The Theodore Roosevelt Inn of Court
Holocaust Law Program
April 28, 2009

" 'The Dagger of the Assassin Concealed Beneath the Robe of the Jurist' : Murderous Lawyers At Nuremberg"

Prof. Harry Reicher
University of Pennsylvania
School of Law
Scholar -in-Residence, Touro Law Center

"The 60th Anniversary of the Genocide Convention– Realizing 'Never Again' "

Prof. Sheri Rosenberg
Cardozo School of Law
Yeshiva University

Hon. Leonard B. Austin, Liaison
Debora G. Nobel, Chair
Hon. Steven Jaeger
Abraham Krieger
Harry Kutner
William Cherno
Touro Law Center Students

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HARRY REICHER

Bio

Harry Reicher teaches international human rights and law and the Holocaust at the University of Pennsylvania Law School and is Scholar-in-Residence at Touro Law School.

Born in Prague and raised in Australia, Harry Reicher is a graduate of Monash University, in Melbourne, with graduate law degrees from the University of Melbourne and Harvard Law School. From 1995-2004, he was Director of International Affairs and Representative to the United Nations of Agudath Israel World Organization, in which capacity he practiced international law and diplomacy in the field of human rights, with particular emphasis on freedom of religion. In addition, he was heavily involved in Holocaust-era restitution, reparations and compensation, and the plethora of litigation arising therefrom.

As a Barrister at Law, he has argued cases before a range of courts and tribunals, including the High Court of Australia, and the courts of England, up to the House of Lords (and also in the United States). These have resulted in numerous precedent-setting judgments in the areas of international law (environmental law and human rights), taxation and corporate law.

As an academic, he has taught a range of international law and taxation courses at law schools in Australia and the U.S. He has taught at Penn Law School since 1995, and has pioneered what is effectively a new academic discipline, combining Holocaust studies and law.

In 2004, President Bush appointed him to the United States Holocaust Memorial Council. He has published in the *Columbia Journal of Transnational Law* and is the editor of *Australian International Law: Cases and Materials*, the first-ever indigenous Australian Casebook on international law.

Prof. Reicher maintains a private practice in Brooklyn, N.Y. specializing in international law, boutique in-house counsel services and arbitration.

SHERI ROSENBERG

Bio

Professor Rosenberg is a Clinical Professor of Law and Director of the Human Rights and Genocide Clinic and Program in Holocaust and Human Rights Studies at the Benjamin N. Cardozo School of Law.

Professor Rosenberg has worked in the areas of civil rights and international human rights with a specific focus on issues of discrimination, equality and genocide. In 2000, the U.S. Department of State selected Professor Rosenberg to be one of two U.S. lawyers to work for the Human Rights Chamber in Sarajevo, Bosnia and Herzegovina. The Human Rights Chamber was a quasi-international court established under the Dayton Peace Agreement. There she developed and coordinated the case work of the Court and authored judicial opinions in a number of significant cases in the area of international human rights. Additionally, she trained local lawyers and judges in international human rights law. Before coming to Cardozo, she was awarded a Human Rights Fellowship at Columbia University, where she worked for the United Nations, Office for the Coordination of Humanitarian Affairs, Policy Branch and completed her LL.M with honors. Professor Rosenberg's research interests include equality and non-discrimination in international law, minority rights and genocide prevention. She recently published *Promoting Equality after Genocide*, 16 Tul. J. In't L 329-393 (2008) and *What's Law Got to do With it? The Bosnia v. Serbia Decision's Impact on Reconciliation* is forthcoming in the Rutger's Law Review. Professor Rosenberg speaks widely about issues related to the law and genocide.

DEBORA G. NOBEL

Debora G. Nobel is an attorney with the firm of Ivone, Devine & Jensen, LLP in Lake Success since 1993 and specializes in medical malpractice defense litigation. Prior to that, she was a Senior Attorney with the firm of Bower & Gardner in New York City.

Ms. Nobel has a Master's Degree in Health Policy and Administration from New York University Wagner School of Public Service (1974) and a J.D. from New York Law School (Night Division 1979). Before graduating from law school, Ms. Nobel held the position of Assistant Director for Medical Review and Evaluation in the Ambulatory Care Program of the New York State Department of Health Office of Health Systems Management.

Ms. Nobel serves as a Board member of the Theodore Roosevelt American Inn of Court.

William A. Cherno, Esq. Bio

Bill received his JD from The Hofstra School of Law in 1979 after a BA in Political Science from American University in Washington, DC and was admitted to practice law in New York in 1980. In 1996 he was admitted to practice law in Florida. He is currently a sole practioner practicing primarily in the areas of residential and commercial real estate as well as civil litigation. He has been practicing in these areas of law for the past 15 years representing lenders, sellers and purchasers in all aspects of real estate. Prior to that, he was a litigator first for private law firms and then in-house litigation counsel for Chase Manhattan Bank as a Vice-President representing almost every division of the bank.

He has also been very involved doing pro-bono work for his prior congregation Temple Judea of Massapequa having been its treasurer for many years, a trustee, and co-chair of a very sensitive committee, the reduced dues membership committee. While counsel to the congregation, he dealt with litigation against the congregation, rental agreements, lease negotiations and contracts of its employees, as well as his final position as chair of the merger committee which let to the successful merger of Temple Judea of Massapequa with The Suburban Temple of Wantagh.

Hon. Steven M. Jaeger
County Court Judge, Nassau County, New York
Acting Supreme Court Justice

Judge Steven M. Jaeger has served as a Judge of the County Court of Nassau County since January, 2005 and currently is an Acting Supreme Court Justice in a Criminal Term felony Trial Part. Judge Jaeger previously served as an Acting Family Court Judge in 2005 and as a Nassau County District Court Judge from January, 2002 through 2004.

Judge Jaeger was admitted to the practice of law in New York in 1977 and was a criminal defense lawyer in New York City and appellate counsel for the Legal Aid Society of the City of New York. From 1981 to 1984, he was Law Secretary to the late Hon. Alexander Vitale in both Nassau County Court and New York State Supreme Court. From 1984 through 1999 he was engaged in the private practice of law on Long Island and New York City. He served as Law Secretary to Nassau County Court Judge Meryl J. Berkowitz during 2000 and 2001.

Judge Jaeger has been an active member of the Bar Association of Nassau County and is on the Executive Committee of the Theodore Roosevelt American Inn of Court and the Board of Directors of the Jewish Lawyers Association of Nassau County. Judge Jaeger received his undergraduate degree in political science from the University of Pennsylvania and his law degree from NYU Law School.

ABRAHAM B. KRIEGER

Abraham B. Krieger is an attorney in the Commercial Real Estate Law practice of Meyer, Suozzi, English & Klein, P.C., having joined the firm as a member in February 2007. Mr. Krieger's broadly-based practice focuses on representing businesses and individuals in commercial and residential real estate and lease transactions and real estate, lease and commercial litigation.

In addition to his legal career, Mr. Krieger is deeply committed to his community and beyond. Since 1978, he has served as Counsel to the American Gathering of Jewish Holocaust Survivors. He also served on the Second Generation Advisory Committee of the United States Holocaust Memorial Museum.

In the summer of 2002, Mr. Krieger served at the University of Berlin, Germany on the Wannsee Conference Advisory Committee on The Corruption of the Rule of Law in Germany. In November of 2008, Mr. Krieger appeared at the at the Nassau County Bar Association where he presented a program to the Yashar, the Attorneys' and Judges' Chapter of the Hadassah of Nassau County. His program, titled, "Stories of Hope and Survival as Told By a Child of Survivors," recounted his personal and professional perspectives on being raised by two Jewish parents, both of whom were Holocaust survivors.

In January of 2009, Mr Krieger traveled to Jerusalem to participate in the 13th Plenary of the World Jewish Congress Assembly (WJC), an organization that works to address the needs of Jews and Jewish communities throughout the world and to cooperate with all peoples on the basis of universal ideas of peace, freedom, and justice. While there, Mr. Krieger joined 400 other delegates representing Jewish communities in over 80 countries as well as several affiliated international Jewish Organizations.

In March 2009, Mr. Krieger, along with other members of the WJC, met with the German Ambassador to the United Nations to discuss human rights issues and the upcoming United Nations Human Rights conference to take place in April 2009 in Geneva, Switzerland.

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1971-72 Law Clerk, Nassau County Attorney
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The Tragedy Of The Human Rights Movement

by Harry Reicher
Special To The Jewish Week

The human rights movement, which offered so much hope and promise after the horrors of the Holocaust, has, in very significant respects, lost its way.

The sight of President Ahmadinejad of Iran spewing out vile anti-Semitic canards and openly prophesying the destruction of the State of Israel would be bad enough in any context. But for it to have happened on the eve of the 60th anniversaries of two of the central pillars of the whole human rights movement of the post-World War II era, and in the very body that adopted those monumental instruments, is a savage mockery of history that is frightening in its grotesqueness.

On Dec. 10, 1948, the General Assembly of the United Nations, sitting in Paris, adopted the Universal Declaration of Human Rights, the charter document of the human rights law that has evolved in the six decades since then. Just a day earlier, the same General Assembly had adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Both were responses, on a measure-for-measure basis, to the Holocaust, which revealed, in the most horrific fashion, the ultimate depths to which human society could sink, absent a meaningful system of recognition, protection and enforcement of human rights.

As the catalyst for the human rights movement, the Holocaust was intended to annihilate all the Jews of Europe, numbering over 11 million; six million Jews were ultimately killed. At the heart of this nightmare lay an egregious racial ideology: All of humankind was divided into racial groups, arranged in hierarchical formation, with Aryans at the top, embodying perfection, and Jews at the bottom, representing its antithesis. Jews were considered racial vermin, the worst polluters of pure Aryan blood; as such, they could be treated as vermin.

To this, the Universal Declaration responded. First, it isolated the key elements in the Nazi dehumanization of the Jews, and affirmed them as human rights. It is thus possible to go down the list of rights enumerated in the Universal Declaration, and check off one after another of the means of assault employed by the Nazis — beginning with the right to live, and not to have one's life ruthlessly snuffed out, the first and most basic of human rights, and extending to a series of rights consistent with basic human dignity.

Even more basically, though, the Universal Declaration smashed through the core assumption lying at the heart of Nazi racial ideology. It proclaimed, in its opening words, the "inherent dignity ... of all members of the human family," that is, irrespective of the racial (or other) group to which they happen to belong.

The Genocide Convention went further. Addressing the ultimate corollary of Nazi theories of race — that people could even be eliminated altogether, if they belonged to a group viewed as racial pestilence — the Convention proclaimed it "a crime under international law" to take action aimed at the destruction of a group, whether based on race, religion, ethnicity or nationality. The "right" to murder individuals based on the group to which they belonged was met by making it a crime to do so.

These responses of international law to the Holocaust have now been turned, in most vicious

fashion, against its very victims. With monotonous regularity, Israel is pilloried as a perpetrator, not only of genocide, but also crimes against humanity, the other egregious crime to which the Holocaust gave rise, as well as the heinous practice of apartheid. The infamous Durban conference on racism, in 2001, degenerated into a hate fest directed against Israel, and the follow-up conference scheduled for next year is hurtling downhill along the same path. No other country on this planet is singled out for so much opprobrium in the UN.
Rabid anti-Semitism, under the guise of anti-Zionism, is spewed regularly out of the Human Rights Council, and Ahmadinejad's hate-filled tirade in the General Assembly, on Sept. 23, was strongly reminiscent of Hitler's Mein Kampf. The applause with which it was greeted, together with the warm embrace he received from the president of the General Assembly, put the UN's imprimatur on the 360-degree turn that the human rights movement has taken.

As a result, the movement itself has seriously undermined its credibility. So many of the UN's 192 members are undemocratic, and presided over by despots who are themselves guilty of terrible human rights violations. Collective finger pointing directed against Israel serves as a convenient way of diverting attention from their own behavior. But that the very victims of the event that triggered the human rights movement should now become its targets is undoubtedly one of the bitter ironies of modern history. On the 60th anniversary of two of the central pillars of the movement, there is a crying need for the UN to undertake some serious soul searching. n

Harry Reicher teaches international human rights and law and the Holocaust at the University of Pennsylvania Law School, and is Scholar-in-Residence at Touro Law School.

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WHAT WILL IT TAKE FOR THE WORLD TO LEARN?
ON THE 60TH ANNIVERSARY OF THE GENOCIDE CONVENTION

Harry Reicher

Pictures of the unfolding horrors in the Congo are themselves alarming. But coming on top of the continuing tragedy in Darfur - the first genocide of the 21st century - they usher in a dismal start to the century.

The 60th anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide, one of the pillars of the post-World War II human rights movement, is a fitting occasion to reflect on its origins, and measure the reality against the noble intentions that propelled the movement in its initial stages. Darfur and Congo were just the sorts of tragedies the Convention was designed to prevent.

Genocide has an extraordinary history in international law. A mere 65 years ago, the word did not exist in the English language. It was coined by a Polish-Jewish refugee to the United States, Dr Rafael Lemkin, as a response to a challenge implicit in Sir Winston Churchill's comment, during the Holocaust, that the annihilation of the Jews was "a crime without a name." Lemkin published his neologism in 1944, having built it as a hybrid of the Greek word "genus," meaning a group or class, and the Latin suffix "cide," meaning killing; hence, killing of a group. He then worked to the point of emotional and psychological exhaustion, and beyond, to have it converted into a full-blown convention, which was adopted on December 9, 1948, by the General Assembly of United Nations.

The convention achieved three central objects. First, it defined genocide as acts taken with the intention of wiping out a group (in whole or in part), as defined by race, ethnicity, religion or nationality. Secondly, it confirmed that genocide is a crime in international law. And, very significantly, Article 1 obligated states parties to prevent genocide, and to bring perpetrators to justice.

In a fundamental way, the Genocide Convention was a measure-for-measure response to the Holocaust. At the heart of the Nazi regime lay an egregious ideology that defined the value of people, not by virtue of being human alone, but by the racial groups to which they belonged. Certain groups - first and foremost, Jews - were regarded as racial vermin, and could be treated as such, even to the point of extermination. This "right" to annihilate human beings based on the group to which they belong was met head-on by the convention, which made it a crime to do so. Today, 140 states are parties to the convention, ironically including Sudan.

While giving every impression, on paper at least, of achieving the desired result, in practice the convention has not had the intended effect. The United Nations, itself another pillar of the human rights movement, which was given ample enforcement powers, including the use of force, has failed miserably. Witness, among many other cases, a succession of high-profile horror stories: In the 1970s, the annihilation of 1.5-2 million Cambodians, at the hands of their own government; in the 1980s, Saddam Hussein's ruthless actions aimed at wiping out the Kurds in Iraq; in the 1990s, the slaughter of 800,000 Rwandan Tutsis in the space of just 100 days; and now, in the first decade of this century, the ongoing genocide directed against black Africans in Darfur, and the ethnically-based atrocities in the Congo. Shortly after the ouster of Saddam Hussein, an Iraqi representative summed it up very succinctly and powerfully, when he thundered to the Security Council: "Where were you for 35 years!"

The situation cries out for extraordinary measures. Solutions need to be crafted outside of the United Nations, and the Genocide Convention itself provides the legal framework for sidestepping the world body. It unequivocally directs states to "prevent" genocide, but without specifying the means by which that is to be accomplished. In that way, the convention creates the opportunity - and indeed, imposes an obligation - for parties to the convention to assess each case, identify the measures most likely to put an end to the carnage, and then to take those measures. If steps short of outright armed conflict - such as trade and arms embargoes, or other sanctions - are adjudged to be sufficient, then that is what must be undertaken. But if the only alternative is armed humanitarian intervention, then that is the obligation which the convention imposes on parties to it, acting either individually or collectively. Although such a course will not be popular at the UN, regrettably its own failures, which include Rwanda, where its culpability actually contributed positively to the genocide, have made it painfully obvious that other avenues in the international legal system must be pursued.

What is needed is for parties to the convention to summon up the moral courage, and put their actions where their expressed intentions are, thereby demonstrating that, when the convention imposes an obligation to prevent genocide, it really means what it says. As the most egregious crime in the international legal lexicon, no less is called for. The 60th anniversary is a fitting occasion for a reassessment, and a new direction to be charted.

Professor Harry Reicher teaches International Human Rights and Law and the Holocaust at the University of Pennsylvania Law School, and is Scholar-in-Residence at Touro Law Center. From 1995-2004 he was Representative to the United Nations of Agudath Israel World Organization, and from 2004-2008 he was a member of the US Holocaust Memorial Council.

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Time to Act on Genocide

January 24, 2005

National Law Journal
By Harry Reicher, Professor, University of Pennsylvania Law School

If it weren't for the horror of what is happening in Darfur, with at least 80,000 lives lost and around 1.6 million people displaced, the United Nations' impotence on the subject would constitute high farce. But it causes one to ask: Is the international legal system capable of coming to grips with Darfur, or is it destined to be yet another entry in the long catalog of U.N. human-rights failures since its creation in 1945?

...Labeling of the Darfur case as "genocide," most notably by Secretary of State Colin Powell, has triggered references to the Convention on the Prevention and Punishment of the Crime of Genocide, especially Article 8... Darfur constitutes an ideal opportunity to breathe life into the terms of the convention.

While Article 8 raises-in permissive language-the possibility of the Security Council taking such action as it may "consider appropriate," this is certainly not an exhaustive statement of what may be done under the convention; in addition, the article contemplates that any of the "competent organs" of the United Nations, that is, including the General Assembly, may act.

