to conceal the criminal responsibility of **AL BASHIR**.⁴⁴⁵ The directive was distributed at a secret meeting of GoS officials in July 2004, and was disseminated to NISS operatives in Sudanese media outlets.

318. The directive instructed NISS operatives to, *inter alia*, pro-actively encourage misinformation by bringing in foreign journalists and showing them areas of humanitarian operations in Darfur, by highlighting stories about voluntary returns of IDPs, and by conveying to Darfurians inside and outside of Darfur that Darfur is a safe place where they can lead a normal life.⁴⁴⁶ An example of the disparity between the message put out by the GoS in relation to the NISS instructions on voluntary returns and the experience of IDPs themselves was explained [TEXT REDACTED]: “The Government is telling us that our village is safe and we can go back but I know that our village is not safe to live. The Janjaweed are still very active on the outskirts of our IDP camp.”⁴⁴⁷

319. The NISS directive also instructed those in the media to intimidate opposition by arguing that bringing in foreign forces will lead to a situation worse than Iraq, and by highlighting the prejudices of Western countries.⁴⁴⁸ [TEXT REDACTED]⁴⁴⁹

⁴⁴¹ Video Material, DAR-OTP-0136-0018.

⁴⁴² Video Material (Arabic script), DAR-OTP-0136-0018 at 0019.

⁴⁴³ [FOOTNOTE REDACTED].

⁴⁴⁴ Public Source, DAR-OTP-0149-0397; Public Source, DAR-OTP-0149-0444.

⁴⁴⁵ [FOOTNOTE REDACTED]

⁴⁴⁶ [FOOTNOTE REDACTED]

⁴⁴⁷ UNCOI Material, DAR-OTP-0014-0140 at 0141.

⁴⁴⁸ [FOOTNOTE REDACTED]

⁴⁴⁹ Public Source, DAR-OTP-0148-0252.

320.The NISS directive also contains an instruction to explain that the Janjaweed cannot be “disarmed” and that there must be a political solution.⁴⁵⁰ This instruction is reflected in numerous press statements made by **AL BASHIR** himself (see paragraph 290 above).

321.In addition, the NISS directive provided instructions on how to control the use of terminology, by defining Janjaweed as “thugs”, and avoiding any clear distinction between Arabs and non-Arabs in media statements;⁴⁵¹ how to strengthen messages defending the GoS, by giving media space to voices of Arab militia leaders and explaining the burning villages as part of counterinsurgency plan.⁴⁵²

322.In support of the cover up, **AL BASHIR** also utilized the Ministry of Foreign Affairs and GoS diplomatic representatives outside Sudan, to manage and control the international community intervention to stop the crimes. **AL BASHIR** ensured that GoS officials assigned to assist the Cease Fire Commission of the African Union Mission in Sudan,⁴⁵³ the UNCOI,⁴⁵⁴ and UN officials regularly misinformed and obstructed the activities of these organizations. The Ministry does this through its own media which it uses to launch propaganda information.

323.In September 2004, Dr. Mustapha Osman Ismail, then Sudan’s Minister of Foreign Affairs, maintained that fewer than 5,000 people had died in Darfur, far short of the UN’s contemporary estimate of 30,000 to 50,000 dead. He stated, “those who are saying 30,000 or 50,000, we are telling them, ‘Tell us the names, show us the graves where these people have been buried.’”⁴⁵⁵

324.Although at the time, more than one of three Darfurians was living in overcrowded IDP camps with no viable educational or livelihood opportunities, on 5 December 2007, the GoS through its UN Ambassador stated that “we have reached a very good situation now regarding...the humanitarian situation”.

325.“*It’s all fake, everything is fake*” UN Ambassador Abdalhaleem told reporters of a UN report that accused Khartoum of violating an arms embargo. He also denied Sudan had used aircraft for offensive purposes in Darfur, insisting that photographs in the panel’s report of a white plane with “UN” marked on its wings were taken in neighbouring Chad or other African countries, not in Darfur.⁴⁵⁶

⁴⁵⁰ [FOOTNOTE REDACTED]

⁴⁵¹ [FOOTNOTE REDACTED]

⁴⁵² [FOOTNOTE REDACTED]

⁴⁵³ [FOOTNOTE REDACTED]

⁴⁵⁴ [SOURCE REDACTED]; UNCOI Material, DAR-OTP-0018-0010 at 0018 and 0019.

⁴⁵⁵ Public Source, DAR-OTP-0138-0114.

⁴⁵⁶ Public Source, DAR-OTP-0149-0472.

326. [TEXT REDACTED] an incident that occurred on 7 January 2008, in which GoS forces fired on a clearly marked UNAMID convoy. Sudan's UN Ambassador Abdalhaleem told reporters on 9 January that "*they were not the Government. The rebels did that. No doubt about it.*"⁴⁵⁷ However, on 10 January, the GoS Defence Minister acknowledged that "some elements of the armed forces" attacked a UNAMID convoy but concluded that UNAMID was responsible for the incident because it should have notified the army of its movements so that it would not think it was a rebel force.⁴⁵⁸

327. **AL BASHIR** has consistently obfuscated in response to different Security Council Resolutions requiring the GoS to disarm the Militia/Janjaweed. In August 2004, the UN Security Council demanded that the GoS fulfil its commitments to disarm the Militia/Janjaweed.⁴⁵⁹ On 21 October 2004, the GoS announced that it had disarmed 272 Janjaweed around Kass in South Darfur, 350 Janjaweed from Kulbus in Western Darfur, and approximately 2,600 in Al Fashir, Northern Darfur. Witnesses disputed these assertions⁴⁶⁰ and [TEXT REDACTED] concluded that no progress had been made with respect to Militia/Janjaweed disarmament.⁴⁶¹ [TEXT REDACTED]⁴⁶²

328. **AL BASHIR** and his subordinates also sought to blame the international community so as to deflect international criticism for the genocide. **AL BASHIR** has repeatedly claimed that ill-intentioned countries are trying to exaggerate the humanitarian crisis in Darfur and supporting the rebels in order to approve their secret agendas or in the hope of exploiting Sudanese oil resources.⁴⁶³

j. AL BASHIR used the criminal justice system to provide impunity to the perpetrators of crimes in Darfur

329. **AL BASHIR** provides impunity to those who follow his orders⁴⁶⁴ and denies victims access to the criminal justice system while using it against those who do not go along with the genocide. The Prosecution is aware of officers investigated and prosecuted when they refused to cooperate with his plan. **AL BASHIR** has total control over the justice system in the Sudan.

⁴⁵⁷ Public Source, DAR-OTP-0149-0478.

⁴⁵⁸ Public Source, DAR-OTP-0149-0480.

⁴⁵⁹ Public Source, DAR-OTP-0080-0200.

⁴⁶⁰ [FOOTNOTE REDACTED]

⁴⁶¹ Public Source, DAR-OTP-0080-0173.

⁴⁶² Public Source, DAR-OTP-0138-0116, para. 20.