Indeed, the procedural mechanism, known as the Uniting for Peace Resolution, has long existed to enable the assembly to be convened, as a matter of urgency, on 24 hours' notice. In Sudan's case, the formality of a vote in the Security Council-with China a likely veto-would first be required. But that would crystallize the situation, trigger the Uniting for Peace Resolution, and point the spotlight of international blame, with its accompanying opprobrium, where it belongs. Though the result in the General Assembly also may be predictable, the power of bringing the debate into the public arena of the assembly should not be underestimated. At any rate, with massive human suffering taking place, and a crying need for drastic action, no stone can be left unturned.

...At its heart, the convention was designed with prevention in mind. Article 1 directs parties, in unequivocal language, to "prevent" genocide. What are not spelled out, however, are the means by which parties should do so. By not prejudging or dictating what the nature of such action should be, the convention requires an assessment of what is appropriate to a particular case-and then requires that such action be taken.

Currently, 136 states are parties to the convention [including, it should be noted, Sudan], and each is thus charged with the obligation to tailor a solution to the case at hand, either alone or in concert with others. If what it takes to stop the carnage is an arms embargo or a trade embargo [whether or not specifically directed at oil], then that is what is mandated by the convention.

Or, if it would help to establish an international tribunal, following the Nuremberg precedent, to investigate and issue indictments and arrest warrants, then that should be done. And if nothing less than humanitarian intervention, in the form of military action by one or more states, is the only solution, then so be it. If working around the U.N. in that fashion is not to the liking of the world body, regrettably it has only itself to blame. As the revelations of the full extent of the U.N.'s culpability in Rwanda continue to emerge, on top of so many other failures, it has become clear that if serious issues are to be meaningfully addressed, other avenues in the international legal system must be pursued.

The convention provides such an avenue; Darfur is a perfect opportunity to demonstrate that, when the convention imposes an obligation to prevent genocide, it really means what it says.

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United Nations A/60/L.1

General Assembly

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Sixtieth session
Items 48 and 121 of the provisional agenda*

Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields

Follow-up to the outcome of the Millennium Summit

Draft resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session

2005 World Summit Outcome

The General Assembly

Adopts the following 2005 World Summit Outcome:

2005 World Summit Outcome

I. Values and principles

1. We, Heads of State and Government, have gathered at United Nations Headquarters in New York from 14 to 16 September 2005.

2. We reaffirm our faith in the United Nations and our commitment to the purposes and principles of the Charter and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterate our determination to foster strict respect for them.

3. We reaffirm the United Nations Millennium Declaration, which we adopted at the dawn of the twenty-first century. We recognize the valuable role of the major United Nations conferences and summits in the economic, social and related fields, including the Millennium Summit, in mobilizing the international community at the local, national, regional and global levels and in guiding the work of the United Nations.

* A/60/150.

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Democracy

135. We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.

136. We renew our commitment to support democracy by strengthening countries' capacity to implement the principles and practices of democracy and resolve to strengthen the capacity of the United Nations to assist Member States upon their request. We welcome the establishment of a Democracy Fund at the United Nations. We note that the advisory board to be established should reflect diverse geographical representation. We invite the Secretary-General to help ensure that practical arrangements for the Democracy Fund take proper account of existing United Nations activity in this field.

137. We invite interested Member States to give serious consideration to contributing to the Fund.

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

HOLOCAUST LAW
MATERIALS AND COMMENTARY

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Preliminary Edition
2007

PART III

THE NAZI LEGAL SYSTEM IN ACTION

SECTION A:

LEGISLATION

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FORWARD

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LEGISLATING THE HOLOCAUST: On September 15, 1935, Hermann Göring (center) stood in front of a special session of the Nazi Reichstag attended by Adolf Hitler (bottom right) to decree one of what came to be known as the Nuremberg laws.

The Day Evil Became the Rule of Law

By HARRY REICHER

Seventy years ago this month, Hermann Göring stood up in front of a special Reichstag session in Nuremburg and read out the Law for the Protection of German Blood and Honor. The decree was one of what came to be known as the Nuremberg laws, which peremptorily and ruthlessly wrought fundamental changes to the place of Jews in German society and formed an important step on the way to the Holocaust.

Under the Nazis, law was debased beyond recognition. It became a tool of hatred and viciousness — the very antithesis of everything normally connoted by the notion of law: justice, goodness, fairness, due process, protection of the individual against the excesses of government, even morality.

Seven decades after the enactment of the Nuremburg laws, it is sobering to recall that legislation was exploited, side by side with force, to propel the German genocide machine.

The Law for the Protection of German Blood and Honor sought to effect a strict separation between Jews and Aryans by outlawing marriages between them, prohibiting extramarital relations and the employment by Jews of female Germans who are of childbearing age. At the same time, the Reich Citizenship Law stripped Jews of the right to citizenship and, with it, all the protections and political rights that accompany citizenship in a society — including the right to vote.

The legal schema formed by the Nuremberg laws was completed by the first ordinance to them, of November 14, 1935. The ordinance defined a Jew. The fulcrum around which the legal system revolved was constituted. A Jew was, first and foremost, someone who was descended from at least three grandparents who belonged to the Jewish religious community. Being dealt with in a definitional ordinance of this magnitude delivered a massive psychological blow to the Jewish community, by defining them legally to be separate and inferior. All subsequent legislation dealing with Jews harked back to this definition.

The Nuremberg laws arose directly out of the two limbs to the Nazi racial ideology, so far as Jews were concerned. The primary obsession was with racial purity, and Jews were seen as the worst polluters of Aryan blood. Thus any contact that could lead to such pollution was outlawed. In addition, Jews were regarded as diabolically clever outsiders who insinuate themselves into a society, identify and take over the key levers of control and then steer the society toward Bolshevism. For that reason, their influence in society had to be extirpated, beginning with the fruits of citizenship.

The Nazis went to extraordinary lengths to "legalize" their massive assault on Jews. By legislative means — among others, of course — Nazi Germany discriminated against, ostracized and dehumanized the Jews. In the 12-year period of Nazi rule, something of the order of 2,000 laws was directed solely, specifically and directly at the Jews. The subjects covered by those laws were breathtaking: They ranged from depriving Jews of the right to work and earn a living, expropriating their property and throwing them out of the educational system, to absurd minutiae such as the ban on buying milk from a cow owned by a Jew.

In all this, the Nuremberg laws stood at the apex, as the implementation of the core of the regime's ideology. The lessons to be learned from the Nazis' ability to legislate evil resonate into the 21st century.

First, law is inherently neutral. Used with wisdom and compassion, it can accomplish the greatest good. But if a legal system falls into the wrong hands, it can become the instrument of the greatest barbarities.

Second, constitutional separation of powers is important. The Nazis were able to legislate with impunity because there was no institution in the governmental framework to scrutinize what they were doing. The führer principle by which all legislative, executive and judicial power was aggregated in a small number of hands — and ultimately in one set of hands, Adolf Hitler's — was the very antithesis of American-style separation of powers, with its built-in system of checks and balances. The strongest guarantee of individual freedoms is ultimately a diffusion of power.

Third, within the separation of powers, the there is a need for an independent judiciary. It is imperative that courts are capable of measuring legislative action against an objective constitutional standard and, if warranted, being prepared to tell the government that it has gone too far.

Fourth, there is the fragility of democracy itself. Hitler was elected lawfully and then proceeded to destroy the very system that brought him to power, using legislation as part of that process. Can the need for vigilance be more urgently underscored?

And lastly, the plans and the threats of despots and would-be despots must be believed, for only then is there a chance that preventative action will be taken. The Nazis made no secret of their plans. From the intention to work within the system in order to come to power so that they could overturn the system itself, to the use of poison gas to kill Jews, it was all there in explicit terms.

If one had been the legal counsel to the Nazi Party when it came to power in 1933, and had been given the task of preparing a legislative program to implement the party's underlying ideology, a review of "Mein Kampf" would have yielded the very sort of legislation that was promulgated in the following years. That is why the Nuremberg laws were, in a sick, perverse way, so logical.

Harry Reicher, a member of the United States Holocaust Memorial Council, teaches law and the Holocaust at the University of Pennsylvania Law School.

THEME 4: DEPRIVATION OF INCOME-EARNING CAPACITY

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■ NAZI LAWS

An infamous date

By Harry Reicher SPECIAL TO THE NATIONAL LAW JOURNAL

THE BRUTAL, sadistic era of Nazi rule in Germany, though relatively brief historically—12 years in all, from 1933 to 1945—left in its wake a number of dates that continue to live in infamy. April 7, 1933, the day on which the euphemistically named Law for the Restoration of the Civil Service was promulgated, is one of these. And the day bears particular resonance for lawyers.

In ordering that "Officials of non-Aryan descent are to be retired," the law was the opening salvo in a systematic assault by the Nazi regime on the income-earning capacity of the Jews. Requiring the dismissal of Jewish civil servants, as well as university professors, the law was the model for a relentless and merciless campaign by which professions, occupations, trades and businesses, one after another, were all peremptorily closed to Jews. And as with civil servants, in each case a law giving effect to the closure was promulgated. "The profession of lawyer is closed to Jews," proclaimed one law. "Licenses of Jewish physicians terminate," declared another: "Jews...are excluded from the operation of individual retail shops, as well as the independent operation of a trade," announced a third, and so on.

This campaign emanated, and, in a sick, perverse way, followed logically from, the egregious Nazi racial ideology, a critical pillar of which viewed Jews as a mortal danger to the fabric of society, which thus required the elimination of their influence from it.

The effects of the campaign were direct, immediate and personal on the daily lives of Jews in Germany. And they were horrific. The memoirs, diaries and testimony of survivors are replete with heart-rending accounts of loss of income, and the way this translated into terrible financial difficulties, with the most basic items of food, clothing and shelter becoming an immense burden. The writings evoke the deepest empathy, especially in anyone who has ever been unemployed, or endured financial hardships.

From middle class to desperate

Victor Klemperer, in his perceptive and moving diaries, traces the decline of himself and his wife from the life of a middle-class academic into poverty, reporting how he took to measuring the distance of Sunday afternoon drives, conscious of the cost of gas, and how he gave vent to his frustration at being reduced to a diet of potatoes. Professor Marion Kaplan in *Between Dignity and Despair* wrote of the heart-rending cases of role reversal, in which, in a traditionally patriarchal society, women were suddenly thrust into the unfamiliar role of breadwinners, as well as the becoming the emotional and psychological mainstays of families. The descent into despair chronicled in various writings from and about the era cannot fail to provoke intense emotions, even decades later.

The campaign to prevent Jews from earning an income constituted a fundamental assault on one of their most basic human rights. The ability to work, to earn an income and support oneself and one's family is one of the indicia of a human being. Indeed, the charter of the post-World War II human rights movement, the Universal Declaration of Human Rights, proclaims that "everyone has the right to work" and to "just and favorable remuneration ensuring himself and his family an existence worthy of human dignity." The universal declaration identified the very rights that the Nazis had wrenched from certain classes of people, particularly Jews. The declaration's structure is a reaction, measure-for-measure, proclaiming those very rights to be human rights.

One of the most extraordinary aspects of the Nazi regime was that so many of their actions were perpetrated "lawfully"—from the initial denial of economic opportunity to the ultimate denial of life itself. One after another of the indignities heaped upon the Jews was effected by means of pseudo-legislation—one of the hallmarks of the Nazis' fanatical obsession with legalizing their rising level of discrimination and atrocities.

In reflecting on the significance of the anniversary this week of the enactment of the Law for the Restoration of the Civil Service, lawyers might ask themselves what special message the day bears for them. The legislation itself is a harsh reminder that it is possible to commit the most grotesque illegalities through "legal" means. The Nuremberg "Justice Trial" (or Justice Cases) in which the leading figures in the Nazi legal establishment were tried, bears this out. Having heard evidence about the judges who continued to serve in the German judiciary, applying and enforcing the laws of the Third Reich, the tribunal concluded: "The dagger of the assassin was concealed beneath the robe of the jurist."

Underlying these stark facts is an obvious yet fundamental point: Law is inherently neutral. If it is used with wisdom and compassion, it can accomplish the greatest good. But if a legal system falls into the wrong hands, it can become the instrument of the greatest barbarities. If April 7 reminds us of that, it has accomplished something important.

Harry Reicher teaches a course on law and the Holocaust at the University of Pennsylvania Law School.

Translation
from
REICHSGESETZBLATT I, No. 165
October 14, 1938

Fifth Decree governing Reich Citizenship Law dated September 27, 1938.

On the basis of Section 3 of the Reich Citizenship Law of September 15, 1935 (REICHSGESETZBLATT, Part I, page 1146), the following is decreed:

Article I.

Elimination of Jews from Corps of Lawyers

Section 1.

The profession of lawyer is closed to Jews. In so far as Jews are still lawyers they are eliminated from the Corps of Lawyers in accordance with the following regulations:

a) In the old Reich territory:

The licenses of Jewish lawyers are to be revoked as of November 30, 1938;

b) In the Province of Austria:

1. Jewish lawyers are to be stricken from the list of lawyers at the latest by December 31, 1938, by order of the Reich Minister of Justice.

2. In the case of Jews who are registered in the list of the Lawyers' Chamber in Vienna, cancellation may be waived for the time being if their families have been in the Province of Austria for at least fifty years, and if they were front line fighters. The date of cancellation in this case is determined by the Reich Minister of Justice.

3. Until a decision is reached concerning whether cancellation from the list of lawyers is to take place, the Reich Minister of Justice may provisionally forbid a lawyer the exercise of his profession.

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NAZI GERMANY AND THE JEWS

VOLUME I

The Years of Persecution, 1933–1939

SAUL FRIEDLÄNDER

1997

HarperPerennial

p. 29

The Justice Ministry had prepared a decree excluding Jewish lawyers from the bar on the same basis—but also with the same exemptions regarding combat veterans and their relatives, and longevity in practice, as under the Civil Service Law. At the April 7 cabinet meeting Hitler unambiguously opted for Gürtner's proposal. In Hitler's own words: "For the moment . . . one has to deal only with what is necessary."* The decree was confirmed the same day and made public on April 11.

Because of the exemptions, the initial application of the law was relatively mild. Of the 4,585 Jewish lawyers practicing in Germany, 3,167 (or almost 70 percent) were allowed to continue their work; 336 Jewish judges and state prosecutors, out of a total of 717, were also kept in office.* In June 1933 Jews still made up more than 16 percent of all practicing lawyers in Germany.* These statistics should, however, not be misinterpreted. Though still allowed to practice, Jewish lawyers were excluded from the national association of lawyers and listed not in its annual directory but in a separate guide; all in all, notwithstanding the support of some Aryan institutions and individuals, they worked under a "boycott by fear."

INVISIBLE WALLS

A German Family under the Nuremberg Laws

Translated from the German by
John Brownjohn

INGEBORG HECHT

NORTHWESTERN UNIVERSITY PRESS
Evanston, Illinois 1984

p 15

The laws affecting my father's profession came into being before he had really managed to get his practice off the ground, so they nipped his livelihood in the bud. My mother tried to keep the wolf from the door by converting our Hochallee home into a miniature boarding house.

Where our "Aryan" grandparents were concerned, Wolfgang and I occasionally dipped into the Almanach de Gotha, or directory of noble families. It transpired that the Sillichs had not been granted their coveted "von" until 1871. "True" aristocrats, most of whom could trace their lineage back to the Middle Ages, tended to look down their noses at such upstarts. Although we couldn't have cared less whether the "von" was ancient or modern, the little prefix now came in handy. Mother reverted to her maiden name so that "Aryans," too, need have no qualms about renting rooms from us—to begin with, at least—but it soon dawned on us children that our future mode of existence would be a frugal one. Mother had absolutely no idea how to run a boarding house. The place was managed on very haphazard lines, and all that kept our tenants content was the pleasant atmosphere that reigned there. The venture was doomed from the outset, and the strain told increasingly on our parents' state of health.

* * *

On January 28, 1939, my father received a letter from the Gestapo revoking his permission to appear before the Hamburg courts.

* * *

There being no well-to-do Jewish clients left, my father's income had dried up. He was therefore entitled to claim a subsistence allowance under the 1938 decree, though this was a

laborious and demeaning business. I came across a letter from the Bar Association in Berlin, dated November 1941, which allotted my father RM 170 a month but warned him to expect further cuts in the future. It additionally pointed out that he qualified for a grant only because he had two underage children.

Like many communications from attorneys who had taken over the clients and, thus, the incomes of their Jewish colleagues, this letter conveyed not a shadow of regret, not a hint of shame. Its tone was chilly.

My wages as an office worker just about covered our monthly gas bill, once I had deducted an agreed share for myself, so we drew a supplementary allowance from the public welfare office—not in those days a legal entitlement.

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Inherit the Truth

A Memoir of Survival and the Holocaust

Anita Lasker-Wallfisch

St. Martin's Press New York 1996

p. 38

The hounding of the Jews grew steadily worse. My father was no longer working as a lawyer but, by special dispensation, he still represented a certain Count Künigl who had such a complicated lawsuit, which had been going on for so many years, that it would have been impossible for it to be taken on by any other lawyer. Count Künigl had obtained permission to be represented by my father, although he was a Jew, and he did his very best to help us later on. Mercifully this kept my father fully occupied till the end.

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I SHALL BEAR WITNESS

The Diaries of VICTOR KLEMPERER 1933–41

Abridged and translated
from the German edition by
MARTIN CHALMERS

Weidenfeld & Nicolson
LONDON 1998

P 252

[1938]

10th August, Wednesday

• • •

For weeks intensified Jew-baiting again and drastic new measures all the time. From 1st October all Jewish doctors have been struck from the Medical Register,[24] nor are they allowed to practise as 'healers'; so they can starve.

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I SHALL BEAR WITNESS

The Diaries of VICTOR KLEMPERER 1933–41

Abridged and translated
from the German edition by
MARTIN CHALMERS

Weidenfeld & Nicolson
LONDON 1998

P 173

[1936]

7th August, Friday
Yesterday the heaviest blow since my dismissal: Markus, Breslau with whom I had been involved in promising negotiations, has now rejected the Voltaire book after all . . .