⁴⁶³ Video Material, DAR-OTP-0136-0018 at 0018 and 0019; [SOURCE REDACTED]; UNCOI Video Material, DAR-OTP-0019-0369; [SOURCE REDACTED].

⁴⁶⁴ [SOURCES REDACTED]; [TEXT REDACTED], DAR-OTP-0098-0030; [SOURCES REDACTED].

He has unfettered power to appoint and dismiss judges at will.⁴⁶⁵ **AL BASHIR** also appoints and dismisses all officials responsible for ensuring the investigation and prosecution of crimes including the Minister of Justice and Attorneys General. One example of **AL BASHIR**'s control over the Ministry of Justice was to discontinue the investigation against Ahmad Harun (see paragraph 267 above).

330.**AL BASHIR** used the criminal justice system to prosecute those who refused to comply with orders to attack civilians in Darfur. [TEXT REDACTED]⁴⁶⁶

i. Guarantee of impunity

331.**AL BASHIR** ensured impunity for those who followed his orders. This guarantee of impunity was key in ensuring the continuation of the genocide.

332.**AL BASHIR** established Special Courts to provide a veneer of legality while ensuring impunity for the most responsible. **AL BASHIR** established the Darfur Special Court in June 2005; two additional Courts were created in November 2005 as well as *ad hoc* institutions to support the work of those Courts, including the Judicial Investigations Committee and the Special Prosecutions Commissions, Committees against Rape and the Special and Specialised Courts of 2001 and 2003 respectively. All these institutions were given the mandate to investigate crimes recommended for investigation in the report of the NCOI.

333.As mentioned above, on 6 June 2005, the Prosecution announced it would investigate the events that took place in Darfur. On 7 June, Chief Justice Galal El-Din Mohamed Osman issued a decree establishing a Special Criminal Court on the Events in Darfur (SCCED).⁴⁶⁷ The Chief Justice is a political appointee of **AL BASHIR**.

334.From their establishment in June 2005, directly after the Prosecution's announcement of the first investigation, the GoS has repeatedly presented publicly the various Darfur Special Courts as alternatives to prosecution by the International Criminal Court – invoking the complementarity framework underpinning the Rome Statute.

335.At the time of the establishment of the additional Darfur Special Courts mentioned above, the President of the original Special Court highlighted that the subject-matter jurisdiction of the Courts would include crimes against humanity and war crimes and that the Courts would deal with any perpetrators, regardless of rank or affiliation. The GoS announced that approximately

⁴⁶⁵ Sudanese Judiciary Law of 1986 as amended in 2000, DAR-OTP-0065-0130.

⁴⁶⁶ [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0019-0287.

⁴⁶⁷ This decree was issued under the Sudanese Criminal Procedure Code 1991, which permits the Chief Justice to establish special courts and to define their powers. The decree was also issued under the Sudanese Judiciary Act 1986, which allows "Any other court established by the Chief Justice upon a foundation order should detail the formation, place and Jurisdiction".

160 suspects had been identified for investigation and possible prosecution: 92 from South Darfur, 38 from North Darfur and 32 from West Darfur.

336. However the President of the Special Court stated later to representatives of the Office during one of its missions to Khartoum that no cases involving serious violations of international humanitarian law were ready for trial and that the six cases selected were in fact chosen from the case files lying before the ordinary Courts.

337. Having established the NCOI, **AL BASHIR** ensured that it was respecting strict limits.⁴⁶⁸ According to a [TEXT REDACTED], following orders from the President and/or the Vice President, the final report of the NCOI omitted reference to Musa Hilal and to the documented criminal activity of Col. Shukutallah in West Darfur, Lt. Hagaw in Tawila and Adam Jama (the Commissioner of Nyala).⁴⁶⁹

338. The NCOI recognized that crimes against humanity and war crimes were committed in Darfur and identified certain individuals to be investigated including Militia/Janjaweed Commander Ali Kushayb and Military Intelligence Officer-Lt. Hamdi.

339. In December 2006, the Under-Secretary for the Ministry of Justice of the Sudan sent a letter to the Prosecution informing that 14 persons were being investigated including Ali Kushayb.⁴⁷⁰ During a mission to Khartoum between 27 January and 7 February 2007, GoS authorities informed the Prosecution that Kushayb was being investigated for attacks he led together with Lt. Hamdi in Tanako, Nankuseh and Shattaya as well as for extra-judicial killings in Garsila and Deleig.⁴⁷¹

340. Notwithstanding evidence, including in the public domain, concerning Kushayb's responsibility for crimes in Darfur, in April 2008 Kushayb was released from Sudanese custody on the grounds of lack of evidence.⁴⁷²

341. **AL BASHIR** declared that "the Sudanese judiciary has solely the jurisdiction of ruling in cases in Sudan, especially those in Darfur". After five years, none of these initiatives – from the Darfur Special Court, to the ordinary Sudanese courts – has yielded any genuine investigation or prosecution of those responsible of crimes committed in Darfur.

⁴⁶⁸ [FOOTNOTE REDACTED]

⁴⁶⁹ UNCOI Material, DAR-OTP-0014-0293 at 0294-0295 and 0297.

⁴⁷⁰ GoS – OTP Correspondence, DAR-OTP-0123-0002.

⁴⁷¹ Minutes of the ICC mission to Khartoum, 27 January - 7 February 2007, DAR-OTP-0145-0342 at 0379-0381 and 0402-0403.

⁴⁷² Public Source, DAR-OTP-0138-0305 at 0305-0306.

342. Responding to charges that he failed to punish persons responsible for committing atrocities, notwithstanding the abundance of proof that is publicly available, **AL BASHIR** said, “we cannot punish people without evidence.”⁴⁷³

343. On 24 July 2007, after this Court issued warrants of arrest against Ahmad Harun and Ali Kushayb, **AL BASHIR** travelled to Darfur with Harun and announced publicly that he would never hand over Harun for trial by the ICC and that, to the contrary, Harun would continue working in Darfur to implement **AL BASHIR**’s orders. On 14 May 2008, **AL BASHIR** again confirmed publicly to a gathering of the PDF: “*I will not hand over Ahmed Haroun or any Sudanese to ICC.*”

ii. Silencing victims

344. **AL BASHIR**’s agents have intimidated, threatened or carried out reprisals aimed at those complaining or suspected of providing information about, or reporting crimes committed in Darfur. A number of witnesses have suffered intimidation, threats, bribery, arrest, torture and disappearance after having met with commissioners from the UNCOI, UN officials or international NGOs. In November 2004, during his interview with the UNCOI, an [TEXT REDACTED] from [TEXT REDACTED] described his arrest and torture by security forces as retaliation for his complaints while in the camp about the attacks on villages.⁴⁷⁴

345. In April 2005, NISS officers engaged in violence against [TEXT REDACTED] who, after their arrests in [TEXT REDACTED], complained to the police. According to a [TEXT REDACTED], after the attack on [TEXT REDACTED], the local security committee [TEXT REDACTED] issued a decree preventing people from filing complaints with the Police and instructing the Police not to report incidents.⁴⁷⁵ According to another witness [TEXT REDACTED], in early 2003, after the attack at Al Fashir airport, the Chief Representative of the Prosecution Office [TEXT REDACTED], [NAME REDACTED], received a verbal directive from Khartoum not to prosecute incidents which occurred in the context of the counterinsurgency, including the killing of civilians, rape, looting of property and destruction of homes. [TEXT REDACTED].⁴⁷⁶

346. Several witnesses interviewed by [NAME REDACTED] recounted that, in or around [TEXT REDACTED], shortly before the visit of the UNCOI to the camp, a GoS official from Khartoum arrived at the camp and at a meeting with all [TEXT REDACTED], he stated that

⁴⁷³ Video Material, DAR-OTP-0136-0018.