14th September, Monday
We did not go to the cinema; car use for the whole week amounted to 18 miles, the Sunday drive yesterday was limited to 32 miles. 60 miles = 12 litres of petrol + ¾ litre of oil = approx. 5.20M. We are at such a low ebb and so miserably weighed down by large bills (insurance with 108M is the worst, in addition the exasperating church taxes, the dentist etc.) that we have to count every penny and count it ever more gloomily. I shall try to obtain another mortgage of 1,000–2,000M. That would save the life insurance, allow the terrace construction to be carried out and remove the worst financial embarrassment and constraint. Only: for how long? – And who will consider our little house is worth enough to bear it?

• • •

[1937]

27th March, Saturday – Easter tomorrow, probably a white one.

• • • [T]here are the ever-increasing money difficulties. Bolts were changed for 20M and from that arose the necessity of changing all six connecting rods and cleaning the valves. In one workshop that would have cost almost 300M; through Vogel I found a reliable mechanic, who would come to the house. He worked here for a full three and a half days, it 'only' came to 140M, of which I paid 110 immediately and put off the rest until April. But one mudguard is as tattered as it was at the beginning and a superannuated tyre can give out any day, and changing the

oil and this and that. On top of that the dentist's bill of 74M, and one of the fillings that has not been paid for yet has fallen out again. Week by week we find ourselves in worse straits, my suit is fraying, our home is thick with dirt, neither house nor garden is finished, and I count every penny. We are so proletarianised and constrained, that I often wish not to wake up again. But I am afraid of death, and I also do not want to capitulate. I do not see any way out. To give up the car would be to imprison Eva. Yet our use of the car bears no relation to the costs incurred. We so much wanted to drive to Berlin at Easter – we have promised Grete and Marta dozens of times that we would do so, and they invite us again and again and do not understand why we decline; [...] I have a villa and a car, I have a monthly pension of 492M, and we are poorer, more bound down, proletarianised than in our most miserable bohemian and destitute days. We eat as poorly and simply as possible to save money and time – always this washing up, cooking, cleaning – I spend half the day in the kitchen, Eva does the dirtiest jobs, it is unspeakably horrid. And saving the pennies does not help – the jalopy, the house, the dentist, a tax demand at the moment eat up many times the amount in marks which we have agonisingly saved in pennies. I smoke the cheapest cigarillo, 4 pfennigs. Occasionally, to bring down costs even further, I smoke a pipe – I do not like the taste at all any more and it saves only pennies. Show heroic willpower, and not smoke at all any more? But my nerves and spirit have already gone so much to the dogs, and if I deteriorate even more, Eva will break down completely, I've noticed that so often. I really see no way out and let everything slide. Somehow there may be a turn for the better or we shall perish.

Our life insurance is completely lost; I do not know what Eva will do if I bite the dust. She has lost a lot of weight in the last few months, wasted away, aged, sunk into poverty, so to speak. I myself am fat and plump, but as soon as I walk or crank up the car or make some kind of physical effort or have the least upset I am forever brought up short by throat and heart problems.

TO THE BITTER END

The Diaries of VICTOR KLEMPERER 1942–1945

Abridged and translated
from the German edition by
MARTIN CHALMERS

[redacted]
LONDON 1999

p 30

1942

22nd March, Sunday

• • •

Yesterday, because of our extremity, Eva went begging to Pirna. She came home with a heavy load: a basket of potatoes, about two pounds of bread, a can of French beans. Bread coupons are supposed to follow; if they don't come, we shall be literally starving as of Tuesday.

• • •

24th March, Tuesday

So far Annemarie has let us down with bread coupons; Eva exchanged margarine coupons for a four-and-a-half pound loaf, but how we shall get through the one-and-a-half weeks till the next coupon issue is a mystery. On top of that, the complete lack of potatoes. Today Eva taught me how to prepare turnips. I can do it quite well. I find mornings the hardest. Shivering (in the unheated room), feeling hungry and falling asleep with weariness at my desk is usual. Then I look in Kätchen Sara's kitchen to see if I can steal a spoonful of jam or a piece of bread, but that is only possible when there is so much there that she won't notice. And I always worry that she will nevertheless become suspicious. I also keep my miserable secret from Eva, who usually returns from shopping at about two o'clock with a sore foot, heavily laden but nevertheless unsuccessful.

• • •

3rd May, Sunday afternoon

The uninterrupted hauling, brushing and eating of potatoes is slowly get[redacted] on my nerves. I have to be grateful that a few coupons are released, [redacted] acquaintances give us their share; because otherwise we would starve. But [redacted] the long run eating nothing but potatoes is terrible. Eva is not quite so bad[redacted] off because at lunchtime she manages to find a 'meal of the day' somewhere, even if a pitiful one, and because she needs smaller amounts than I.

The Jewish Pennsylvanian

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A DATE IN INFAMY: THE ANNIVERSARY OF THE WANNSEE CONFERENCE

JANUARY 20, 1942

Villa in Wannsee where the "Final Solution" conference was held

Harry Reicher
University of Pennsylvania Law School

The brutal, sadistic era of Nazi rule in Germany, though relatively brief – twelve years, in all, from 1933-1945 – left in its wake a number of dates that continue to live in infamy. January 20, on which the bizarre Wannsee Conference took place, in 1942, is one of these. Convened in a suburb of Berlin, the meeting drew together fourteen of the leading bureaucrats of the regime at sub-ministerial level to discuss one – and only one – agenda item: "The final solution of the Jewish question."

Two aspects of the Wannsee Conference make it remarkable:

First, the sheer scope of what was contemplated was frightening in its awesomeness. Beneath the bureaucratically euphemistic language which the Nazis had refined to a great level of sophistication, was nothing less that the total annihilation of the Jewish population of Europe, in its entirety – on the Nazis' own estimates, over 11,000,000 men, women and children. Whilst the official protocol of the meeting, prepared by Adolf Eichmann, spoke in terms of solving "the Jewish question", Eichmann testified, at his trial in Jerusalem in 1961, that not one person present at the meeting was under any illusion whatsoever about what was intended.

Secondly, and in stark contrast, the nature of the discussion, and the summary in the protocol, completely belied the enormity of what was being planned. Moreover, reconstructions of the event, based on the transcript that was contemporaneously made, as well as recollections of the principal participants, suggest a level of light-heartedness among those present which is chilling in the detachment it bespeaks. What was involved was not any discussion of high policy, but rather the technicalities of moving huge numbers of civilian population to places "in the East", where the "solution" to the "question" would be effected. Even the sum total of the Jews involved was presented to the meeting in bland accounting fashion, in the form of a balance sheet showing Jewish populations throughout Europe, on a country-by-country basis – much as an accountant would prepare a document showing the assets of a corporation. Eichmann himself, who was appointed to devise, and oversee the implementation of, the logistics of transporting the Jews to their deaths, was jocularly referred to as the "shipping agent". Indeed, at his trial, Eichmann's defense was precisely that: he was merely in charge of transport – making the trains run on time, so to speak – and what happened to the "cargo" after it arrived was none of his business, much less his responsibility.

Adolph Eichmann in a glass booth surrounded by guards during his trial in Jerusalem

On top of everything else, the whole meeting, at which the overall plan of implementation was approved, took all of about 87 minutes!

To go some way towards comprehending how something like the Wannsee Conference could have happened, it is helpful to bear in mind two factors:

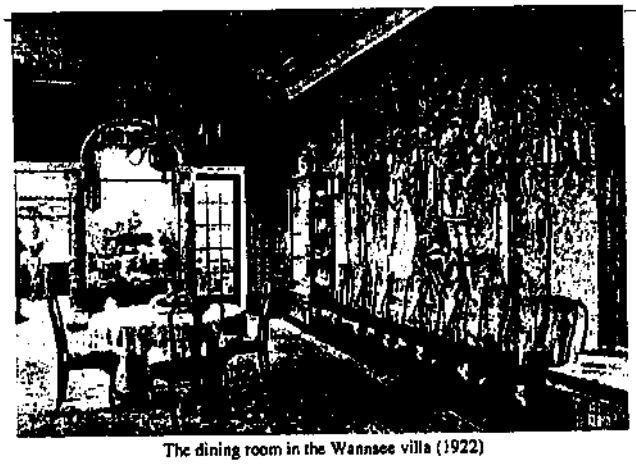
First, from the time the Nazis ascended to power, in March 1933, they directed a massive propaganda campaign at the population. This proceeded on the assumption that Jews (in particular, among others) were racially inferior beings; that they were effectively vermin, being polluters of Aryan blood, who had to be extirpated from society. Very important to the propaganda campaign was the regulatory assault by the Nazis, aimed at the Jews, consisting of a torrent of some 2,000 "laws" directed specifically and directly against them. These emanated from, and reflected, the underlying racial ideology, and, at the same time, reinforced it, by systematically whittling away at the indicia of humanity, in so far as the Jews were concerned. Thus, Jews were subjected to the humiliation of being separately defined, thereby stamping them as different and inferior; their capacity to work, earn a livelihood and support themselves and their families, was withdrawn, as one profession, business and trade after another was closed to them; their property was expropriated by a fiendish schema of laws which, on the one hand, provided the Government with a massive inventory of all Jewish-owned property, and then proceeded to seize it quite ruthlessly; over a period of time, they were excluded from avenues of education, at both university level as well as below, resulting in what the diarist Victor Klemperer described as an "intellectual death"; gradual segregation, as well as severe restrictions on movement, both within as well as among cities and towns, compounded the sense of interiority, and generated a communal and individual claustrophobia of depressing proportions; and, on top of everything else, they were publicly branded as being objects of obloquy, and subject to all the other restrictions, indignities and humiliations, most infamously by laws requiring the wearing of the Star of David on their outer clothing. Through the legislative scheme implementing these and other steps in the persecution of the Jews, the Nazis discriminated against, ostracized and, most importantly, dehumanized them. In doing so, they very effectively paved the way for the ultimate corollary thereof, as represented by the Wannsee Conference.

Co-extensively with the massive campaign aimed at reinforcing the dehumanized image of Jews, the Nazi Government promoted the perverted view of government which became known as "the Fuhrer principle", under which all power – executive, legislative and judicial – was aggregated in very few hands, and ultimately in one pair of hands, namely those of Hitler himself. As such, it was the worst sort of antithesis of notions of separation of powers, to which we are accustomed in this country. An integral component of the Fuhrer principle was the deification of Hitler himself, who could, quite literally, do no wrong, and whose every word was, again quite literally, law. Thus, even the Propaganda Minister in the regime, Josef Goebbels, himself an educated man, who held a PhD, and who masterminded the propaganda campaign aimed at training the masses to think in the way the Government wanted, could, in his own diaries, wax positively lyrical about Hitler, whose image he himself was molding: "The chief talks about race questions. It is impossible to reproduce what he said. It must be experienced. He is a genius. The natural, creative instrument of a fate determined by God. I am deeply moved. He is like a child: kind, good, merciful. Like a cat: cunning, clever, agile. Like a lion: roaring and great and gigantic. A fellow, a man.... [H]e goes on for a long time preaching about the new state and how we are going to fight for it. It sounds like prophecy. Up in the skies a white cloud takes on the shape of the swastika. There is a blinking light that cannot be a star. A sign of fate?! We go back late! The lights of Salzburg shine in the distance. I am indeed happy. This life is worth living. 'My head will not roll in the sand until I have completed my mission.' Those were his last words. That's what he is like! Indeed! I cannot sleep for a long time!....

These days have signposted my road! A star shines leading me from deep misery! I am his to the end. My last doubts have disappeared. Germany will live! Heil Hitler!"

Thus, when Hitler ultimately judged that the stage had been sufficiently set, and that the time was right to give the order for the final solution – which apparently happened in the summer of 1941, and resulted in the convening of the Wannsee Conference – his judgment proved absolutely accurate. The reaction of Eichmann himself, upon learning of the order that the Fuhrer had given, is described in the memoirs of the man who led the prosecution against him in Jerusalem, the Israeli Attorney-General, Gideon Hausner: "It was quite obvious to me that at the time Eichmann had fully identified himself with the new 'radical method', as he called it. Like other leading Nazis he considered the slaughter absolutely necessary. True, when Heydrich first informed him of the Fuehrer's deci-

sion, it left him speechless for a while. Then he thought it over. The Fuehrer was right, of course, as usual. It was the right thing to do, he mused, in fact the only right thing. It involved, of course, new and onerous duties. Not very pleasant at times, but great things always require a sacrifice. He was proud to be right in the middle of it. He knew he was making history; it gave him a feeling of elation that future generations would regard him among the benefactors of mankind for having 'freed the world of a pest'."



The dining room in the Wannsee villa (1922)

When we think of [redacted] the anniversary of the day of infamy on which the Wannsee Conference took place, the grim reality, therefore, is that it was the end product of many other days of infamy. On each of so many other dates during the Nazi era, acts took place which either contributed to the dehumanization of the Jews, or to the reinforcement of the Fuhrer principle. As such, they all paved the way for the Final Solution, and ultimately made it possible.

Harry Reicher teaches Law and the Holocaust at the University of Pennsylvania Law School. The course is open to law and non-law students. His e-mail address is: hreicher@law.upenn.edu

SECTION B:

ROLE OF THE COURTS

AND THE JUDGES

Harry Reicher

The Jurists' Trial and Lessons for the Rule of Law

The Nuremberg Trials
International Criminal Law Since 1945

edited by
Herbert R. Reginbogin
Christoph J. M. Safferling

K · G · Saur München 2006 p. 175

Introduction

In its Opinion and Judgment in "The Justice Case", in which leading figures in the Nazi legal establishment were brought to trial, the Tribunal summed up very powerfully: "The dagger of the assassin was concealed beneath the robe of the jurist."[1] The lesson delivered in these words is a somber one: Lawyers can commit hideous crimes, even mass murder, while going about their "normal" functions. Adopting that notion as its central theme, this paper addresses three issues of particular interest:

1. The most important crime with which the Defendants in The Justice Case were charged with crimes against humanity.[2] Yet it seems deeply incongruous when applied to members of the legal profession apparently practising their craft. Crimes against humanity are usually associated with massive atrocities: with concentration camps and death camps; with gas ovens and crematoria; with the *Einsatzgruppen*, being mobile killing squads that roamed the Soviet Union, shooting Jews into mass graves which they themselves had been forced to dig; with slave labor; and so on. In the modern era, we associate the term with ethnic cleansing in the former Yugoslavia, with wholesale macheting of people to death in Rwanda and the use of chemical weapons on the Kurds by the Iraqi regime. We do not naturally associate crimes against humanity with practise of the legal profession. When we think of lawyers, we think, first and foremost, of judges, wearing judicial robes, sitting in detached objectivity, listening carefully and impartially to the evidence and deciding cases fairly and strictly in accordance with the evidence and a reasonable interpretation of the applicable law. In criminal cases, we think of them bending over backwards to be fair to the defendant, insuring that no-one is convicted unless the case against them is proven beyond a reason doubt. In short, judges embody all we associate with the term "justice". In western systems of justice, we often view the role of prosecutors as not that of people intent on obtaining convictions at any cost; rather, we think of them as being officers of the court, whose duty is to inform the court fully, and advise the defense fairly and fully what the case against it is, and furnishing it with potentially exculpatory information. Finally, we think of civil servants, in positions in ministries of justice, as being faithful administrators of the law, under a legal duty to act fairly and properly vis-à-vis the general population affected by the law. All of which leads directly into the central question: How can these three categories of lawyers commit crimes against humanity, while pursuing their professional calling? (These lawyers are to be contrasted with other leading figures in the Nazi regime, who while qualified as lawyers, were responsible for the commission of atrocities, albeit not by practising law *per se*, eg Ernst Kaltenbrunner, Hans Frank and Wilhelm Frick.)

2. What was the fate of the Defendants in The Justice Case, given that so many of them were found guilty of crimes against humanity, and that, as a result, they may be said to represent the worst face of the legal profession under the Nazi regime?

3. Finally, what lessons may be derived from the Nazi judicial system, as represented in The Justice Case?

The Defendants

On trial in The Justice Case were 16 defendants, of whom six were judges in the Nazi era, four were prosecutors and nine were civil servants. (Some occupied more than one category of position, which accounts for the discrepancy in the numbers.)[3]

Crimes with which the Defendants were Charged

The principal crime, as mentioned above, was crimes against humanity, being the commission of atrocities such as murder, extermination, enslavement, deportation, illegal imprisonment, torture, rape and persecution on political, racial and religious grounds.[4] The net was cast wide, in the sense that the Defendants could be found guilty not only if they were principals in the commission of the above acts, but also if they were accessories to them or ordered, abetted, took a consenting part in, or were connected with plans and enterprises relating to the listed acts.[5] In sum, the defendants were charged with the destruction of the German legal system, and with using the shell for wide-scale atrocities – judicial murder.[6] The other charges, which are not centrally relevant here, were war crimes, conspiracy to commit both crimes against humanity and war crimes and membership in criminal organizations.[7]

Lawyers Committing Crimes Against Humanity: Three Case Studies

Three of the Defendants may be singled out for consideration, in order to illustrate the role of lawyers.

Franz Schlegelberger[8]

As a bureaucrat in the Justice Ministry, he played a central role in the tragic case of Markus Luftglass, an elderly Jew who was convicted on a charge of stealing a large quantity of eggs, and sentenced to two-and-a-half years' imprisonment. A brief report of the case appeared in a Berlin daily newspaper, and it was brought to the attention of Hitler himself, who expressed the view that the sentence was manifestly inadequate, and that the death penalty was appropriate. Correspondence involving Schlegelberger passed between various departments, with the result that Luftglass was ultimately handed over to the Gestapo for execution.[9] The correspondence is chilling in three respects.