⁴⁷⁴ UNCOI Material, DAR-OTP-0016-0080 at 0089.

⁴⁷⁵ [FOOTNOTE REDACTED]

⁴⁷⁶ [FOOTNOTE REDACTED]

“he was coming from the head of the Sudan Government to let the [IDPs] know that there was a committee coming in”, that there are “rumours about crime, execution and rapes to get rid of specific tribes” and concluded by stating, “if you [IDPs] say everything is okay, we will help you”. The GoS official then called each [TEXT REDACTED] aside and had a brief word with them individually. [TEXT REDACTED].⁴⁷⁷

5. AL BASHIR acted with the requisite *mens rea* for genocide

347. In this section, the Prosecution will prove that **AL BASHIR** acted with the requisite *mens rea* and intended to destroy each of the Fur, Masalit and Zaghawa ethnic groups, as such, in part. The intent was to target the groups and not specific individuals within the groups.

a. Motive vs. Intent

348. The jurisprudence distinguishes between motive and intent: “[i]n genocide cases, the reason why the accused sought to destroy the victim group has no bearing on guilt.”⁴⁷⁸ **AL BASHIR** assessed that the Fur, Zaghawa and Masalit ethnic groups constituted threats to his power and obstacles to the achievement of his political, military and strategic objectives in Darfur and in the Sudan. In particular, members of the group had engaged in armed rebellion. **AL BASHIR**’s motives for the attacks his forces have carried out against the target groups were largely political. But his intent was genocide. The goal was to destroy those ethnic groups whose members challenged his power.

b. Origins of AL BASHIR’s intent to destroy, in part, each of the target groups as such

349. **AL BASHIR**’s decision to destroy the target groups developed over time.

350. In 1991, Daud Bolad, a Fur and founding member of **AL BASHIR**’s political movement at the time, the National Islamic Front⁴⁷⁹ (hereafter the “NIF”), became disillusioned with the policies being pursued towards Darfur by **AL BASHIR**. With the support of the Sudan Peoples

⁴⁷⁷ UNCOI Material, DAR-OTP-0029-0168 at 0170; UNCOI Material, DAR-OTP-0011-0102 at 0103; UNCOI Material, DAR-OTP-0011-0143 at 0143-0144.

⁴⁷⁸ Prosecutor v. Stakić, Judgment, Appeals Chamber, Case No. IT-97-24-A, 22 March 2006 (Stakić Appeal Judgment), para. 45. See also Prosecutor v. Muvunyi, Judgment, Trial Chamber, Case No. ICTR-2000-55A-T, 12 September 2006, para. 479, citing Ntakirutimana Appeal Judgment, paras 302-304 and Prosecutor v. Niyitegeka, Appeals Chamber, Case No. ICTR-96-14-A, 9 July 2004 (Niyitegeka Appeal Judgment), paras 48-53 (“[A]n accused can be found guilty of committing genocide even if his personal motivation went beyond the criminal intent to commit genocide”). Prosecution further recalls that *mens rea* is the mental state or degree of fault which the accused holds at the relevant time of perpetration of the crime, while motive is an incentive that prompted the perpetrator towards committing the crime in question. Along these lines, the Appeals Chamber has repeatedly held that, as far as question of guilt is concerned, motive is generally irrelevant in international criminal law, however it becomes relevant in mitigation or aggravation of guilt at the sentencing stage, see Prosecutor v. Blaškić, Judgment, Appeals Chamber, Case No. IT-95-14-A, 29 July 2004, para. 694, in which the Appeals Chamber yet another time took note of an established distinction between motive and criminal intent.

⁴⁷⁹ [FOOTNOTE REDACTED]

Liberation Army/Movement,⁴⁸⁰ he organized a rebellion. **AL BASHIR**'s Government swiftly put down the rebellion using the Armed Forces and the *fursan* militias.⁴⁸¹ Thereafter **AL BASHIR** and the NIF concluded that they could no longer trust the Fur.

351. In 1992, following Bolad's defeat, the NIF issued a secret bulletin advocating the exclusion of the Fur from key Government positions in the intelligence service, the military and the police administration. The bulletin also advocated the destabilization of Fur areas to force the removal of the Fur from Darfur.⁴⁸² This idea was also being propagated by a group known as the "*Arab Gathering*".⁴⁸³

352. In 1994, **AL BASHIR** divided Darfur into three states with the aim and effect of diluting the political strength of the Fur by rendering them minorities in each of the three states of Darfur.⁴⁸⁴

353. During a peace conference in 1994, the then Social Planning Minister, Ali Osman Taha (who became Vice President in 1998 and second Vice President from 2005 to date), declared that tribal rights would no longer be associated with land in Darfur.⁴⁸⁵ The aim and effect of this decision were to weaken the claims of Fur, Zaghawa and Masalit communities to their traditional lands.

354. In March 1995, Muhammad Ahmad Al-Fadul, the then Governor of West Darfur, enacted a local Government reform which shifted the balance of power in Dar Masalit, in a manner that reduced the power of the Masalit over land and potentially gave more authority to other tribes.⁴⁸⁶ As a result of this change, eight non-Masalit were appointed to outnumber the five Masalit in the electoral college of the tribal administration of West Darfur, creating the possibility for the first time that a non-Masalit could be selected as Sultan for Dar-Masalit.⁴⁸⁷ This reform provoked another war in Dar Masalit from 1996 to 1999⁴⁸⁸ during which tribal Militias

⁴⁸⁰ Rebel group which was fighting for the liberation of the South of Sudan.

⁴⁸¹ [FOOTNOTE REDACTED]

⁴⁸² [FOOTNOTE REDACTED]

⁴⁸³ A coalition of Arabs in Darfur which propagate greater political authority in Darfur and removal of the Fur, Zaghawa and Masalit tribes from Darfur. In the 1980s and 1990s, it issued Memoranda entitled Qurai'sh I and Qurai'sh II; [SOURCES REDACTED].