1. The callous fate of a human being in his 70s, which is its subject-matter.

2. The deep personal reach it reveals of Hitler into the daily workings of the legal system, being emblematic of the very antithesis of US-style separation of powers, represented by the "Führer-principle".

3. The bland, almost matter-of-fact bureaucratese in which the correspondence is couched, completely belying the seriousness of the subject-matter.

The case of Marcus Luftglass was by no means an exception, and Schlegelberger was involved many times.[10] Indeed, the Tribunal focused on the fact that Schlegelberger disregarded legal judicial process in his efforts to fulfill the will of Hitler, contributing to the destruction of judicial independence;[11] specifically, that he concocted many "legal justifications" for SS shootings of defendants whose court sentences were deemed disapproved of, as insufficient, by Hitler.[12] If it happens once, as in the case of Marcus Luftglass, it is murder; if it happens twice, that is two counts of murder. And if it happens enough times, it is a crime against humanity.

Curt Rothenberger[13]

As a judge, who coveted the position of State Secretary of the Reich Ministry of Justice, Rothenberger wrote an infamous Memorandum,[14] in which he sought to curry favor with Hitler, and to which he attributed his eventual appointment as State Secretary. In the Memorandum he said, among other things: "Law must *serve* the political leadership";[15] "[T]he Führer is... the *supreme judge*. Theoretically, the authority to pass judgment is therefore only his";[16] "*[A] judge who is in direct relation of fealty to the Fuehrer must judge 'like the Führer'*."[17] The message was absolutely clear and unequivocal: There was no such thing as judicial independence; the role of judges was, quite simply, to execute the political will, as embodied in, and expressed by, the Führer himself.

Quite extraordinarily, when under cross-examination in The Justice Case, in a passage that reads like an excerpt from Alice in Wonderland, Rothenberger steadfastly maintained (presumably with a straight face) that his Memorandum had been an argument for judicial independence![18] In relation to Rothenberger, the Tribunal focused, among other things, on actions which had "materially contributed toward the prostitution of the Ministry of Justice and the courts and their subordination to the arbitrary will of Hitler..."[19]

Oswald Rothaug[20]

There are many ways of illustrating what Kurt Rothenberger meant when he declared that judges "must judge like the Fuehrer", at the levels of both form as well as substance. At the formal level, one may, for instance, point to scenes, captured for posterity in archival film footage, in which judges are seen entering the courtroom and giving the "Heil Hitler!" salute before taking their places on the bench, thereby affirming their primary loyalty to Hitler himself, as opposed to the constitution. This was not, they thereby declared, a government under law, but very much a case of law being subordinated to government. Indeed, their oath of office, declaring loyalty first and foremost to the Fuehrer, affirmed as much. Or, one may recall archival footage showing the President of the People's Court, Roland Freisler, in action, in the trial of the plotters who attempted to assassinate Hitler on July 20, 1944. Freisler, who had the dubious distinction of sentencing some 5,000 people to death, and was characterized by William Shirer, in his classic work *The Rise and Fall of the Third Reich: A History of* Nazi *Germany*, as a "vile, vituperative maniac",[21] is seen and heard yelling and screaming, and generally carrying on in decidedly unjudicative fashion.

And at the substantive level, Oswald Rothaug gave expression to Rothenberger's dictum in the infamous Katzenberger case,[22] which was immortalized in Stanley Kramer's film *Judgment at Nuremberg*. In that case, Rothaug resorted to blatant distortions and machinations in order to guarantee that the hapless Leo Katzenberger, who was charged with "racial pollution",[23] arising out of an alleged relationship with an Aryan woman, was sent to his death[24] on the basis of no credible evidence. Consistent with the goal of "judging like the Führer", Rothaug had two clear objects in presiding over the Katzenberger case: Most importantly, the Jew had to lose and, further, he had to lose big, meaning, in the case of Leo Katzenberger, that he had to be sentenced to death. The problem for Rothaug, however, was that each of these goals faced what, in normal circumstances, would have been insurmountable obstacles.

Finding the defendant guilty was confronted by the problem of there being no credible evidence against him; such evidence as there was consisted only of rumor, hearsay and flimsy circumstantial material. The only credible witness in the case was Irene Seiler, the woman with whom the alleged improper relationship had taken place.[25] The difficulty was that Seiler's evidence exonerated Katzenberger; her position was, quite unequivocally, that the "crime" had not been committed.[26] Rothaug, however, got around this inconvenience by having Seiler charged with perjury,[27] arising out of her statement on interrogation, and conducting the perjury trial concurrently with the trial of Katzenberger himself. He then found Seiler guilty of perjury[28] and, having done so, could therefore brush aside her evidence, and convict Katzenberger; in fact, if Seiler had perjured herself in denying crime, it followed that the crime had in fact taken place.

That still left the object of ensuring that the death sentence was passed. Here, too, there was a difficulty in Rothaug's path. The crime of "racial pollution" arose under the *Law for the Protection of German Blood and Honor*[29], one of the infamous so called Nuremberg laws, enacted on September 15, 1935. But the penalty for that crime was set at a maximum of a prison term or hard labor.[30] In fact, nowhere in the law was there provision for the death penalty. In this light, a curious aspect of the judgment in the Katzenberger case suddenly takes on a different mien. Although the charge against Katzenberger was "racial pollution", the judgment gradually elides into another crime, namely that of being a "public enemy",[31] and in fact when Katzenberger was ultimately sentenced, it was for that crime, in addition to the crime with which he was charged.[32] The difference, and therefore the importance of superimposing the additional crime even though the case had begun on a very different basis, lay in the fact that the penalty for being a public enemy was death.[33] So far as Rothaug was concerned, the Tribunal in The Justice Case focused, among other things, on the fact that he "made his court an instrumentality of terror...He was and is a sadistic and evil man..."[34]

Sentencing of the Three Defendants and Their Respective Fates after the Trial[35]

There were 16 Defendants in The Justice Case. Of these: ten were convicted on one or more counts,[36] four were found not guilty,[37] one suffered from ill health, and could not attend most of the

trial, as a result of which a mistrial was declared,[38] one committed suicide in prison, after being indicted and before the trial opened.[39]

Franz Schlegelberger was sentenced to life imprisonment[40] but was released in 1950.[41] After his release from prison, he received a monthly pension of 2,894 Marks (compared with the earnings of an average skilled worker of about 400 Marks).[42] In addition, he received 160,000 Marks, by way of back pension, which included payment for the time he had spent in prison.[43]

Curt Rothenberger was sentenced to seven years' imprisonment[44] and was released in 1951.[45] After his release, was awarded a pension of 2,073 Marks per month, plus a back pension.[46]

Oswald Rothaug was sentenced to life imprisonment,[47] and was the last of the convicted defendants released, in 1956,[48] all the others having been released by 1951.[49]

Rothaug's co-judges in the Katzenberger case were charged in Germany, but were held to be unfit to stand trial in 1976. This was despite the fact that one of the two was actively conducting a law practice at the time. The Nuremberg County Court held that that was not a bar to holding that he was unfit to stand trial, because he suffered from "intellectual and emotional disturbances".[50]

Roland Freisler was killed by a direct hit by a United States bomb on the courthouse where he was presiding over the People's Court, on February 3, 1945.[51]

The leniency with which the Defendants in The Justice Case were treated was symptomatic of the continuity which by and large characterized the legal system of the Federal Republic of Germany in the post-War years, one aspect of which was the re-employment of Nazi-era officials as judges, prosecutors and civil servants.[52]

Duration of the Justice Case

The trial opened on March 5, 1947,[53] and concluded on October 18, 1947,[54] with sentences being handed down on December 3 and 4, 1947.[55] From beginning to end, therefore, it lasted exactly nine months, and makes an interesting contrast with the current trial of Slobodan Milosevic, which is now mid-way through its fourth year.

The Judges

It is interesting to reflect on the positions, which the judges in The Justice Case held in the United States, before presiding at Nuremberg. One was a former Chief Justice of the Supreme Court of Ohio, another was a Justice of the Supreme Court of Oregon, the third was an Associate Justice of the Court of Civil Appeals for the Third District of Texas, and the fourth was a former Assistant Attorney-General of Ohio and a District Judge of the First Division of the Territory of Alaska.[56]

On the one hand, this was a reflection of the fact that, by the time The Justice Case was held, interest in bringing Nazi-era perpetrators to justice had waned in the United States; in fact, continuing prosecution of Nazi-era crimes had become so unfashionable that, in certain judicial circles, accepting a position on one of the tribunals was considered an obstacle to advancement in the US.[57] At the same time, though, it illustrates one of the profound lessons about judicial character and temperament, as brilliantly portrayed in the counter pointing of two central characters in *Judgment at Nuremberg*. Ernst Janning . . . was endowed with an exceptionally brilliant mind, and had stellar careers in academe and the judiciary, but a fundamental element was missing at the core of his judicial persona; indeed, of his very being. As a result, he was capable of committing terrible atrocities, thereby debasing the very notion of law. By contrast, Judge Haywood (portrayed by Spencer Tracy), who presided over the trial, was no intellectual heavyweight. But, at his core, he was a decent human being, endowed with genuine common sense, and, very importantly, with a highly-tuned moral compass that allowed him instinctively to differentiate between right and wrong. The two personalities together represent the moral equivalent of the hare and the tortoise.

Other Lessons Emerging from The Justice Case

Among the sobering lessons that emerge clearly from The Justice Case are the following: First and foremost, perhaps, the critical importance of a system of constitutional separation of powers, with its concomitant checks and balances. The underlying message is that the ultimate guarantee of individual freedoms is a diffusion of power, as opposed to the aggregation of power in few sets of hands, and ultimately in one set of hands, namely that of the Führer, which resulted in Hitler being not only chief legislator and chief executive, but also Chief Justice. Within that, the importance of an independent judiciary, which is empowered to judge governmental action by reference to constitutional standards and, if the occasion arises, is prepared to tell the government that it has gone too far At its heart, all this means that government must be under law, and not the reverse.

Law, in its judicial aspect (and the same applies to its legislative aspect) is inherently neutral. If it is administered by righteous people, it can accomplish the greatest good in a society. But if it falls into evil hands, it can become the instrument of the greatest brutalities, inflicting untold amounts of suffering, misery and loss of life.

The case also underscores the fragility of democracy itself, when it is borne in mind that Hitler came to power lawfully, under the Weimar Constitution, which was never repealed, yet managed to turn the court system into a grotesque caricature of a judiciary which, in parrot-like fashion, spewed out the Government's hatred and poison, directed at the targets of its racial ideology.

The case also illustrates an important principle, which is emblematic of a theme which links all the twelve subsidiary trials conducted by the United States, after the conclusion of the trial of the major war criminals. The notion of "crimes against humanity" is normally associated with politicians, and military personnel; in other words, those who make the policy decisions, and those who actually carry out the atrocities, namely the killings, the torture, the enslavement, and so on. In the case of Nazi Germany, as Professor Raul Hilberg has pointed out, all corners of German society were involved in some way or other.[58] In prosecuting the twelve subsidiary trials, the defendants were categorized by "profession" – the doctors, the lawyers, the industrialists, and so on.[59] The message for future generations was clear: if all corners of society are complicit, then all corners of society are potentially liable to give account for their actions and, if found guilty, to face the consequences. The Nazi regime went to extraordinary lengths to "legalize" the Holocaust, in the process harnessing the German legislative system as well as the judiciary and the legal bureaucracy to accomplish its ends. Legalization of the Holocaust could not have taken place without the active participation of lawyers, and The Justice Case therefore teaches the lesson that, in the context of major human rights violations, lawyers, like anyone else, are ultimately liable to face the consequences of their actions.

Military Tribunal III

Case 3

THE UNITED STATES OF AMERICA

—against—

JOSEF ALTSTOETTER, WILHELM VON AMMON, PAUL BARNICKEL, HERMANN CUHORST, KARL ENGERT, GUENTHER JOEL, HERBERT KLEMM, ERNST LAUTZ, WOLFGANG METTGENBERG, GUENTHER NEBELUNG, RUDOLF OESCHEY, HANS PETERSEN, OSWALD ROTHAUG, CURT ROTHENBERGER, FRANZ SCHLEGELBERGER, and CARL WESTPHAL, *Defendants*

IN

TRIALS

OF

WAR CRIMINALS

BEFORE THE

NUERNBERG MILITARY TRIBUNALS

UNDER

CONTROL COUNCIL LAW No. 10

NUERNBERG

OCTOBER 1946–APRIL 1949

VOLUME III

UNITED STATES
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P 489

Testimony of Defendant Rothenberger Concerning His Memorandum on Judicial Reform

EXTRACTS FROM THE TESTIMONY OF DEFENDANT ROTHENBERGER

[CURT ROTHENBERGER—State Secretary (Staatssekretaer) of the Reich Ministry of Justice; deputy president of the Academy of German Law (Akademie fuer deutsches Recht); Gaufuehrer of the National Socialist Lawyers League]

CROSS-EXAMINATION

* * * * * * *

MR. KING: Dr. Rothenberger, I would like to come back to Prosecution Exhibit 27, which is Document NG-075. This is your memorandum to Hitler, or rather your memorandum which eventually reached Hitler, and to which you attribute your appointment to the position of State Secretary. The purpose of examining certain phrases from this memorandum is to enable me better to understand what your new program for the independence of the judiciary was. I am sure you know that memorandum much better than I do. I want to read to you several paragraphs from it. You say in one place: "Law must serve the political leadership." Then you say in another place on page 8 of the document, "He who is striving toward a new world order cannot move in the limitation of an orderly Ministry of Justice. To accomplish such a far-reaching revolution in domestic and foreign policy it is only possible if on one hand all outmoded institutions, concepts, and habits have been done away with, if need be in a brutal manner." Then you say still further on, "The Fuehrer is the supreme judge, theoretically the authority to pass judgment is only his." Then you say still further on: "A judge who is in a direct relation of fealty to the Fuehrer must judge like the Fuehrer." All of these phrases which I read appear in that memorandum and based on them, I want to ask you this and perhaps several other questions. You have repeatedly said that the purpose of your program was to establish an independence of the judiciary. However, the essence of your program, as it seems clear to me from reading your memorandum, is that the Fuehrer is the supreme judge. As you say here, theoretically the authority to pass judgment is only his. A judge in a position of direct relation of fealty to the Fuehrer must judge like the Fuehrer. Now my question to you, Dr. Rothenberger, is simply this: When you speak of the independence of the German judiciary, how do you reconcile that with these statements that the Fuehrer is the supreme judge, and that only he can actually judge, and that all judges must reflect his thinking?

DEFENDANT ROTHENBERGER: During my direct examination I have already tried to explain the thoughts which made me write this memorandum. It is extraordinarily difficult to do so briefly, especially to state one's attitude only in regard to two or three sentences which are taken out of their context. Therefore, I am of the opinion that the memorandum as such should speak for itself, and that I leave it up to the Tribunal to form its judgment about the actual thoughts contained in the memorandum. And if in spite of that I may answer that question only very briefly in a concrete manner, I have to say the following: In 1942 the authoritarian state as such was a fact in Germany. That is to say, Hitler was also the highest judicial authority, and if any chance or possibility still existed to remove all the damage which had occurred during the course of years and all the burdens with which the administration of justice was loaded by the Party and by the SS—or, as we used to say at the time, on the part of the thousand little Hitlers who every day jeopardized the independence of the individual judge—under those conditions the only possibility to bring about any amelioration at all was Hitler himself. That it was impossible to convince Hitler I, and later on, everybody realized. But at the time I believed that it was possible to convince him, and I had to seize that possibility as a last chance. And if it would have been possible to convince him, then in effect the independence of the courts would have been reestablished again. For in that case this direct relationship between Hitler and the judiciary which I asked for would have been established and all other influences which burdened every judge every day would have been eliminated.

Q. Dr. Rothenberger, may I interrupt you at this point? I think that you are entirely too modest about the success of your program. If you meant what you said in your memorandum, and I assume that you did mean what you said, then isn't it true that your program was a complete success, since the final result was that the Fuehrer became the supreme judge? Isn't that true?

A. The fact that after only 15 months I again left my office is probably the best proof of the fact that my program was a complete failure.

Q. Dr. Rothenberger, do you distinguish between the success of your program and your own failure to get along with people in the ministry? Isn't it possible that those two factors are separable?

A. No. A second reason also speaks for the assumption that it was a complete failure—and that is the intervention of outside

offices with the activity of the judges which I wanted to prevent; this did not stop at all after this memorandum was submitted, but rather became worse. The independence of the court and the lifting of the judiciary from the civil service, which I was striving for, did not become effective at all. I request the Tribunal to tell me whether I should go into more detail in regard to this problem, which of course is a fundamental problem, or whether I should not say any more about it now.

PRESIDING JUDGE BRAND: We will not interefere at this time.

MR. KING: Dr. Rothenberger, I am frankly puzzled by seemingly contradictory statements in your memorandum. Let's go over it once more. You say, on the one hand, that you want an independent judiciary. You say, on the other, that the Fuehrer is the supreme judge, and all judges must act like the Fuehrer. Now, unless you meant that all judges must act in accordance with the wishes of the Fuehrer, your memorandum means absolutely nothing and is pure double-talk. If that isn't what you meant—if you didn't mean that the Fuehrer's decisions should be the final decisions—just what do you mean by all that talk of the Fuehrer being the supreme judge?