⁴⁸⁴ [FOOTNOTE REDACTED]

⁴⁸⁵ [FOOTNOTE REDACTED]

⁴⁸⁶ [FOOTNOTE REDACTED]

⁴⁸⁷ [FOOTNOTE REDACTED]

⁴⁸⁸ [FOOTNOTE REDACTED]

backed by **AL BASHIR**'s Government⁴⁸⁹ killed at least 2,000 Masalit civilians and displaced 100,000, 40,000 of whom fled to Chad.⁴⁹⁰

355. The initial steps toward the armed rebellion which eventually triggered **AL BASHIR**'s genocidal response were taken in August 2000,⁴⁹¹ when a number of young Fur and Zaghawa men, later joined by some Masalit, organized an armed group called the Darfur Liberation Army/ Front ("DLA") and launched attacks on Government facilities and outposts.⁴⁹² The DLA, which later evolved into the SLM/A, called for greater political autonomy for Darfur.⁴⁹³

356. By 2001 or 2002, several senior officials of the GoS had started planning to get "*rid*"⁴⁹⁴ of the "Zurga" from Darfur. In August 2002, the GoS engaged in some negotiations with the SLM/A and the JEM, another rebel group, even as the Armed Forces attempted to end the rebellion by force. The Armed Forces campaign was unsuccessful and the rebels continued to launch attacks on GoS military installations including garrisons and police stations.⁴⁹⁵ When negotiations broke down in March 2003 **AL BASHIR** declared that the Government would use military force, and then ordered the Armed Forces to quell the rebellion within fourteen days and take no prisoners.⁴⁹⁶

357. As of March 2003, **AL BASHIR** decided that only the destruction of the target groups would allow him to control Darfur. **AL BASHIR** set out to destroy them through attacks, including massive killings and rapes, in their villages and subsequently through the inflicting of serious bodily and mental harm and imposition of conditions calculated to bring about their destruction while in hostile desert terrain and/or in IDP camps. **AL BASHIR** considered that this slow death would be the most efficient method to secure the destruction of each of the three groups, especially in the face of international scrutiny.

c. Substantial Part

358. Where it is alleged that the accused intended to destroy a group, as such, in part, there must be evidence that it was the intention to destroy at least a *substantial* part of the group.⁴⁹⁷ To de-

⁴⁸⁹ [FOOTNOTE REDACTED]

⁴⁹⁰ [FOOTNOTE REDACTED]

⁴⁹¹ UNCOI Material, DAR-OTP-0107-0627 at 0632.

⁴⁹² [FOOTNOTE REDACTED]

⁴⁹³ Public Source, DAR-OTP-0143-0313 at 0315.

⁴⁹⁴ [FOOTNOTE REDACTED]

⁴⁹⁵ [FOOTNOTE REDACTED]

⁴⁹⁶ [FOOTNOTE REDACTED]

⁴⁹⁷ Prosecutor v Krstić, Case No: IT-98-33-A, Judgment dated 19 April 2004 (Krstić Appeal Judgment) paras 8, 12; Prosecutor v Krajišnik, Case: IT-00-39-T, Judgment dated 27 September 2006 (Krajišnik Trial Judgment) para. 853, Brđanin Trial Judgment, paras 701, 967; Jelisić Trial Judgment, para. 82; Semanza Trial Judgment, para. 316.

termine whether the targeted part of the group is substantial, Courts have considered (i) the numerical significance of the part targeted for destruction in relation to the group as a whole, and (ii) the prominence of the part targeted for destruction within the group as a whole.⁴⁹⁸ In both respects, the part of each group targeted for destruction by **AL BASHIR** was substantial.

359. With regard to numerical significance, the total population displaced as of 2008 by **AL BASHIR**'s forces is at least 2.7 million.⁴⁹⁹ A substantial part of the 2.7 million people displaced came from areas predominantly inhabited by members of the target groups. As of 2003, the overwhelming majority of the members of each targeted group lived in small towns and villages in Darfur.⁵⁰⁰ This is where the target groups were first attacked and moved into camps.

360. Taking into consideration the estimation of a target group population of 2.5 million, it appears that a very substantial part of the Fur, Zaghawa and Masalit were forcibly displaced by the forces of the GoS and militias starting in 2003 and they remain displaced up to date. Now most of them, a substantial part of each group, are in IDP camps, where they are subjected to conditions meant to bring about their destruction.

361. The available evidence shows that the areas inhabited by the Fur, Zaghawa and Masalit were the main targets of the attacks by **AL BASHIR**'s forces. The data from the refugee camps in Chad [TEXT REDACTED] and Darfur ([TEXT REDACTED] [TEXT REDACTED]) of IDP camps in North, West and South Darfur, all indicate that the vast majority of the displaced population are members of these three groups.⁵⁰¹ With regard to the prominence of those attacked, each target group had historic ties with the small towns, villages and the surrounding land in which they were attacked. Links to the land and small village life in Darfur defined their identity as a group. Members of each of the target groups who lived outside Darfur or in larger towns and cities within Darfur, often returned to their own villages in Darfur for visits with family and friends, as reflected in a number of testimonies. Thus the members of each of these groups who resided in villages and small towns in Darfur were therefore considered emblematic of the groups as a whole.

362. Further, as established by existing jurisprudence, the fact that attacks have been pursued in villages and then in camps, over five years, in the face of international scrutiny and outcry, demonstrates to the entire groups their total vulnerability. In this sense also, the part of the group targeted for attacks is prominent.

⁴⁹⁸ Krajišnik Trial Judgment, para. 853; Krstić Appeal Judgment, para. 12.

⁴⁹⁹ Public Source, DAR-OTP-0147-0859 at 0860.

⁵⁰⁰ [FOOTNOTE REDACTED]

⁵⁰¹ Public Source, DAR-OTP-0148-0098; Public Source, DAR-OTP-0149-0483.

363. In sum, **AL BASHIR** targeted both a numerically substantial part of the groups and a prominent part within the groups as a whole.

d. AL BASHIR's intent to destroy in part, each of the target group as such

364. The crime of genocide is a crime of intention. It does not require that the intended destruction succeed.⁵⁰² 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 circumstances of the crime.⁵⁰³

365. When considering whether a perpetrator had genocidal intent, an inference may properly be drawn from all the evidence taken together,⁵⁰⁴ even where each factor on its own may not warrant such an inference. As held by the ICTY Appeals chamber, there should not be a compartmentalised analysis of *Mens Rea*.

366. Finally, when “the Prosecution relies upon proof of a state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.”⁵⁰⁵ In the instant case, the Prosecution respectfully submits that **AL BASHIR's** intent to destroy the target groups as such in substantial part is the only available inference from a comprehensive con-

⁵⁰² See Prosecutor v. Brđanin, Judgment, trial Chamber, Case No. IT-99-36, 1 September 2004, 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.