DEFENDANT ROTHENBERGER: I said in my memorandum that theoretically the Fuehrer is the highest judge in Germany; I also expressed that the individual judge in his decision must be independent even in his relationship to the Fuehrer. What I attempted to achieve first was to eliminate all other influences on the judge and therefore to establish this direct connection between the Fuehrer and the judge. Therefore, my suggestion in order to say it clearly to put in place of the influence of Bormann or Himmler, the so-called "Judge of the Fuehrer," who would influence the Fuehrer in the capacity of a judge, and would therefore not only try to direct the development in Germany into quite different channels in a legal respect but in every respect.

Q. Let me put this question to you. If, under your program, as you envisaged it in 1942, a judge came to a decision, and that decision was known not to be in accordance with the Fuehrer's views, in your view whose opinion should have prevailed, as you intended it to work out?

A. The decision of the judge.

Q. Then what do you mean when you say the judge must judge like the Fuehrer?

A. The Fuehrer does not have the right to touch a decision made by a judge.

Q. Dr. Rothenberger, we know that that wasn't so in practice, don't we? We have seen instances where it didn't work out that way, haven't we?

A. Unfortunately, after I wrote this memorandum, especially here in this trial, and also when I was in Berlin already, I found out that the Fuehrer acted in a different way. The purpose of this memorandum, however, was merely the following: to convince the Fuehrer that the men who had influenced him so far and in that direction were wrong. My knowledge from Hamburg was not sufficient in order to know already at that time that the Fuehrer himself could not be convinced. But that is not only my own tragedy, but the tragedy of the entire German people.

Q. Did you ever consider the possibility that the Fuehrer in reading your memorandum read it literally and decided that when you said "The Fuehrer should be the supreme judge," that you meant what you said? Did you ever consider that possibility?

A. Yes, I considered that possibility.

Q. Do you have any feeling that in practice it didn't work out that way? In fact, the evidence adduced here at this trial tends to prove, don't you believe, that by the end of the war the Fuehrer really became the supreme judge and interfered with all judicial decisions?

A. I saw that later, and if I had known that before, I would not have undertaken this daring attempt, because there was no hope for it from the very beginning. But at the time, I thought that as a jurist I was under an obligation to make this final attempt, because I just could not accept the conditions which existed.

Q. You knew what the Party platform was, did you not? You knew what Hitler had said in Mein Kampf, did you not?

A. About that problem, he did not say anything in a negative way in his Party platform and not in Mein Kampf either.

Q. Well, as a reasonable man, Dr. Rothenberger, you knew what his attitudes were on all of these questions, and if your program embodied having him become the supreme judge, you knew fairly well how he would judge on all these questions from your prior knowledge, did you not?

A. No. I can only emphasize again and again that as long as I saw the possibiltiy of influencing him, I considered it my duty to make this attempt; otherwise I would have been a fool.

Q. No one denies that you did influence him, Dr. Rothenberger; the implication is that you did, and that you were completely successful.

A. I did not have any success. That is just it. Hitler could not be convinced.

Q. He became the supreme judge, did he not?

A. In effect, he interfered with the administration of justice, as we know now.

Q. All of the judges in Germany were in a position of fealty to the Fuehrer, were they not?

A. No fealty, no.

Q. What do you understand by "fealty"?

A. Dependence upon him.

Q. And you don't think judges in Germany at the end of the war were dependent on Hitler?

A. I just wanted to prevent this fealty.

Q. You wanted to prevent it?

A. Yes.

Q. That is not what you said in your memorandum. You said in your memorandum, "A judge who is in direct relation of fealty to the Fuehrer must judge like the Fuehrer." That doesn't sound like you were trying to prevent it. That sounds like you were trying to induce it.

A. You do not distinguish between the dependence and fealty on the one hand, and an obvious natural relationship of trust and confidence which every German and therefore every judge too should have in the Fuehrer.

III-490

"The Justice Case"

Military Tribunal III

Case 3

THE UNITED STATES OF AMERICA

—against—

JOSEF ALTSTOETTER, WILHELM VON AMMON, PAUL BARNICKEL, HERMANN CUHORST, KARL ENGERT, GUENTHER JOEL, HERBERT KLEMM, ERNST LAUTZ, WOLFGANG METTGENBERG, GUENTHER NEBELUNG, RUDOLF OESCHEY, HANS PETERSEN, OSWALD ROTHAUG, CURT ROTHENBERGER, FRANZ SCHLEGELBERGER, and CARL WESTPHAL, *Defendants*

IN

TRIALS

OF

WAR CRIMINALS

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OCTOBER 1946–APRIL 1949

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P 429

TRANSLATION OF DOCUMENT NG-287
PROSECUTION EXHIBIT 88

CORRESPONDENCE BETWEEN LAMMERS, SCHAUB, AND DEFENDANT SCHLEGELBERGER, OCTOBER 1941, CONCERNING TRANSFER OF MARKUS LUFTGAS TO THE GESTAPO FOR EXECUTION

[FRANZ SCHLEGELBERGER—State Secretary; Acting Reich Minister of Justice.]

The Reich Minister and Chief of the Reich Chancellery
Rk/ 15506 B

Fuehrer Headquarters
25 October 1941
[Handwritten] 393A

1. To: Under Secretary, Professor Dr. Dr. h.c. Schlegelberger, charged with the management of the affairs of the Reich Minister of Justice

Berlin W 8
Welhelmstrasse 65
[Handwritten] Refer to newspaper

Dear Mr. Schlegelberger:

The enclosed newspaper clipping about the sentencing of the Jew Markus Luftgas to imprisonment for 2½ years by the Special Court of Bielitz has been submitted to the Fuehrer.[1] The Fuehrer wishes Luftgas to be sentenced to death. May I ask you urgently to instigate what is necessary and to notify me about the measures taken so that I can inform the Fuehrer.

Heil Hitler!

Yours very truly,
(Signature of the Reich Minister)

[Handwritten] Justice 11

---

2. To: SS-Gruppenfuehrer Julius Schaub[2]

Fuehrer Headquarters

Subject: Markus Luftgas

Dear Mr. Schaub:

After receiving your letter dated 22 October 1941 I got into touch with the Reich Minister of Justice and asked him to instigate the necessary measures.

Heil Hitler!

Yours very truly,
(Signature of the Reich Minister)

3. Copy of the newspaper clipping to be filed.

4. After dispatch—For the attention of Ministerial Director Kritzinger for information.

5. After 1 month.

(Signature of the Reich Minister)
[Initial] L [Lammers]

Copy
[Enclosure] to Rk. 15 506 B

"Berlin Illustrated Night Edition"
No: 246, Monday 20 October 1941

Jew hoarded 65,000 eggs and allowed 15,000 of them to spoil

By wire from our reporter

Breslau, 20 October—The 74-year-old Jew Markus Luftgas from Kalwarja removed a huge number of eggs from the controlled economy and had to answer for it at the Special Court in Bielitz. The Jew had hidden 65,000 eggs in containers and in a lime-pit, 15,000 of which had already spoiled. The defendant was sentenced to 2½ years' imprisonment as a just punishment for a crime against the war economy regulations.

Berlin, 29 October 1941

The Acting Reich Minister of Justice
III g–14 3454/41

To the Reich Minister and
Chief of the Reich Chancellery
in Berlin W 8, Vosst. 6

[Initial] L [Lammers]

[Handwritten] 3/11

1. Submitted to the Minister for his information

2. To be filed.

[Initial] KR [Kritzinger]

Subject: Case against the Jew Luftglass (not Luftgas) Sg 12 Js 340/.41 of the Chief Public Prosecutor in Katowice —Rk. 15506 B dated 25 October 1941.

Dear Reich Minister Dr. Lammers:

In accordance with the order of the Fuehrer and Reich Chancellor dated 24 October 1941, transmitted to me by the Minister of State and Chief of the Presidential Chancellery of the Fuehrer, I have handed over to the Gestapo for the purpose of execution, the Jew Markus Luftglass who was sentenced to 2½ years' imprisonment by the Special Court in Katowice.

Heil Hitler!

Very truly yours,
[Signed] SCHLEGELBERGER

"The Justice Case"

Military Tribunal III

Case 3

THE UNITED STATES OF AMERICA

—*against*—

JOSEF ALTSTOETTER, WILHELM VON AMMON, PAUL BARNICKEL, HERMANN CUHORST, KARL ENGERT, GUENTHER JOEL, HERBERT KLEMM, ERNST LAUTZ, WOLFGANG METTGENBERG, GUENTHER NEBELUNG, RUDOLF OESCHEY, HANS PETERSEN, OSWALD ROTHAUG, CURT ROTHENBERGER, FRANZ SCHLEGELBERGER, and CARL WESTPHAL, *Defendants*

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TRANSLATION OF DOCUMENT NG-154
PROSECUTION EXHIBIT 152

OPINION AND SENTENCE OF THE NUERNBERG SPECIAL COURT IN THE KATZENBERGER CASE, 13 MARCH 1942, IN WHICH DEFENDANT ROTHAUG WAS PRESIDING JUDGE

[OSWALD ROTHAUG—Senior Public Prosecutor (Reichsanwalt) of the People's Court; formerly Chief Justice of the Special Court in Nuernberg; member of the Leadership Corps of the Nazi Party at Gau executive level.]

Sg No. 351/41

Verdict

In the name of the German People

The Special Court for the district of the Court of Appeal in Nuernberg with the District Court Nuernberg-Fuerth in the proceedings against Katzenberger, Lehmann Israel, commonly called Leo, merchant and head of the Jewish religious community in Nuernberg, and Seiler, Irene, owner of a photographic shop in Nuernberg, both at present in arrest pending trial the charges being racial pollution and perjury—in public session of 13 March 1942, in the presence of—

The President—Dr. Rothaug, Senior Judge of the District Court;

Associate Judges—Dr. Ferber and Dr. Hoffmann, Judges of the District Court;

Public Prosecutor for the Special Court—Markl; and

Official Registrar: Raisin, clerk, pronounced the following verdict:

Katzenberger, Lehmann Israel, commonly called Leo, Jewish by race and religion, born 25 November 1873 at Massbach, married, merchant of Nuernberg; Seiler, Irene, nee Scheffler, born 26 April 1910 at Guben, married, owner of a photographic shop in Nuernberg, both at present in arrest pending trial have been sentenced as follows:

Katzenberger—for an offense under section 2, legally identical with an offense under section 4 of the decree against public enemies in connection with the offense of racial pollution to death and to loss of his civil rights for life according to sections 32–34 of the criminal (penal) code.

Seiler—for the offense of committing perjury while a witness to 2 years of hard labor and to loss of her civil rights for the duration of 2 years.

The 3 months the defendant Seiler spent in arrest pending trial will be taken into consideration in her sentence.

Costs will be charged to the defendants.

Findings

I

1. The defendant Katzenberger is fully Jewish and a German national; he is a member of the Jewish religious community.

As far as his descent is concerned, extracts from the birth registers of the Jewish community at Massbach show that the defendant was born on 25 November 1873 as the son of Louis David Katzenberger, merchant, and his wife Helene née Adelberg. The defendant's father, born on 30 June 1838 at Massbach, was, according to an extract from the Jewish registers at Thundorf, the legitimate son of David Katzenberger, weaver, and his wife Karoline Lippig. The defendants' mother Lena Adelberg, born on 14 June 1847 at Aschbach, was, according to extracts from the birth register of the Jewish religious community of Aschbach, the legitimate daughter of Lehmann Adelberg, merchant and his wife, Lea. According to the Thundorf register, the defendant's parents were married on 3 December 1867 by the district rabbi in Schweinfurt. The defendant's grandparents on his father's side were married, according to extracts from the Thundorf register, on 3 April 1832; those on his mother's side were married, according to an extract from the register of marriages of the Jewish religious community of Aschbach, on 14 August 1836.

The extracts from the register of marriages of the Jewish religious community at Aschbach show, concerning the marriage of the maternal grandparents, that Bela-Lea Seemann, born at Aschbach in 1809, was a member of the Jewish religious community. Otherwise the documents mentioned give no further information so far as confessional affiliations are concerned that parents or grandparents were of Jewish faith.

The defendant himself has stated that he is certain that all four grandparents were members of the Jewish faith. His grandmothers he knew when they were alive; both grandfathers were buried in Jewish cemeteries. Both his parents belonged to the Jewish religious community, as he does himself.

The court sees no reason to doubt the correctness of these statements, which are fully corroborated by the available extracts from exclusively Jewish registers. Should it be true that all four grandparents belonged to the Jewish faith, the grandparents would be regarded as fully Jewish according to the regulation to facilitate the producing of evidence in section 5, paragraph 1 together with section 2, paragraph 2, page 2 of the ordinance to the Reich Civil Code of 14 November 1935 Reichsgesetzblatt, page 1333. The defendant therefore is fully Jewish in the sense of the Law for the Protection of German Blood.* His own admissions show that he himself shared that view.

The defendant Katzenberger came to Nuernberg in 1912. Together with his brothers, David and Max, he ran a shoe shop until November 1938. The defendant married in 1906, and there are two children, ages 30 and 34.

Up to 1938 the defendant and his brothers, David and Max, owned the property of 19 Spittlertorgraben in Nuernberg. There were offices and storerooms in the rear building, whereas the main building facing the street was an apartment house with several apartments.

The co-defendant Irene Seiler arrived in 1932 to take a flat in 19 Spittlertorgraben, and the defendant Katzenberger has been acquainted with her since that date.

2. Irene Seiler, née Scheffler, is a German citizen of German blood.

Her descent is proved by documents relating to all four grandparents. She herself, her parents, and all her grandparents belong to the Protestant Lutheran faith. This finding of the religious background is based on available birth and marriage certificates of the Scheffler family which were made part of the trial. As far

as descent is concerned therefore, there can be no doubt about Irene Seiler, née Scheffler, being of German blood.

The defendant Katzenberger was fully cognizant of the fact that Irene Seiler was of German blood and of German nationality.

On 29 July 1939, Irene Scheffler married Johann Seiler, a commercial agent. There have been no children so far.

In her native city, Guben, the defendant attended secondary school and high school up to Unterprima [eighth grade of high school], and after that, for 1 year, she attended the Leipzig State Academy of Art and Book Craft.

She went to Nuernberg in 1932 where she worked in the photographic laboratory of her sister Hertha, which the latter had managed since 1928 as a tenant of 19 Spittlertorgraben. On 1 January 1938, she took over her sister's business at her own expense. On 24 February 1938, she passed her professional examination.

3. The defendant Katzenberger is charged with having had continual extra-marital sexual intercourse with Irene Seiler, née Scheffler, a German national of German blood. He is said to have visited Seiler frequently in her apartment in Spittlertorgraben up to March 1940, while Seiler visited him frequently, up to autumn 1938, in the offices of the rear building. Seiler, who is alleged to have got herself in a dependent position by accepting gifts of money from the defendant Katzenberger and by being allowed delay in paying her rent, was sexually amenable to Katzenberger. Thus, their acquaintance is said to have become of a sexual nature, and, in particular, sexual intercourse occurred. They are both said to have exchanged kisses sometimes in Seiler's flat and sometimes in Katzenberger's offices. Seiler is alleged to have often sat on Katzenberger's lap. On these occasions Katzenberger, in order to achieve sexual satisfaction, is said to have caressed and patted Seiler on her thighs through her clothes, clinging closely to Seiler, and resting his head on her bosom.

The defendant Katzenberger is charged with having committed this act of racial pollution by taking advantage of wartime conditions. Lack of supervision was in his favor, especially as he is said to have visited Seiler during the black-out. Moreover, Seiler's husband had been called up, and consequently surprise appearances of the husband were not to be feared.

The defendant Irene Seiler is charged with having, on the occasion of her interrogation by the investigating judge of the local Nuernberg Court on 9 July 1941, made deliberately untrue statements and affirmed under oath that this contact was without sexual motives and that she believed that to apply to Katzenberger as well.

Seiler, it is alleged, has thereby become guilty of being a perjuring witness.

The defendants have said this in their defense—

The defendant Seiler—When in 1932 she arrived in the photographic laboratory of her sister in Nuernberg, she was thrown completely on her own resources. Her sister returned to Guben, where she opened a studio as a photographer. Her father had recommended her to the landlord, the defendant Katzenberger, asking him to look after her and to assist her in word and deed. This was how she became closely acquainted with the Jew Katzenberger.

As time went on, Katzenberger did indeed become her adviser, helping her, in particular, in her financial difficulties. Delighted with the friendship and kindness shown her by Katzenberger she came to regard him gradually as nothing but a fatherly friend, and it never occurred to her to look upon him as a Jew. It was true that she called regularly in the storerooms of the rear house. She did so after office hours, because it was easier then to pick out shoes. It also happened that during these visits, and during those paid by Katzenberger to her flat, she kissed Katzenberger now and then and allowed him to kiss her. On these occasions she frequently would sit on Katzenberger's lap which was quite natural with her and had no ulterior motive. In no way should sexual motives be regarded as the cause of her actions. She always thought that Katzenberger's feelings for her were purely those of a concerned father.

Basing herself on this view she made the statement to the investigating judge on 9 July 1941 and affirmed under oath, that when exchanging those caresses neither she herself nor Katzenberger did so because of any erotic emotions.

The defendant Katzenberger—He denies having committed an offense. It is his defense that his relations with Frau Seiler were of a purely friendly nature. The Scheffler family in Guben had likewise looked upon his relations with Frau Seiler only from this point of view. That he continued his relations with Frau Seiler after 1933, 1935, and 1938, might be regarded as a wrong [Unrecht] by the NSDAP. The fact of his doing so, however, showed that his conscience was clear.

Moreover, their meetings became less frequent after the action against the Jews in 1938. After Frau Seiler got married in 1939, the husband often came in unexpectedly when he, Katzenberger, was with Frau Seiler in the flat. Never, however, did the husband surprise them in an ambiguous situation. In January or February 1940, at the request of the husband, he went to the Seiler's apartment twice to help them fill in their tax declarations. The last talk

he ever had in the Seiler apartment took place in March 1940. On that occasion Frau Seiler suggested to him to discontinue his visits because of the representations made to her by the NSDAP, and she gave him a farewell kiss in the presence of her husband.

He never pursued any plans when being together with Frau Seiler, and he therefore could not have taken advantage of wartime conditions and the blackout.

II

The court has drawn the following conclusions from the excuses made by the defendant Katzenberger and the restrictions with which the defendant Seiler attempted to render her admissions less harmful:

When, in 1932, the defendant Seiler came to settle in Nuernberg at the age of 22, she was a fully grown and sexually mature young woman. According to her own admissions, credible in this case, she was not above sexual surrender in her relations with her friends.

In Nuernberg, when she had taken over her sister's laboratory in 19 Spittlertorgraben, she entered the immediate sphere of the defendant Katzenberger. During their acquaintance she gradually became willing, in a period of almost 10 years, to exchange caresses and, according to the confessions of both defendants, situations arose which can by no means be regarded merely as the outcome of fatherly friendliness. When she met Katzenberger in his offices in the rear building or in her flat, she sat often on his lap and, without a doubt, kissed his lips and cheeks. On these occasions Katzenberger, as he admitted himself, responded these caresses by returning the kisses, putting his head on her bosom and patting her thighs through her clothes.

To assume that the exchange of these caresses, admitted by both of them, were on Katzenberger's part the expression of his fatherly feelings, on Seiler's part merely the actions caused by daughterly feelings with a strong emotional accent, as a natural result of the situation, is contrary to all experience of daily life. The subterfuge used by the defendant in this respect is in the view of the court simply a crude attempt to disguise as sentiment, free of all sexual lust, these actions with their strong sexual bias. In view of the character of the two defendants and basing itself on the evidence submitted, the court is firmly convinced that sexual motives were the primary cause for the caresses exchanged by the two defendants.

Seiler was usually in financial difficulties. Katzenberger availed himself of this fact to make her frequent gifts of money, and repeatedly gave her sums from 1 to 10 reichsmarks. In his ca-

pacity as administrator of the property on which Seiler lived and which was owned by the firm he was a partner of, Katzenberger often allowed her long delays in paying her rental debts. He often gave Seiler cigarettes, flowers, and shoes.

The defendant Seiler admits that she was anxious to remain in Katzenberger's favor. They addressed each other in the second person singular.

According to the facts established in the trial, the two defendants offered to their immediate surroundings, and in particular to the community of the house of 19 Spittlertorgraben, the impression of having an intimate love affair.

The witnesses Kleylein, Paul and Babette; Maesel, Johann; Heilmann, Johann; and Leibner, Georg observed frequently that Katzenberger and Seiler waved to each other when Seiler, through one of the rear windows of her flat, saw Katzenberger in his offices. The witnesses' attention was drawn particularly to the frequent visits paid by Seiler to Katzenberger's offices after business hours and on Sundays, as well as to the length of these visits. Everyone in the house came to know eventually that Seiler kept asking Katzenberger for money, and they all became convinced that Katzenberger, as the Jewish creditor, exploited sexually the poor financial situation of the German-blooded woman Seiler. The witness Heilmann, in a conversation with the witness Paul Kleylein, expressed his opinion of the matter to the effect that the Jew was getting a good return for the money he gave Seiler.

Nor did the two defendants themselves regard these mutual calls and exchange of caresses as being merely casual happenings of daily life, beyond reproach. According to statements made by the witnesses Babette and Paul Kleylein, they observed Katzenberger to show definite signs of fright when he saw that they had discovered his visits to Seiler's flat as late as 1940. The witnesses also observed that during the later period Katzenberger sneaked into Seiler's flat rather than walking in openly.

In August 1940, while being in the air-raid shelter, the defendant Seiler had to put up with the following reply given to her by Oestreicher, an inhabitant of the same house, in the presence of all other inhabitants: "I'll pay you back, you Jewish hussy." Seiler did not do anything to defend herself against this reproach later on, and all she did was to tell Katzenberger of this incident shortly after it had happened. Seiler has been unable to give an even remotely credible explanation why she showed this remarkable restraint in the face of so strong an expression of suspicion. Simply pointing out that her father, who is over seventy, had advised her not to take any steps against Oestreicher does not

make more plausible her restraint shown in the face of the grave accusation made in public.

The statements made by Hans Zeuschel, assistant inspector of the criminal police, show that the two defendants did not admit from the very beginning the existing sexual situation as being beyond reproach. The fact that Seiler admitted the caresses bestowed on Katzenberger only after having been earnestly admonished, and the additional fact that Katzenberger, when interrogated by the police, confessed only when Seiler's statements were being shown to him, forces the conclusion that they both deemed it advisable to keep secret the actions for which they have been put on trial. This being so, the court is convinced that the two defendants made these statements only for reason of opportuneness intending to minimize and render harmless a situation which has been established by witnesses' testimony.

Seiler has also admitted that she did not tell her husband about the caresses exchanged with Katzenberger prior to her marriage —all she told him was that in the past Katzenberger had helped her a good deal. After getting married in July 1939 she gave Katzenberger a "friendly kiss" on the cheek in the presence of her husband on only one occasion, otherwise they avoided kissing each other when the husband was present.

In view of the behavior of the defendants toward each other, as repeatedly described, the court has become convinced that the relations between Seiler and Katzenberger which extended over a period of 10 years were of a purely sexual nature. This is the only possible explanation of the intimacy of their acquaintance. As there were a large number of circumstances favoring seduction no doubt is possible that the defendant Katzenberger maintained continuous sexual intercourse with Seiler. The court considers as untrue Katzenberger's statement to the contrary that Seiler did not interest him sexually, and the statements made by the defendant Seiler in support of Katzenberger's defense the court considers as incompatible with all practical experience. They were obviously made with the purpose of saving Katzenberger from his punishment.

The court is therefore convinced that Katzenberger, after the Nuernberg laws had come into effect, had repeated sexual intercourse with Seiler, up to March 1940. It is not possible to say on what days and how often this took place.

The Law for the Protection of German Blood defines extramarital sexual intercourse as any form of sexual activity apart from the actual cohabitation with a member of the opposite sex which, by the method applied in place of actual intercourse, serves to satisfy the sexual instincts of at least one of the partners. The

conduct to which the defendants admitted and which in the case of Katzenberger consisted in drawing Seiler close to him, kissing her, patting and caressing her thighs over her clothes, makes it clear that in a crude manner Katzenberger did to Seiler what is popularly called "Abschmieren" [petting]. It is obvious that such actions are motivated only by sexual impulses. Even if the Jew had only done these so-called "Ersatzhandlungen" [sexual acts in lieu of actual intercourse] to Seiler, it would have been sufficient to charge him with racial pollution in the full sense of the law.

The court, however, is convinced over and above this that Katzenberger, who admits that he is still capable of having sexual intercourse, had intercourse with Seiler throughout the duration of their affair. According to general experiences it is impossible to assume that in the 10 years of his tête-a-tête with Seiler, which often lasted up to an hour, Katzenberger would have been satisfied with the "Ersatzhandlungen" which in themselves warranted the application of the law.

III

Thus, the defendant Katzenberger has been convicted of having had, as a Jew, extra-marital sexual intercourse with a German citizen of German blood after the Law for the Protection of German Blood came into force, which according to section 7 of the law means after 17 September 1935. His actions were guided by a consistent plan which was aimed at repetition from the very beginning. He is therefore guilty of a continuous crime of racial pollution according to sections 2 and 5, paragraph 11 of the Law for the Protection of German Blood and German Honor of 15 September 1935.

A legal analysis of the established facts shows that in his polluting activities, the defendant Katzenberger, moreover, generally exploited the exceptional conditions arising out of wartime circumstances. Men have largely vanished from towns and villages because they have been called up or are doing other work for the armed forces which prevents them from remaining at home and maintaining order. It was these general conditions and wartime changes which the defendant exploited. As he continued his visits to Seiler's apartment up to spring 1940, the defendant took into account the fact that in the absence of more stringent measures of control his practices could not, at least not very easily, be seen through. The fact that her husband had been drafted into the armed forces also helped him in his activities.

Looked at from this point of view, Katzenberger's conduct is particularly contemptible. Together with his offense of racial pollution he is also guilty of an offense under section 4 of the decree

against public enemies. It should be noted here that the national community is in need of increased legal protection from all crimes attempting to destroy or undermine its inner solidarity.

On several occasions since the outbreak of war the defendant Katzenberger sneaked into Seiler's flat after dark. In these cases the defendant acted by exploiting the measures taken for the protection in air raids and by making use of the black-out. His chances were further improved by the absence of the bright street lighting which exists in the street along Spittlertorgraben in peacetime. In each case he exploited this fact being fully aware of its significance, thus during his excursions he instinctively escaped observation by people in the street.

The visits paid by Katzenberger to Seiler under the cover of the black-out served at least the purpose of keeping relations going. It does not matter whether during these visits extra-marital sexual intercourse took place or whether they only conversed because the husband was present, as Katzenberger claims. The motion to have the husband called as a witness was therefore overruled. The court holds the view that the defendant's actions were deliberately performed as part of a consistent plan and amount to a crime against the body according to section 2 of the decree against public enemies. The law of 15 September 1935 was promulgated to protect German blood and German honor. The Jew's racial pollution amounts to a grave attack on the purity of German blood, the object of the attack being the body of a German woman. The general need for protection therefore makes appear as unimportant the behavior of the other partner in racial pollution who, however, is not liable to prosecution. The fact that racial pollution occurred at least up to 1939–1940 becomes clear from statements made by the witness Zeuschel to whom the defendant repeatedly and consistently admitted that up to the end of 1939 and the beginning of 1940 she was used to sitting on the Jew's lap and exchanging caresses as described above.

Thus, the defendant committed an offense also under section 2 of the decree against public enemies.

The personal character of the defendant likewise stamps him as a public enemy. The racial pollution practiced by him through many years grew, by exploiting wartime condition, into an attitude inimical to the nation, into an attack on the security of the national community during an emergency.

This was why the defendant Katzenberger had to be sentenced, both on a crime of racial pollution and of an offense under sections 2 and 4 of the decree against public enemies, the two charges being taken in conjunction according to section 73 of the penal code.

In view of the court the defendant Seiler realized that the contact which Katzenberger continuously had with her was of a sexual nature. The court has no doubt that Seiler actually had sexual intercourse with Katzenberger. Accordingly the oath given by her as a witness was to her knowledge and intention a false one, and she became guilty of perjury under sections 154 and 153 of the penal code.

IV

In passing sentence the court was guided by the following considerations:

The political form of life of the German people under national socialism is based on the community. One fundamental factor of the life of the national community is the racial problem. If a Jew commits racial pollution with a German woman, this amounts to polluting the German race and, by polluting a German woman, to a grave attack on the purity of German blood. The need for protection is particularly strong.

Katzenberger practiced pollution for years. He was well acquainted with the point of view taken by patriotic German men and women as regards racial problems and he knew that by his conduct the patriotic feelings of the German people were slapped in the face. Neither the National Socialist Revolution of 1933, nor the passing of the Law for the Protection of German Blood in 1935, neither the action against the Jews in 1938, nor the outbreak of war in 1939 made him abandon this activity of his.

As the only feasible answer to the frivolous conduct of the defendant, the court therefore deems it necessary to pronounce the death sentence as the heaviest punishment provided by section 4 of the decree against public enemies. His case must be judged with special severity, as he had to be sentenced in connection with the offense of committing racial pollution, under section 2 of the decree against public enemies, the more so, if taking into consideration the defendant's personality and the accumulative nature of his deeds. This is why the defendant is liable to the death penalty which the law provides for such cases as the only punishment. Dr. Baur, the medical expert, describes the defendant as fully responsible.

Accordingly, the court has pronounced the death sentence. It was also considered necessary to deprive him of his civil rights for life, as specified in sections 32–34 of the penal code. When imposing punishment on the defendant Seiler, her personal character was the first matter to be considered. For many years, Seiler indulged in this contemptible love affair with the Jew Katzenberger. The national regeneration of the German people in 1933 was alto-

gether immaterial to her in her practices, nor was she in the least influenced when the Law for the Protection of German Blood and Honor was promulgated in September 1935. It was, therefore, nothing but an act of frivolous provocation on her part to apply for membership in the NSDAP in 1937 which she obtained.

When by initiating legal proceedings against Katzenberger the German people were to be given satisfaction for the Jew's polluting activities, the defendant Seiler did not pay the slightest heed to the concerns of State authority or to those of the people and decided to protect the Jew.

Taking this over-all situation into consideration the court considered a sentence of 4 years of hard labor as having been deserved by the defendant.

An extenuating circumstance was that the defendant, finding herself in an embarrassing situation, affirmed her—as she knew—false statement with an oath. Had she spoken the truth she could have been prosecuted for adultery, aiding, and soliciting. The court therefore reduced the sentence by half despite her guilt, and imposed as the appropriate sentence 2 years of hard labor. (Sec. 157, par. I, No. 1, of the Penal Code.)

On account of the lack of honor of which she was convicted, she had to be deprived of her civil rights too. This has been decided for a duration of 2 years.

Taking into consideration the time spent in arrest pending trial: Section 60, Penal Code. Costs: Section 465, Code of Criminal Procedure.

[Signed] ROTHAUG

DR. FERBER

DR. HOFFMANN

Certified:

Nuernberg, 23 March 1942

The Registrar of the Office of the Special
Court for the district of the Nuernberg Court
of Appeal with the District Court Nuernberg-Fuerth

[Stamp]

District Court
Nuernberg-Fuerth

[Illegible signature]
Justizinspektor

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(2 pgs)

The Tragedy Of The Human Rights Movement

by Harry Reicher
Special To The Jewish Week

The human rights movement, which offered so much hope and promise after the horrors of the Holocaust, has, in very significant respects, lost its way.

The sight of President Ahmadinejad of Iran spewing out vile anti-Semitic canards and openly prophesying the destruction of the State of Israel would be bad enough in any context. But for it to have happened on the eve of the 60th anniversaries of two of the central pillars of the whole human rights movement of the post-World War II era, and in the very body that adopted those monumental instruments, is a savage mockery of history that is frightening in its grotesqueness.

On Dec. 10, 1948, the General Assembly of the United Nations, sitting in Paris, adopted the Universal Declaration of Human Rights, the charter document of the human rights law that has evolved in the six decades since then. Just a day earlier, the same General Assembly had adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Both were responses, on a measure-for-measure basis, to the Holocaust, which revealed, in the most horrific fashion, the ultimate depths to which human society could sink, absent a meaningful system of recognition, protection and enforcement of human rights.

As the catalyst for the human rights movement, the Holocaust was intended to annihilate all the Jews of Europe, numbering over 11 million; six million Jews were ultimately killed. At the heart of this nightmare lay an egregious racial ideology: All of humankind was divided into racial groups, arranged in hierarchical formation, with Aryans at the top, embodying perfection, and Jews at the bottom, representing its antithesis. Jews were considered racial vermin, the worst polluters of pure Aryan blood; as such, they could be treated as vermin.

To this, the Universal Declaration responded. First, it isolated the key elements in the Nazi dehumanization of the Jews, and affirmed them as human rights. It is thus possible to go down the list of rights enumerated in the Universal Declaration, and check off one after another of the means of assault employed by the Nazis — beginning with the right to live, and not to have one's life ruthlessly snuffed out, the first and most basic of human rights, and extending to a series of rights consistent with basic human dignity.

Even more basically, though, the Universal Declaration smashed through the core assumption lying at the heart of Nazi racial ideology. It proclaimed, in its opening words, the "inherent dignity ... of all members of the human family," that is, irrespective of the racial (or other) group to which they happen to belong.

The Genocide Convention went further. Addressing the ultimate corollary of Nazi theories of race — that people could even be eliminated altogether, if they belonged to a group viewed as racial pestilence — the Convention proclaimed it "a crime under international law" to take action aimed at the destruction of a group, whether based on race, religion, ethnicity or nationality. The "right" to murder individuals based on the group to which they belonged was met by making it a crime to do so.

These responses of international law to the Holocaust have now been turned, in most vicious

fashion, against its very victims. With monotonous regularity, Israel is pilloried as a perpetrator, not only of genocide, but also crimes against humanity, the other egregious crime to which the Holocaust gave rise, as well as the heinous practice of apartheid. The infamous Durban conference on racism, in 2001, degenerated into a hate fest directed against Israel, and the follow-up conference scheduled for next year is hurtling downhill along the same path. No other country on this planet is singled out for so much opprobrium in the UN.
Rabid anti-Semitism, under the guise of anti-Zionism, is spewed regularly out of the Human Rights Council, and Ahmadinejad's hate-filled tirade in the General Assembly, on Sept. 23, was strongly reminiscent of Hitler's Mein Kampf. The applause with which it was greeted, together with the warm embrace he received from the president of the General Assembly, put the UN's imprimatur on the 360-degree turn that the human rights movement has taken.

As a result, the movement itself has seriously undermined its credibility. So many of the UN's 192 members are undemocratic, and presided over by despots who are themselves guilty of terrible human rights violations. Collective finger pointing directed against Israel serves as a convenient way of diverting attention from their own behavior. But that the very victims of the event that triggered the human rights movement should now become its targets is undoubtedly one of the bitter ironies of modern history. On the 60th anniversary of two of the central pillars of the movement, there is a crying need for the UN to undertake some serious soul searching. n

Harry Reicher teaches international human rights and law and the Holocaust at the University of Pennsylvania Law School, and is Scholar-in-Residence at Touro Law School.

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The Jewish Week

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(2 pgs)

WHAT WILL IT TAKE FOR THE WORLD TO LEARN?
ON THE 60TH ANNIVERSARY OF THE GENOCIDE CONVENTION

Harry Reicher

Pictures of the unfolding horrors in the Congo are themselves alarming. But coming on top of the continuing tragedy in Darfur - the first genocide of the 21st century - they usher in a dismal start to the century.