⁵⁰³ See Stakić, Case No. IT-97-24-A, Appeals Chamber Judgment, para. 18 (“[E]vidence of intent to destroy may be inferred from an accused's actions or utterances vis- a-vis the targeted group”); Krstić, Case No. IT-98-33-A, Judgment, para. 34 (“Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime.”); Prosecutor v. Simba, Case No. ICTR-01-76-T, Judgment, para. 413 (Dec. 13, 2005) (“In the absence of direct evidence, a perpetrator's intent may be inferred from relevant facts and circumstances.”); Brđanin, Case No. IT-99-36-T, Judgment, para. 704 (“The Trial Chamber notes that it is generally accepted in the jurisprudence of the Tribunal and of the ICTR that, in the absence of direct evidence, the specific intent for genocide can be inferred from ‘the facts, the concrete circumstances, or a pattern of purposeful action.’”). See also Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment dated 5 July 2001 (Jelisić Appeal Judgment), para. 47, Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment dated 2 September 1998 (Akayesu Trial Judgment), paras 477 and 522, Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgment dated 1 June 2001 (Kayishema and Ruzindana Appeal Judgment), para. 159 and Prosecutor v. Laurent Semanza, Case No. ICTY-97-20-A, Judgment dated 20 May 2005 (Semanza Appeal Judgment), para. 262.

⁵⁰⁴ Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment dated 22 March 2006 (Stakić Appeal Judgment), paras 53 and 55. (Trial Chamber's compartmentalized inquiry of the *mens rea* evidence with respect to the various genocidal acts alleged was improper. Instead, the Trial Chamber should have taken into account the totality of the evidence to decide whether the accused had intended to destroy the group).

⁵⁰⁵ Krstić, Case No. IT-98-33-A, Appeals Chamber Judgment, para. 41. “Where direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime. Where an inference needs to be drawn, it has to be the only reasonable inference available on the evidence.” Brđanin, Case No. IT-99-36-T, Judgment, para. 970 (emphasis added). While this is the evidentiary standard required for proof beyond reasonable doubt, the Prosecution notes that for the purposes of an Art. 58 application the lower standard of reasonable grounds will instead be applicable.

sideration of nine factors: the pre-existing historical and political background, as exemplified in paragraphs 349-357 above and the following eight factors.

i. Systematic targeting of victims on account of their membership of a particular group,⁵⁰⁶ scale of the atrocities committed⁵⁰⁷ and the actual destruction of the group⁵⁰⁸

367. As shown above, forces and agents under the control of **AL BASHIR** meticulously targeted for violence almost exclusively villages and towns inhabited mainly by members of the targeted groups. For example in Habila, 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.

368. The land occupied by the Fur, Zaghawa and Masalit defined the target. As a result, civilian members of the target groups were the main victims of the attacks,⁵⁰⁹ of the killings, of the rapes, and of forcible displacement.⁵¹⁰ Most of the villages and towns inhabited mainly by members of the target groups were attacked and destroyed.

369. A very high percentage of those who fled the attacks are members of the target groups. In particular, as of December 2007, the total number of Sudanese people from Darfur in refugee camps in [TEXT REDACTED].⁵¹¹

370. The Fur constitute from 50% to the totality of IDPs in some camps. In [TEXT REDACTED], which hosts around 92,000 IDPS, there are an estimated 46 to 50,000 Fur, 9,000 Zaghawa and 5,000 Masalit.

371. **AL BASHIR**'s forces and agents subjected those living in IDP camps to serious bodily and mental harm, including rape and other forms of sexual violence against thousands of

⁵⁰⁶ The perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct constitutes an accepted indicia of genocidal intent (Akayesu Trial Judgment, para. 524, Prosecutor v. Karadžić & Mladić, Trial Chamber, Decision on Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94). Furthermore, consistency in the types of crimes and characteristics of targets of the Militia/Janjaweed attacks vividly demonstrate the methodical way of planning at the highest level of the Government that gives rise to a reasonable inference of genocidal intent on the part of **AL BASHIR** (Kayishema & Ruzindana Trial Judgment, paras 93; 534-535; Muhimana Trial Judgment, para. 496).

⁵⁰⁷ Jelisić Appeal Judgment, para. 47; Akayesu Trial Judgment, para. 523; Bagilishema Trial Judgment, para. 62.

⁵⁰⁸ Brđanin Trial Judgment, para. 697, 973-974, Prosecutor v. Slobodan Milošević, Decision on Motion for Judgment of Acquittal, Trial Chamber, Case No. IT-02-54-T, 16 June 2004, para. 125; Kayishema & Ruzindana Trial Judgment, para. 93.

⁵⁰⁹ [SOURCES REDACTED]; UNCOI Material, DAR-OTP-0018-0010 at 0084, para. 304, at 0086, para. 315.

⁵¹⁰ UNCOI Material, DAR-OTP-0018-0010 at 0089.

⁵¹¹ Public Source, DAR-OTP-0149-0483; Public Source, DAR-OTP-0148-0098.

women in the camps,⁵¹² and generally to conditions calculated to bring about destruction. The result of the conditions accompanying and subsequent to the displacement imposed by **AL BASHIR**'s forces and agents has been already the "slow death" of between 80,000 to 265,000 people, including a substantial part of the target groups.

372. Forces and agents under the control of **AL BASHIR** killed outright at least 35,000 civilians, including a substantial number of members of the targeted groups, in physical attacks on towns and villages.⁵¹³

373. The Prosecution submits that in the instant case, the intent to destroy a substantial part of the group has to be inferred from the number of members of the target groups on whom conditions to bring destruction are imposed. 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.⁵¹⁴ 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.

374. [TEXT REDACTED] explained in an interview with the Prosecution that [TEXT REDACTED], 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, [NAME REDACTED] 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, either because they were directing it or because they were deliberately failing to act.*" The evidence shows that **AL BASHIR** directed the plan and only punished those who did not comply with his orders; he provided impunity to those who followed his orders.

375. Ahmad Harun is an example. Ahmad Harun said that **AL BASHIR** had "given him all the power and authority to kill or forgive whoever in Darfur" and that "they were ready to kill ¾ of

⁵¹² 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".

⁵¹³ UNCOI Material, DAR-OTP-0018-0010 at 0161-0163, para. 630-631.

⁵¹⁴ The crime of genocide requires that 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. See Prosecutor v. Brđanin, Judgment, Trial Chamber, Case No. IT-99-36, 1 September 2004, 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 people in Darfur so that ¼ could live”.⁵¹⁵ Harun openly incited to attack the target groups by stating that “*all the Fur and what they had, had become booty for the Mujahidin*”.⁵¹⁶

376. **AL BASHIR** has kept Ahmed Harun in critical positions to achieve his goals. Harun coordinated the attacks against the villages during 2003-2005. The State Security Committees reported to him. Since September 2005, Harun is responsible for the so called HAC that controls the camps. He is a key element of both aspects of the genocide, the attacks on the villages and the attack on the camps. As part of the North/South agreement Harun heads a committee to investigate human rights abuses, providing certainty to the other members of the Government involved in crimes that they will not be affected; Harun is also a member of the UNAMID oversight committee, affecting the peacekeepers’ deployment. In addition, **AL BASHIR** has appointed Harun to other important functions, which have a critical impact on the IDPs.⁵¹⁷

377. In June 2007, **AL BASHIR** announced publicly that he would never hand over Harun to the ICC; to the contrary, Harun would continue working in Darfur to implement his orders.⁵¹⁸

ii. Existence of a genocidal plan or policy⁵¹⁹

378. While not a legal ingredient of the crime of genocide, the existence of a plan or policy is an important factor in proving the specific intent.⁵²⁰

379. Neither the scale of the criminal acts described herein - spanning a geographic region as large as Darfur, and over a time period extending more than five years – nor their systematic nature – the common sequence of killing, rape, forcible displacement, burning and destruction of dwellings, obstruction of humanitarian aid, and insecurity for IDPs – nor the rigor with which civilian members of the Fur, Masalit and Zaghawa ethnic groups, rather than armed re-

⁵¹⁵ [FOOTNOTE REDACTED]

⁵¹⁶ [FOOTNOTE REDACTED]

⁵¹⁷ He is also Secretary General of the National Mine Action Authority (NMAA) and Chairman of the delegation of experts of the National Council for the Demobilization, Disarmament and Reintegration (see the website External Information Council of the Sudan - <http://exinfo.gov.sd/details.php?rsnType=1&id=22316> - last visited 14/03/08).