The 60th anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide, one of the pillars of the post-World War II human rights movement, is a fitting occasion to reflect on its origins, and measure the reality against the noble intentions that propelled the movement in its initial stages. Darfur and Congo were just the sorts of tragedies the Convention was designed to prevent.

Genocide has an extraordinary history in international law. A mere 65 years ago, the word did not exist in the English language. It was coined by a Polish-Jewish refugee to the United States, Dr Rafael Lemkin, as a response to a challenge implicit in Sir Winston Churchill's comment, during the Holocaust, that the annihilation of the Jews was "a crime without a name." Lemkin published his neologism in 1944, having built it as a hybrid of the Greek word "genus," meaning a group or class, and the Latin suffix "cide," meaning killing; hence, killing of a group. He then worked to the point of emotional and psychological exhaustion, and beyond, to have it converted into a full-blown convention, which was adopted on December 9, 1948, by the General Assembly of United Nations.

The convention achieved three central objects. First, it defined genocide as acts taken with the intention of wiping out a group (in whole or in part), as defined by race, ethnicity, religion or nationality. Secondly, it confirmed that genocide is a crime in international law. And, very significantly, Article 1 obligated states parties to prevent genocide, and to bring perpetrators to justice.

In a fundamental way, the Genocide Convention was a measure-for-measure response to the Holocaust. At the heart of the Nazi regime lay an egregious ideology that defined the value of people, not by virtue of being human alone, but by the racial groups to which they belonged. Certain groups - first and foremost, Jews - were regarded as racial vermin, and could be treated as such, even to the point of extermination. This "right" to annihilate human beings based on the group to which they belong was met head-on by the convention, which made it a crime to do so. Today, 140 states are parties to the convention, ironically including Sudan.

While giving every impression, on paper at least, of achieving the desired result, in practice the convention has not had the intended effect. The United Nations, itself another pillar of the human rights movement, which was given ample enforcement powers, including the use of force, has failed miserably. Witness, among many other cases, a succession of high-profile horror stories: In the 1970s, the annihilation of 1.5-2 million Cambodians, at the hands of their own government; in the 1980s, Saddam Hussein's ruthless actions aimed at wiping out the Kurds in Iraq; in the 1990s, the slaughter of 800,000 Rwandan Tutsis in the space of just 100 days; and now, in the first decade of this century, the ongoing genocide directed against black Africans in Darfur, and the ethnically-based atrocities in the Congo. Shortly after the ouster of Saddam Hussein, an Iraqi representative summed it up very succinctly and powerfully, when he thundered to the Security Council: "Where were you for 35 years!"

The situation cries out for extraordinary measures. Solutions need to be crafted outside of the United Nations, and the Genocide Convention itself provides the legal framework for sidestepping the world body. It unequivocally directs states to "prevent" genocide, but without specifying the means by which that is to be accomplished. In that way, the convention creates the opportunity - and indeed, imposes an obligation - for parties to the convention to assess each case, identify the measures most likely to put an end to the carnage, and then to take those measures. If steps short of outright armed conflict - such as trade and arms embargoes, or other sanctions - are adjudged to be sufficient, then that is what must be undertaken. But if the only alternative is armed humanitarian intervention, then that is the obligation which the convention imposes on parties to it, acting either individually or collectively. Although such a course will not be popular at the UN, regrettably its own failures, which include Rwanda, where its culpability actually contributed positively to the genocide, have made it painfully obvious that other avenues in the international legal system must be pursued.

What is needed is for parties to the convention to summon up the moral courage, and put their actions where their expressed intentions are, thereby demonstrating that, when the convention imposes an obligation to prevent genocide, it really means what it says. As the most egregious crime in the international legal lexicon, no less is called for. The 60th anniversary is a fitting occasion for a reassessment, and a new direction to be charted.

Professor Harry Reicher teaches International Human Rights and Law and the Holocaust at the University of Pennsylvania Law School, and is Scholar-in-Residence at Touro Law Center. From 1995-2004 he was Representative to the United Nations of Agudath Israel World Organization, and from 2004-2008 he was a member of the US Holocaust Memorial Council.

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Time to Act on Genocide

January 24, 2005

National Law Journal
By Harry Reicher, Professor, University of Pennsylvania Law School

If it weren't for the horror of what is happening in Darfur, with at least 80,000 lives lost and around 1.6 million people displaced, the United Nations' impotence on the subject would constitute high farce. But it causes one to ask: Is the international legal system capable of coming to grips with Darfur, or is it destined to be yet another entry in the long catalog of U.N. human-rights failures since its creation in 1945?

...Labeling of the Darfur case as "genocide," most notably by Secretary of State Colin Powell, has triggered references to the Convention on the Prevention and Punishment of the Crime of Genocide, especially Article 8... Darfur constitutes an ideal opportunity to breathe life into the terms of the convention.

While Article 8 raises-in permissive language-the possibility of the Security Council taking such action as it may "consider appropriate," this is certainly not an exhaustive statement of what may be done under the convention; in addition, the article contemplates that any of the "competent organs" of the United Nations, that is, including the General Assembly, may act.

Indeed, the procedural mechanism, known as the Uniting for Peace Resolution, has long existed to enable the assembly to be convened, as a matter of urgency, on 24 hours' notice. In Sudan's case, the formality of a vote in the Security Council-with China a likely veto-would first be required. But that would crystallize the situation, trigger the Uniting for Peace Resolution, and point the spotlight of international blame, with its accompanying opprobrium, where it belongs. Though the result in the General Assembly also may be predictable, the power of bringing the debate into the public arena of the assembly should not be underestimated. At any rate, with massive human suffering taking place, and a crying need for drastic action, no stone can be left unturned.

...At its heart, the convention was designed with prevention in mind. Article 1 directs parties, in unequivocal language, to "prevent" genocide. What are not spelled out, however, are the means by which parties should do so. By not prejudging or dictating what the nature of such action should be, the convention requires an assessment of what is appropriate to a particular case-and then requires that such action be taken.

Currently, 136 states are parties to the convention [including, it should be noted, Sudan], and each is thus charged with the obligation to tailor a solution to the case at hand, either alone or in concert with others. If what it takes to stop the carnage is an arms embargo or a trade embargo [whether or not specifically directed at oil], then that is what is mandated by the convention.

Or, if it would help to establish an international tribunal, following the Nuremberg precedent, to investigate and issue indictments and arrest warrants, then that should be done. And if nothing less than humanitarian intervention, in the form of military action by one or more states, is the only solution, then so be it. If working around the U.N. in that fashion is not to the liking of the world body, regrettably it has only itself to blame. As the revelations of the full extent of the U.N.'s culpability in Rwanda continue to emerge, on top of so many other failures, it has become clear that if serious issues are to be meaningfully addressed, other avenues in the international legal system must be pursued.

The convention provides such an avenue; Darfur is a perfect opportunity to demonstrate that, when the convention imposes an obligation to prevent genocide, it really means what it says.

Restricted access full text:http://store.law.com/nlj_results.asp?lqry=genocide&x=0&y=0

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Sixtieth session
Items 48 and 121 of the provisional agenda*

Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields

Follow-up to the outcome of the Millennium Summit

Draft resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session

2005 World Summit Outcome

The General Assembly

Adopts the following 2005 World Summit Outcome:

2005 World Summit Outcome

I. Values and principles

1. We, Heads of State and Government, have gathered at United Nations Headquarters in New York from 14 to 16 September 2005.

2. We reaffirm our faith in the United Nations and our commitment to the purposes and principles of the Charter and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterate our determination to foster strict respect for them.

3. We reaffirm the United Nations Millennium Declaration, which we adopted at the dawn of the twenty-first century. We recognize the valuable role of the major United Nations conferences and summits in the economic, social and related fields, including the Millennium Summit, in mobilizing the international community at the local, national, regional and global levels and in guiding the work of the United Nations.

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Democracy

135. We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.

136. We renew our commitment to support democracy by strengthening countries' capacity to implement the principles and practices of democracy and resolve to strengthen the capacity of the United Nations to assist Member States upon their request. We welcome the establishment of a Democracy Fund at the United Nations. We note that the advisory board to be established should reflect diverse geographical representation. We invite the Secretary-General to help ensure that practical arrangements for the Democracy Fund take proper account of existing United Nations activity in this field.

137. We invite interested Member States to give serious consideration to contributing to the Fund.

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

NY Times
Sunday March 8, 2009

(10)

NICHOLAS D. KRISTOF

Watching Darfuris Die

The first gauntlet thrown at President Obama didn't come from Iran, Russia or China. Rather, it came from Sudan, in its decision to expel aid groups that are a lifeline keeping more than a million people alive in Darfur.

Unfortunately, the administration's initial reaction made Neville Chamberlain seem forceful. The State Department blushingly suggested that the expulsion "is certainly not helpful to the people who need aid."

Wow.

Since then, the administration has stiffened its spine somewhat. Susan Rice, the ambassador to the United Nations and designated hitter on Sudan, told me, "If this decision stands, it may well amount to genocide by other means."

That's exactly what we may be facing, for President Omar Hassan al-Bashir is confirming the International Criminal Court's judgment when it issued an arrest warrant for him on Wednesday for "extermination," murder and rape. Now Mr. Bashir is preparing to kill people en masse, not with machetes but by withholding the aid that keeps them alive.

More than one million people depend directly on the expelled aid groups for health care, food and water. I've been in these camps, so let me offer an educated guess about what will unfold if this expulsion stands.

The biggest immediate threat isn't starvation, because that takes time. Rather, the first crises will be disease and water shortages, particularly in West Darfur.

The camps will quickly run out of clean water, because generator-operated pumps bring the water to the surface from wells and boreholes. Fuel supplies to operate the pumps may last a couple of weeks, and then the water disappears.

Health clinics have already closed, and diarrhea is spreading in Zam Zam camp and meningitis in Kalma camp. These are huge camps — Kalma has perhaps 90,000 people — and diseases can spread rapidly. Children will be the first to die.

Hundreds of thousands of people in the camps may try to flee to Chad, but that would overwhelm Chad's own impoverished and vulnerable population. And to top it off, Mr. Bashir has armed a large proxy force of Chadian rebels who are said to be preparing an attack on the Chadian government.

"This is a whole new kind of hell for the people of Darfur," Josette Sheeran, the head of the United Nations World Food Program, told me. "The life bridge for more than a million people has just been dismantled."

My hunch is that Mr. Bashir's calculation is twofold. First, he hopes that if there's enough suffering in Darfur, the United Nations Security Council will approve a one-year delay in the courts proceedings (he miscalculated, for that won't happen). Second, he has long wanted to get rid of aid workers in Darfur, partly because they are the world's eyes and ears there.

I was on the Chad-Darfur border a couple of weeks ago, talking to Darfuri refugees, and they worried that Mr. Bashir might lash out after an arrest warrant. But they still rejoiced at the prospect, as a sign that the deaths of their loved ones mattered and as a sign that impunity for murder and rape might be coming to an end. Not a single Darfuri I spoke to favored a delay in International Criminal Court proceedings.

Our greatest problem in responding to Darfur is that we have never held either carrots or sticks. It's difficult at this point to offer carrots, but the United States and other countries can wield some sticks.

Gen. Merrill McPeak, the former Air Force chief of staff and a co-chairman of the Obama presidential campaign, suggested one in an op-ed article in The Washington Post on Thursday: a no-fly zone over Darfur. The aim is to attach costs to brutality and gain leverage.

Sudan cares deeply about maintaining its air force, partly because it is preparing for renewed war against South Sudan. That means that a denial of air cover or the loss of helicopter gunships would deeply alarm Sudan's military, and that gives us leverage.

Another option is for the government of South Sudan to take over administration of Darfur. The leaders of South Sudan have periodically offered to send 10,000 of their troops into Darfur, and if the north Sudanese government cannot provide security or look after Darfur's needs then the south can try, with international backing.

Madeleine Albright, the former secretary of state, says she was intrigued by General McPeak's proposal for a no-fly zone and adds, "I don't think the international community can stand by and watch as thousands more people starve to death."

"We were criticized, rightfully so, on Rwanda," Ms. Albright said. But she noted that the Rwandan genocide ended quickly, while Darfur has dragged on for years. "You can't watch this and not feel that there has to be something done," she said.

Sudan's defiant leader finds a new way to kill. Will we try to stop him?

NICHOLAS D. KRISTOF

A President, a Boy and Genocide

When the International Criminal Court issued its arrest warrant for Sudan's president on Wednesday, an 8-year-old boy named Bakit Musa would have clapped — if only he still had hands.

I met Bakit a couple of weeks ago in eastern Chad, near the border of Darfur. He and two friends had found a grenade left behind in fighting after Sudan's president, Omar Hassan al-Bashir, armed and dispatched a proxy force to wreak havoc in Chad. The boys played with the grenade, and it exploded, taking both of Bakit's hands, one eye and the skin on half of his face.

So Bakit became, inadvertently, one more casualty of the havoc and brutality that President Bashir has unleashed in Sudan and surrounding countries. Other children laugh at him, so Bakit plays by himself in the dust on the outskirts of a huge camp for people displaced by Mr. Bashir.

One of Mr. Bashir's first actions after the arrest warrant was to undertake yet another crime against humanity: He expelled major international aid groups, including the International Rescue Committee and the Dutch section of Doctors Without Borders. In effect, he is now preparing to massacre the Darfuri people in still another way, for Darfuris are living in camps and depend on aid workers for food, water and health care — even as deadly meningitis has broken out in one of the camps.

"The consequences are going to be dire," notes George Rupp, the president of the International Rescue Committee, on which 1.75 million Sudanese depend for water, sanitation, education and health care. "If Sudan persists in this decision, it's difficult to see how the outcome will be anything other than serious suffering and death for hundreds of thousands of people."

> Sudan answers an arrest warrant by expelling aid workers.

Mr. Bashir is now testing the international community, and President Obama and other world leaders must respond immediately and decisively, in conjunction with as many non-Western nations as possible.

The first step is to insist that aid groups be reinstated immediately to prevent this genocide in slow motion. A second step could be to destroy one of Mr. Bashir's military planes with a warning that if he takes his genocide to a new level by depriving Darfuris of food and medical care, he will lose the rest of his air force.

Yet it's also important to understand that Mr. Bashir engages in a consistent pattern of destruction and slaughter, not because he is a sadistic monster, but because he is a calculating pragmatist.

Mr. Bashir saw early in his career that atrocities can constitute an effective policy — shooting villagers and gang-raping women is quite useful to depopulate rural areas, thereby denying support to rebel militias. Best of all from Mr. Bashir's perspective, there's no downside as long as the international community averts its eyes or backs down. His aim in expelling aid groups is apparently to divide the international community and to try to force the United Nations Security Council to delay International Criminal Court proceedings.

Mr. Bashir assumes, not unreasonably, that he can get away with it. That culture of impunity is what the I.C.C. arrest warrant may begin to change. It is one way of attaching costs to systematic brutality, and thus to change the calculations of pragmatists like Mr. Bashir in Sudan and elsewhere.

So now President Obama and other leaders — hello, Gordon Brown, you there? — need to back up the I.C.C. arrest warrant and push to reverse the expulsion of aid workers, while working with Arab countries like Qatar that want to help.

Intriguingly, Khartoum is full of rumors that the handful of leaders just below Mr. Bashir are thinking of throwing him overboard to save themselves. We can encourage that by making it clear that Sudan will pay a price if the killings continue.

We also must call on China to stop training the military pilots used by Mr. Bashir to strafe villages, and to stop supplying weapons and spare parts to Sudan as long as Mr. Bashir is in office. There are precedents: China was a strong supporter of the Khmer Rouge and of Slobodan Milosevic, but distanced itself from both when they came under the spotlight for genocide.

President Obama could also announce that from now on, when Sudan violates the U.N. ban on offensive military flights in Darfur by bombing villagers, we will afterward destroy a Sudanese military aircraft on the ground in Darfur (we can do this from our base in Djibouti in the Horn of Africa).

I won't pretend that we can end all genocides. But we can attach enough costs so that it is no longer in a leader's interests to dispatch militias to throw babies into bonfires. The I.C.C. arrest warrant marks a wobbly step toward accountability and deterrence.

So let's applaud the I.C.C.'s arrest warrant, on behalf of children like Bakit who can't. □

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The New York Review of Books

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Genocide in Slow Motion

By Nicholas D. Kristof

Darfur: A Short History of a Long War
by Julie Flint and Alex de Waal
London: Zed Books, 176 pp., £12.00 (to be published in the US in March)

Darfur: The Ambiguous Genocide
by Gérard Prunier
Cornell University Press, 212 pp., $24.00

1.

During the Holocaust, the world looked the other way. Allied leaders turned down repeated pleas to bomb the Nazi extermination camps or the rail lines leading to them, and the slaughter attracted little attention. My newspaper, *The New York Times*, provided meticulous coverage of World War II, but of 24,000 front-page stories published in that period only six referred on page one directly to the Nazi assault on the Jewish population of Europe. Only afterward did many people mourn the death of Anne Frank, construct Holocaust museums, and vow: Never Again.

The same paralysis occurred as Rwandans were being slaughtered in 1994. Officials from Europe to the US to the UN headquarters all responded by temporizing and then, at most, by holding meetings. The only thing President Clinton did for Rwandan genocide victims was issue a magnificent apology after they were dead.

Much the same has been true of the Western response to the Armenian genocide of 1915, the Cambodian genocide of the 1970s, and the Bosnian massacres of the 1990s. In each case, we have wrung our hands afterward and offered the lame excuse that it all happened too fast, or that we didn't fully comprehend the carnage when it was still under way.