⁵¹⁸ [SOURCE REDACTED]; Public Source, DAR-OTP-0138-0251.

⁵¹⁹ Krstić Trial Chamber’s finding of the existence of a plan devised by the VRS Main Staff to execute the military aged Bosnian Muslim men in Srebrenica involved: a number of considerations including 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 Krstić Trial Judgment, paras 85-87, 572). Although existence of a plan or policy is not a legal ingredient of the crime of genocide, it is commonly perceived to facilitate proof of the material elements of the crime, including genocidal intent. Although the Krstić conviction was partly overturned on appeal, the Trial Chamber’s finding of the genocidal plan has been unequivocally upheld on appeal (see Krstić Appeal Judgment, paras 32 and 273).

⁵²⁰ Jelisić Appeal Judgment, para. 48; Jelisić Trial Judgment, paras 100-101; Krstić Appeal Judgment, para. 225; Krstić Trial Judgment, para. 572; Blagojević & Jokić Trial Judgment, para. 656. Kayishema & Ruzindana Trial Judgment, paras 94, 275-276.

bels, were targeted, was a product of chance. In particular the repeated pattern of combined Armed Forces and Militia/Janjaweed attacks required strict coordination. As [NAME REDACTED] said it is inconceivable that there would be two separate forces operating on independent plans. 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.

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

381. 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.”⁵²¹ and “[I]n 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.”⁵²²

382. The minutes of the State Security Committee of West Darfur, confirm the existence of plans, establishing that it also acted in accordance with a *national security plan disseminated from Khartoum*.⁵²³

383. The significance of the minutes was highlighted by a witness [TEXT REDACTED]. [TEXT REDACTED] Harun refused to provide all Security Committee Minutes, stating that [TEXT REDACTED].

iii. Statements of those involved in the crimes exposing their intentions⁵²⁴

384. 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 de-

⁵²¹ Unofficial version of the Armed Forces Memorandum concerning the ICC's inquiries – Military Operations summary since January 2002 – Armed Forces and Rebels (30 April 2006), para. 24(c) (DAR-OTP-0099-0473 to DAR-OTP-0099-0500 (in Arabic), para. 24(c), DAR-OTP-0116-0721 at 0736.

⁵²² DAR-OTP-0099-0473 to DAR-OTP-0099-0500 (in Arabic), para. 3(a), DAR-OTP-0116-0721 at 0724.

⁵²³ UNCOI Material, DAR-OTP-0016-0013; [SOURCE REDACTED].

⁵²⁴ Akayesu Trial Judgment, paras 728-729; Kayishema & Ruzindana Trial Judgment, paras 93, 538-540; Bagilishema Trial Judgment, para. 63; Prosecutor v. Muhimana, Judgment, Trial Chamber, Case No. ICTR-95-1B-T, 28 April 2005, para. 496; Prosecutor v. Gacumbitsi, Judgment, Trial Chamber, Case No. ICTR-2001-64-T, 17 June 2004, para. 252.

stroy, in part, the target groups. 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.⁵²⁵ He declared at different times that he “*didn't want any villages or prisoners, only scorched earth*”;⁵²⁶ publicly gave orders to the military, police and intelligence to eliminate the opposition and leave no survivors;⁵²⁷ 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.⁵²⁸

385. The attackers expressed openly the instructions received from **AL BASHIR**. They told victimized members of the three targeted groups that “*the Fur are slaves, we will kill them*”⁵²⁹; “*You are Zaghawa tribes, you are slaves*”⁵³⁰; “*You are Masalit. Why do you come here, why do you take our grass? You will not take anything today*”⁵³¹.

386. The consistency of these statements indicates that these were not isolated events; rather they reflect **AL BASHIR**'s genocidal intention.⁵³²

iv. Forcible transfers accompanying the genocidal acts pleaded⁵³³

387. Consistent jurisprudence has established that in certain circumstances forcible transfer may constitute evidence of genocidal intention.⁵³⁴

⁵²⁵ [FOOTNOTE REDACTED]

⁵²⁶ [FOOTNOTE REDACTED]

⁵²⁷ [FOOTNOTE REDACTED]

⁵²⁸ [FOOTNOTE REDACTED]

⁵²⁹ UNCOI Material, DAR-OTP-0018-0010 at 0068.

⁵³⁰ UNCOI Material, DAR-OTP-0018-0010 at 0133, para. 511 footnote 189; see also DAR-OTP-0018-0010 at 0090, para. 333. [TEXT REDACTED]

⁵³¹ UNCOI Material, DAR-OTP-0018-0010, at 0133, para. 511 footnote 189. [SOURCE REDACTED]

⁵³² The Prosecution herewith recalls that genocidal intent can be inferred either from words or deeds of the perpetrator and others acting with him (Kayishema & Ruzindana Trial Judgment, paras 93, 538-540; Prosecutor v. Bagilishema, Judgment, Trial Chamber, Case No. ICTR-95-1A-T, 7 June 2001, para. 63; Akayesu Trial Judgment, para. 728). Similarly, genocidal intent can be displayed through a deliberate or systematic pattern of conduct of the perpetrator (Kayishema & Ruzindana Appeal Judgment, paras 158-159 and 162-163; Kayishema & Ruzindana Trial Judgment, paras 93, 527, 534-535; 541; Bagilishema Trial Judgment, para. 63; Muhimana Trial Judgment, para. 496).

⁵³³ Prosecutor v Blagojević, Case No. IT-02-60-A, Judgment dated 9 May 2008 (Blagojević Appeal Judgment), para. 123 and Krstić Appeal Judgment, paras 31-33.

⁵³⁴ Krstić Appeal Judgment, para. 33; Blagojević Appeal Judgment, para. 123. Other judgments that seemingly depart from the above jurisprudence do in fact uphold the main thrust of these cases. However, in contrast with the factual circumstances of Stakić, the scope and nature of the displacement in the present case has well been “accompanied by methods seeking the physical destruction of the group,” (see Stakić Trial Judgment, para. 557, cited in Stakić Appeal Judgment, para. 46), and gives rise to a compelling evidence of genocidal intent on the part of AL BASHIR. Prosecution further notes that the acts of displacement of 2.7 million people from and within Darfur form an integral part of the genocidal plan being executed in Darfur that, inter alia, manifested itself in the imposition of the conditions of life deliberately calculated to bring about the destruction of the target groups as such, in part. This must be borne in mind when drawing necessary distinctions with Trial Chamber's holding of Brđanin.

388. 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*”.⁵³⁵

389. The forcible transfer of members of the target groups has been conducted in such a way that the groups can no longer reconstitute themselves. As documented above, forcible displacement of the three target groups was massive and was accompanied by destruction of all means of livelihood. A Darfurian interviewed by [TEXT REDACTED] recounted that one woman said that she overheard one attacker say to another: “*Don’t waste the bullet, they’ve got nothing to eat and they will die from hunger*”.⁵³⁶

390. The importance of the land for the target group is confirmed in the Darfur Peace Agreement which states that “[T]ribal land ownership rights (hawakeer) historical rights to land, traditional or customary livestock routes, and access to water, shall be recognized and protected. All levels of Government shall institute a process to progressively develop and amend the relevant laws to incorporate customary laws and practices, international trends and practices and protect cultural heritage.”⁵³⁷

391. **AL BASHIR** instead of upholding his promises of respect for traditional land rights and facilitating returns, created conditions to prevent any possible return. People from other tribes, often affiliated with Militia/Janjaweed are resettled there, taking over target groups’ land and followed in many instances by occupation of the land by other tribes. Such usurpation makes moot any possibility for the IDPs to ever return. The displacement has weakened traditional leadership structures which were based on land rights. And as demonstrated above, any new

Since forcible transfer had not been pleaded by prosecution as part of genocidal actus reus (Brđanin Trial Judgment, para. 693), the Trial Chamber found it inappropriate to rely on it as evidence of the actual destruction of the targeted parts of the protected groups (Brđanin Trial Judgment, para. 975). “In determining whether the requisite specific intent can be inferred from the evidence, the Trial Chamber [had to] examine the evidence as to the actual destruction of the groups within the terms of Art. 4(2)(a), (b) and (c)”, (Brđanin Trial Judgment, para. 973, emphasis added).

⁵³⁵ Secretary General, 1947 Draft Convention at p. 24; 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.

⁵³⁶ Public Source, DAR-OTP-0119-0635 at 0644 and 0668.

⁵³⁷ Public Source, DAR-OTP-0115-0563 at 0589.

leadership in the camps is being targeted, thus actually destroying one of the basic foundations of the group.

392.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 current evidence shows that the target groups, far from being assisted, are also attacked in the camps, a clear indication of **AL BASHIR**’s genocidal intention.

v. Rapes and sexual violence as part of a destruction process⁵³⁸

393.As stated by the ICTR Trial Chamber in the Akayesu case, sexual violence can be a step in the process of destruction of the group: “destruction of the spirit, of the will to live and of life itself”. 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 was clearly aimed at destroying the groups, while inflicting serious mental and bodily harm on its members.

394.The ICTR in the *Musema* Trial Judgement, paragraph 933 noted: “Accordingly, the Chamber notes that on the basis of the evidence presented, it emerges that acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramusugi, Musema declared: “*The pride of the Tutsis will end today*”. In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such.

395.The systematic nature of the rapes⁵³⁹ and the statements which accompany these rapes (if we “*could find any Fur woman ...we would rape them again to change the colour of their children*”) are indication of an intention to destroy the group as such. [NAME REDACTED], a victim of rape [TEXT REDACTED] summed up the situation as follows - “*they kill our males and then dilute our blood with rape. [They]...want to finish us as a people, end our history*”.⁵⁴⁰

vi. Strategy to deny and conceal the genocide as evidence of intention

⁵³⁸ Prosecutor v Blagojević, Trial Judgment, para. 662, citing Akayesu Trial Judgment, paras 731-732.

⁵³⁹ UNCOI Material, DAR-OTP-0018-0010 at 0097.

⁵⁴⁰ [FOOTNOTE REDACTED]

396. Instead of investigating and punishing those directly responsible for the physical perpetration of the genocide committed **AL BASHIR** concealed it. **AL BASHIR** labelled as [TEXT REDACTED] “fabrications” photographs of thousands [TEXT REDACTED] of burned villages in Darfur.⁵⁴¹ On the issue of rapes, on 19 March 2007 **AL BASHIR** said that “*It is not in the Sudanese culture or people of Darfur to rape. It doesn’t exist. We don’t have it*”.⁵⁴² **AL BASHIR** further stated that 99% of alleged cases of rape are fabricated in order to place blame on the Government.⁵⁴³

397. Given the international attention given to Darfur, genocide by imposing conditions calculated to bring about the physical destruction, if combined with a studied misinformation strategy, 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’, or ‘inter tribal clashes’, or the ‘actions of lawless autonomous militia’; threatening Sudanese citizens into silence;⁵⁴⁴ trying to blackmail the international community into silence. **AL BASHIR** made possible further commission of crimes.

398. 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, he 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 does not consider genocide.

399. When the UNCOI issued its reports making findings that Government forces and militias conducted indiscriminate attacks that could amount to crimes against humanity, Mustafa Ismail, then Sudanese External Affairs Minister, quickly pointed out that the report did not make a finding of genocide and consistently, Jamal Ibrahim, a top official in the External Affairs Ministry, stated “[we] feel relieved” that there was not finding of genocide.⁵⁴⁵

vii. Conclusion on intent

400. The Prosecution respectfully submits that **AL BASHIR**’s intent to destroy substantial parts of the Fur, Zaghawa and Masalit groups, as such, is the “only reasonable inference available on the evidence.”

6. Mens Rea for Crimes against Humanity

⁵⁴¹ Video Material, DAR-OTP-0136-0018.

⁵⁴² Video Material, DAR-OTP-0146-0140; Public Source, DAR-OTP-0146-0138.

⁵⁴³ Video Material, DAR-OTP-0136-0018.

⁵⁴⁴ [FOOTNOTE REDACTED]

⁵⁴⁵ See Public Source, DAR-OTP-0149-0502.

401. For the purposes of the crimes against humanity charges, the Prosecution must show that (i) the perpetrator intended to further the attack and (ii) the perpetrator knew that his conduct constituted, and took place as part of a widespread or systematic attack against a civilian population.

402. The Prosecution relies on all the evidence and arguments showing that **AL BASHIR** has absolute control of the state apparatus and Militia/Janjaweed actions, and therefore the attacks were executed following his will. Similarly, **AL BASHIR** had full knowledge and intention that the crimes committed on his orders in Darfur by Armed Forces and Militia/Janjaweed would be part of a widespread and systematic attack directed against a civilian population. Harm to civilians was not simply an accepted by-product of a military campaign. To the contrary, in **AL BASHIR**'s plan, civilians were the intended targets of attack. He also received numerous representations and complaints from local leaders, foreign dignitaries and international bodies. **AL BASHIR** also had first-hand knowledge of the widespread and systematic nature of the attacks against civilians from the several visits he made to Darfur following April 2003.⁵⁴⁶

403. The United Nations Security Council has issued numerous resolutions expressing concern about the massive attacks on civilians in Darfur.⁵⁴⁷ For example, on 11 June 2004 the UN Security Council passed Resolution 1556 which condemned all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed. It also demanded that the GoS fulfil its commitments to disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates.⁵⁴⁸

404. Representatives of numerous States, as well as of international bodies including the United Nations, the European Union, and the African Union, have held discussions with **AL BASHIR**, as well as with representatives of his Government, about the crimes in Darfur. On 25 January 2005, the UNCOI released its Final Report on Darfur, finding, *inter alia*, that from February 2003 to mid-January 2005 Armed Forces and Militia/Janjaweed attacked civilians and destroyed and burned down civilian villages and rebel forces did the same on a smaller scale;⁵⁴⁹ unlawfully killed civilians and that the killing was widespread and systematic;⁵⁵⁰ committed

⁵⁴⁶ [FOOTNOTE REDACTED]

⁵⁴⁷ Public Source, DAR-OTP-0080-0017; Public Source, DAR-OTP-0080-0019; Public Source DAR-OTP-0080-0024; Public Source, DAR-OTP-0080-0028; Public Source, DAR-OTP-0080-0035; Public Source DAR-OTP-0080-0019 at 0019; Public Source, DAR-OTP-0080-0019 at 0020.

⁵⁴⁸ Public Source, DAR-OTP-0080-0019 at 0019-0020.

⁵⁴⁹ UNCOI Material, DAR-OTP-0018-0010 at 0161-0163.

⁵⁵⁰ UNCOI Material, DAR-OTP-0018-0010 at 0162.

rape and other forms of sexual violence in a widespread and systematic manner;⁵⁵¹ forcibly displaced the civilian population in a widespread and systematic manner⁵⁵² and that victims of the attacks by the Armed Forces and Militia/Janjaweed belonged to the Fur, Zaghawa and Masalit tribes persecution.⁵⁵³ However **AL BASHIR** did not change his plan. During the last attacks in February/March 2008 there was “*no evidence that rebel forces were even present in [any of the towns] when they were attacked ..., indicating that the attacks on civilians and civilian property were deliberate.*” The “*scale of destruction of civilian property, including objects indispensable for the survival of the civilian population, suggests that the damage was a deliberate and integral part of a military strategy*”.⁵⁵⁴ [TEXT REDACTED] all expressed concern about the deliberate targeting of civilians in these attacks.

Attacks directed against a civilian population

405. This element requires that the Prosecution must establish (a) a course of conduct involving the multiple commission of acts referred in Art. 7(1) against any civilian population and (b) the attacks must be in furtherance of a State or organizational policy. The Prosecution submits that the evidence provided under the section targeting of civilians and the section on widespread or systematic attacks adequately satisfy these elements. The Prosecution submits that the evidence provided shows that **AL BASHIR** used the apparatus of state and the armed forces and Militia/Janjaweed to commit the crimes charged.

406. In sum, the Prosecution submits that all the requisite *mens rea* elements for crimes against humanity have been established.

VII. Ensuring the Appearance of AL BASHIR

407. Under Art. 58, if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that a person has committed crimes within the jurisdiction of the Court, the Chamber may issue upon the application of the Prosecution either a warrant of arrest or a summons to appear.

408. The Prosecution respectfully submits that the evidence and information summarised above establish reasonable grounds to believe that **AL BASHIR** committed the crimes alleged in this Application.

409. The next issue to address is the best manner in which to ensure the appearance of the individual. On the basis of Art. 58, the Prosecutor may submit an application requesting an arrest

⁵⁵¹ UNCOI Material, DAR-OTP-0018-0010 at 0162.

⁵⁵² UNCOI Material, DAR-OTP-0018-0010 at 0162.

⁵⁵³ UNCOI Material, DAR-OTP-0018-0010 at 0162.

⁵⁵⁴ Public Source, DAR-OTP-0143-0273 at 0279.

warrant, see Art. 58(1), or a summons for a person to appear, see Art. 58(7). To decide on the merits of those two options, the Prosecution is obligated to assess all of the information gathered during the investigation. In addition, its assessment and request necessarily involve an element of predicting the likelihood of future events.⁵⁵⁵ The Prosecution finally submits that all of the information in this Application may bear upon the evaluation.

410. Ensuring the persons' appearance will be primarily the responsibility of the territorial State, the Sudan, upon the Chamber's decision. The Sudanese Government, as the territorial State, has both the legal responsibility to cooperate to ensure the appearance of the named individual, **AL BASHIR**, in accordance with the Chamber's decision, and the ability to do so.

411. However, the Prosecution notes, as submitted in its filing of 27 May 2008, that the Government of the Sudan has in practice ceased to provide cooperation to the Office and is not cooperating with the Court. There has been no change since the date of the above mentioned filing. The Prosecution notes that the application of Art. 58(7) of the Statute is restricted to cases in which the person can and will appear voluntarily before the Court without the necessity of presenting a request for arrest and surrender as provided for in Arts. 89 and 91 of the Statute.

412. **AL BASHIR** has consistently challenged the jurisdiction of the Court, and categorically refused that any Sudanese citizen be surrendered to the court. Sitting at the apex of the state structure in the Sudan, he is in a position to obstruct the proceedings and possibly attempt to secure information about witnesses and threaten them; this Application provides numerous examples of such past behaviour of **AL BASHIR** in relation to any person denouncing his crimes. There are reasonable grounds to believe that **AL BASHIR** will not appear for trial unless compelled to do so by arrest.

413. In view of the above and in accordance with Art. 58(1)(b), the Prosecution respectfully requests the issuance of an arrest warrant.

414. The Prosecution submits that a summons to appear could be an alternative pursued by the Court should **AL BASHIR** express his willingness to pursue this route. The Prosecution submits that any official response of the Sudanese Government and/or the individual concerned to the filing of this application, to the effect that they will comply with any decision by the Pre-Trial Chamber on this matter, would modify this assessment of the OTP and could justify, in the Prosecution's view, and subject to the Pre-Trial Chamber's determination, the issuance of a summons.

⁵⁵⁵ Similarly, see Appeals Chamber Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007, para. 137.

VIII. [TEXT REDACTED]
415.[TEXT REDACTED]

IX. Conclusion

416. For the above reasons, the Prosecutor requests that the Pre-Trial Chamber:

- (i) enter a finding that there are reasonable grounds to believe that **AL BASHIR** committed the crimes charged in this application;
- (ii) issue a warrant of arrest against **AL BASHIR**;
- (iii) [TEXT REDACTED];
- (iv) [TEXT REDACTED].



.....
Luis Moreno-Ocampo
Prosecutor

Dated this 14th day of July 2008
The Hague, Netherlands