And now the same tragedy is unfolding in Darfur, but this time we don't even have any sort of excuse. In Darfur genocide is taking place in slow motion, and there is vast documentary proof of the atrocities. Some of the evidence can be seen in the photo reproduced with this essay, which was leaked from an African Union archive containing thousands of other such photos. And now, the latest proof comes in the form of two new books that tell the sorry tale of Darfur: it's appalling that the publishing industry manages to respond more quickly to genocide than the UN and world leaders do.

In my years as a journalist, I thought I had seen a full kaleidoscope of horrors, from babies dying of malaria to Chinese troops shooting students to Indonesian mobs beheading people. But nothing prepared me for Darfur, where systematic murder, rape, and mutilation are taking place on a vast scale, based simply on the tribe of the victim. What I saw reminded me why people say that genocide is the worst evil of which human beings are capable.

On one of the first of my five visits to Darfur, I came across an oasis along the Chad border where several tens of thousands of people were sheltering under trees after being driven from their home villages by the Arab Janjaweed militia, which has been supported by the Sudan government in Khartoum. Under the first tree, I found a man who had been shot in the neck and the jaw; his brother, shot only in the foot, had carried him for forty-nine days to get to this oasis. Under the next tree was a widow whose parents had been killed and stuffed in the village well to poison the local water supply; then the Janjaweed had tracked down the rest of her family and killed her husband. Under the third tree was a four-year-old orphan girl carrying her one-year-old baby sister on her back; their parents had been killed. Under the fourth tree was a woman whose husband and children had been killed in front of her, and then she was gang-raped and left naked and mutilated in the desert.

Those were the people I met under just four adjacent trees. And in every direction, as far as I could see, were more trees and more victims—all with similar stories.

There is no space in most newspaper articles to explain how this came to pass, and that is why the recent books under review are invaluable. The best introduction is *Darfur: A Short History of a Long War*, by Julie Flint and Alex de Waal. Both writers are intimately familiar with Darfur—Ms. Flint reportedly came close to getting herself killed there when traveling with rebels in 2004—and their accounts are as readable as they are tragic.

The killing in Darfur, a vast region in western Sudan, is not a case of religious persecution, since the killers as well as the victims of this genocide are Muslim. But, like the Christian and animist parts of southern Sudan, Darfur has traditionally been neglected by the Arabs (and before them, the British) who held power in Khartoum, the Sudanese capital. Flint and de Waal write that the British colonial rulers deliberately restricted education in Darfur to the sons of chiefs, so as not to produce rabble-rousers who might challenge their authority. As a result, in 1935, all of Darfur had only one full-fledged elementary school. There was no maternity clinic until the 1940s, and at independence in 1956 Darfur had fewer hospital beds than any other part of Sudan. After independence, Sudan's own leaders nationalized this policy of malign neglect.

One result was the terrible Darfur famine of 1984 and 1985, which de Waal earlier made the subject of a powerful case study, *Famine That Kills*.[1] That book has been reissued with a new preface because of the interest in Darfur, and it makes the point that, in places like Sudan, "'to starve' is transitive; it is something people do to each other." The Darfur famine was the result not just of drought, but also of reckless

mismanagement and indifference in the Sudanese government. It was transitive starvation.

During the 1980s and 1990s, ethnic antagonisms were also rising in Darfur. The civil war in neighboring Chad spilled over into Darfur and led some Arab tribes to adopt a supremacist ideology. Meanwhile, the spread of the Sahara desert intensified the competition between Arab and non-Arab tribes for water and forage.

The other book under review, Gérard Prunier's *Darfur: The Ambiguous Genocide*, makes the point that the shorthand descriptions from Darfur of Arabs killing black Africans are oversimplified. He's right—there has been intermarriage between tribes, and it's hardly accurate to talk about Arabs killing Africans when they're all Africans. The racial element is confusing, because to Western eyes, although not to local people, almost everyone looks black. And of course the very concept of an Arab is a loose one; with no consistent racial or ethnic meaning, it normally refers to a person whose mother tongue is Arabic.

But while shorthand descriptions are simplistic, they're also essentially right. In Darfur, the cleavages between the Janjaweed and their victims tend to be threefold. First, the Janjaweed and Sudanese government leaders are Arabs and their victims in Darfur are members of several non-Arab African tribes, particularly the Zaghawa, Fur, and Masalit. Second, the killers are frequently lighter-skinned, and they routinely use racial epithets about the "blacks" they are killing and raping. Third, the Janjaweed are often nomadic herdsmen, and the tribes they attack are usually settled farmers, so the conflict also reflects the age-old tension between herders and farmers.

The leader of the Janjaweed, whom the Sudanese government entrusted with the initial waves of slaughter in Darfur, is usually said to be Musa Hilal, the chief of an Arab nomadic tribe. His own hostility to non-Arabs long predates the present genocide. Flint and de Waal quote a former governor of Darfur as saying that Musa Hilal was recorded back in 1988 as expressing gratitude for "the necessary weapons and ammunition to exterminate the African tribes in Darfur." In the mid-1990s, the early version of the Janjaweed (with the connivance of Sudan's leaders) was responsible for the slaughter of at least two thousand members of the Masalit tribe. In 2001 and 2002, there were brutal attacks on villages belonging to the Fur and Zaghawa tribes.

The upshot was increasing alarm and unrest, particularly among the three major non-Arab tribes in Darfur. Their militants began to organize an armed movement against the Sudanese government, and in June 2002 they attacked a police station. The beginning of their rebellion is usually dated to early in 2003, when they burned government garrisons and destroyed military aircraft at an air base.

That's when the Sudanese government, led by President Omar el-Bashir, decided to launch a scorched-earth counterinsurgency campaign, involving the slaughter of large numbers of people in Darfur. It was difficult to use the army for this, though, partly because many soldiers in the regular army were members of African tribes from

Darfur—and so it wasn't clear that they would be willing to wipe out civilians from their own tribes. The Sudanese leadership therefore decided to adopt the same strategy it had successfully employed elsewhere in Sudan, using irregular militias to slaughter tribes that had shown signs of resistance.

This wasn't a surprise decision. As Prunier writes: "The whole of GoS [Government of Sudan] policy and political philosophy since it came to power in 1989 has kept verging on genocide in its general treatment of the national question in Sudan." Flint and de Waal call this "counterinsurgency on the cheap" and note:

> In Bahr el Ghazal in 1986–88, in the Nuba Mountains in 1992–95, in Upper Nile in 1998–2003, and elsewhere on just a slightly smaller scale, militias supported by military intelligence and aerial bombardment attacked with unremitting brutality. Scorched earth, massacre, pillage and rape were the norm.

In other words, when Sudan's leaders were faced with unrest in Darfur, their instinctive response was to start massacring civilians. It had worked before, and it had aroused relatively little international reaction. Among the few who vociferously protested the brutal Sudanese policies in southern Sudan in the 1990s were American evangelical Christians, partly because many of the victims then were Christians; some American evangelicals have complained to me that the American press and television are now calling attention to Muslim victims in Sudan after years of ignoring similar massacres of Christians in southern Sudan in the past. The comparison they make does not seem to me entirely convincing, but they have a point. It's probably true that if there had been more reaction to Sudanese brutality in the southern part of the country during the 1990s, the government might not have been so quick to launch genocidal attacks in Darfur.

After it had decided to crush the incipient rebellion in Darfur, Sudan's government released Arab criminals from prison and turned them over to the custody of Musa Hilal so that they could join the Janjaweed. The government set up training camps for the Janjaweed, gave them assault rifles, truck-mounted machine guns, and artillery. Recruits received $79 a month if they were on foot, or $117 if they had a horse or camel. They also received Sudanese army uniforms with a special badge depicting an armed horseman. Prunier quotes a survivor from one of the attacks that quickly followed:

> The Janjaweed were accompanied by soldiers. They attacked the people, saying: "You are opponents to the regime, we must crush you. As you are Black, you are like slaves. Then the entire Darfur region will be in the hands of the Arabs. The government is on our side. The government plane is on our side, it gives us food and ammunition."

Flint and de Waal quote a young man who hid under a dead mule and was the only survivor in his family:

> [The attackers] took a knife and cut my mother's throat and threw her into the well. Then they took my oldest sister and began to rape her, one by one. My father was kneeling, crying and begging them for mercy. After that they killed my brother and finally my father. They threw all the bodies in the well.

2.

Initially, the Sudanese government didn't even try hard to hide what was happening. President Omar el-Bashir went on television after a massacre in which 225 peasants were killed to declare: "We will use all available means, the Army, the police, the mujahideen, the horsemen, to get rid of the rebellion." Later, Sudan would pretend that the killings were the result of tribal conflicts and banditry, and deny that it had any control over the Janjaweed. That is false. Today, the Janjaweed and the Sudanese army work hand in hand as they have in the past.

On my last visit to Darfur, in November, while I was driving back from a massacre site where thirty-seven villagers had been slaughtered, I saw a convoy of Janjaweed. This was on a main road with soldiers staffing checkpoints, and in fact I had in my car a soldier who had demanded a ride. None of the soldiers paid any attention to the Janjaweed.

Maybe the authorities had no time to stop the Janjaweed because they were so busy trying to prevent journalists and aid workers from seeing what was happening. At one checkpoint, the secret police tried to arrest my local interpreter. They told me to drive on and leave him behind; I refused, fearing that that might be the end of him. So they detained me as well (they eventually summoned a higher commander who freed us both). It's clear that if the Sudanese government simply applied the current restrictions on foreign journalists to the Janjaweed, the genocide would quickly come to an end.

There has been some debate over whether what is unfolding is genocide, and that's the reason Gérard Prunier in his subtitle refers to it as an "ambiguous genocide." The debate arises principally because Sudan has not tried to exterminate every last member of the Fur, Masalit, and Zaghawa tribes. Typically, most young men are killed but many others are allowed to flee.

Some people think that genocide means an attempt to exterminate an entire ethnic group, but that was not the meaning intended by Rafael Lemkin, who coined the word; nor is it the definition used in the 1948 Genocide Convention. The convention defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such." The acts can include killings, or injuries or psychological distress, or simply restrictions on births; indeed, arguably the Genocide Convention provides too lax a definition. But in any case there is no doubt that in rural Darfur there has been a systematic effort to kill people and wipe out specific tribes and that the killing amounts to genocide by any accepted definition.

here has also been a growing appreciation in recent decades that crimes against humanity often include sexual violence, and that has been a central fact about the terror in Darfur. Indeed, the mass rapes in Darfur have been among the most effective means for the government to terrorize tribal populations, break their will, and drive them away. Rape is feared all the more in Darfur for two reasons. Most important, a woman who has been raped is ruined; in some cases, she is evicted by her family and forced to build her own hut and live there on her own. And not only is the woman shamed for life, but so is her entire extended family. The second reason is that the people in the region practice an extreme form of female genital cutting, called infibulation, in which a girl's vagina is sewn shut until marriage. Thus when an unmarried girl is raped, the act leads to additional painful physical injuries; and the risk of HIV transmission increases.

From the government's point of view, rape is a successful method of control because it sows terror among the victimized population, and yet it initially attracted relatively little attention from foreign observers, because women are too ashamed to complain. As a result, mass rape has been a routine feature of village attacks in every part of Darfur, and it hasn't yet gotten the attention it deserves.

Moreover, rape and killings are not just a one-time event when the Janjaweed attack and burn villages. Two million people have fled the villages, and most have taken refuge in shantytown camps on the edge of cities. The Janjaweed surround the camps and routinely attack people when they go outside to gather firewood or plant vegetables. In order to survive the victims must get firewood; but each time they do so they risk being raped or killed.

After a day last year of interviewing a series of women and girls who had been gang-raped outside Kalma camp, near Nyala, I asked the families why they were sending women to gather firewood, when women are more vulnerable to rape. The answer was simple. As one person explained to me: "When the men go out, they're killed. The women are only raped."

The Sudanese authorities initially denied that rapes were occurring, and it repeatedly imprisoned women who became pregnant by rape—saying that they were guilty of adultery. Last year, a student who was gang-raped sought treatment from a French aid organization in Kalma camp, but an informer alerted the police, who rushed to the clinic, burst inside, and arrested the girl. Two aid workers tried heroically to protect her, but the police forcibly took her away—to a police hospital where she was chained to a cot by one arm and one leg. The government also made it difficult for aid groups to bring in post-exposure prophylaxis (PEP) kits, which reduce the risk of HIV in rape victims when administered promptly.

Sexual violence is also sometimes directed at men, with castrations not uncommon. At one roadblock, a mother named Mariam Ahmad was forced to watch as the Janjaweed emasculated her three-week-old son, who then died in her arms. But it is not clear that this is centrally directed policy.

Since mid-2005, Western pressure has forced the Sudan government to relent to some degree on sexual violence. It appears to have stopped arresting rape victims, and it is allowing the use of PEP kits. But as far as I can tell, rapes are continuing at the same pace as before.

3.

As dispiriting as the genocide itself is the way most other nations have acquiesced in it. You expect that from time to time, a government may attack some part of its own people, but you might hope that by the twenty-first century the world would react. Alas, that hasn't happened. Indeed, the Armenian genocide of 1915 arguably provoked greater popular outrage in America at the time than the Darfur genocide does today.

As the killings began, the Bush administration was in a good position to take the lead. President Bush had given high priority to ending the war in southern Sudan (which is entirely separate from the war in Darfur), and he achieved a tentative peace agreement to resolve the north–south war after twenty years and the loss of two million lives. That is one of Bush's most important foreign policy achievements, and this means that his administration—and the conservative Christians in his base—were particularly aware of events in Sudan. They were among the first to make strong statements about Darfur, and it was conservatives in Bush's own Agency for International Development who led the way in trying to stop Darfur's violence when it first erupted.

Yet as it turned out, the White House couldn't be bothered with Darfur. The Democrats couldn't either for a long time, until finally John Kerry made strong statements about the situation there in the summer of 2004. Then, perhaps worrying about his legacy, Colin Powell began taking a personal interest in Darfur. Finally, in early 2005, the Bush administration declared that genocide was unfolding in Darfur and sent large amounts of aid—but it refused to do anything more. In effect, the US had provided abundant band-aids—so that when children were slashed with machetes, we could treat their wounds. But we did nothing about the attacks themselves.

Prunier captures the situation well:

> President Bush tried to be all things to all men on the Sudan/ Darfur question. Never mind that the result was predictably confused. What mattered was that attractive promises could be handed around without any sort of firm commitment being made. Predictably, the interest level of US diplomacy on the Sudan question dropped sharply as soon as President Bush was reelected....
>
> In its usual way of treating diplomatic matters, the European Union presented a spectacle of complete lack of resolve and coordination over the Sudan problem in general and the Darfur question in particular. The

> French only cared about protecting Idris Deby's regime in Chad from possible destabilization; the British blindly followed Washington's lead, only finding this somewhat difficult since Washington was not very clear about which direction it wished to take; the Scandinavian countries and the Netherlands gave large sums of money and remained silent; Germany made anti-GoS noises which it never backed up with any sort of action and gave only limited cash; and the Italians remained bewildered.

The UN has been similarly ineffectual. At one level, UN agencies have been very effective in providing humanitarian aid; at another, they have been wholly ineffective in challenging the genocide itself. That is partly because Sudan is protected on the Security Council by Russia and especially by China, a major importer of Sudanese oil. China seems determined to underwrite some of the costs of the Darfur genocide just as it did the Cambodian genocide of the 1970s. But the UN's main problem is that it is too insistent on being diplomatic. One of the heroes of Darfur is Mukesh Kapila, the former UN humanitarian coordinator for Sudan, who almost two years ago warned: "The only difference between Rwanda and Darfur now are the numbers involved." But UN officials were disapproving of Kapila's outspokenness, which they saw as a breach of etiquette. And Kofi Annan, while trying to help Darfur, has been trapped in his innate politeness. He should be using his position to express outrage about the slaughter, but he seems incapable of the necessary degree of fury.

News organizations have largely failed Darfur as well—particularly the television networks. A couple of decades ago, television provided genuine news about the world; today, it mostly settles for brief and superficial impressions, or for breathless blondes reporting on missing blondes.

As a result of this collective failure, the situation in the region has been getting much worse since about September 2005. The African Union has lost some of the first troops it stationed there, a growing portion of Darfur is becoming too dangerous as a place to distribute food, and the rebels have been collapsing into fratricide. The UN has estimated that if Darfur collapses completely then the death toll there will reach 100,000 a month. Just as worrying, the instability in Darfur has crossed over into neighboring Chad. There is a real possibility that civil war will again break out there in the next year or two, and that could be a cataclysm that would dwarf Darfur.

The sad thing is that much of the suffering of Darfur seems unnecessary. The conflict there could probably be resolved. The rebels are not seeking independence but simply greater autonomy and a larger share of national resources. Neither of the books under review concentrates on how to bring the disaster to an end, but we have some good clues based in part on the peace settlement between the Sudan government and the rebels in the south. The basic lesson from that long negotiation is that Sudan's leaders will brazenly lie about their repressive use of power, and you will get nowhere in dealings with them unless you apply heavy pressure—and you have to be perceptive about what kind of pressure will work.

In the case of Darfur, the solution is not to send American ground troops; in my judgment, that would make things worse by allowing Khartoum to rally nationalistic support against the American infidel crusaders. But greater security is essential, and the African Union troops that have been sent to Darfur are inadequate to the task of providing it. The most feasible option is to convert them into a "blue-hat" UN force and add to them UN and NATO forces. The US could easily enforce a no-fly zone in Darfur by using the nearby Chadian air base in Abeché. Then it could make a strong effort to arrange for tribal conferences—the traditional method of conflict settlement in Darfur—and there is reason to hope that such conferences could work to achieve peace. The Arab tribes have been hurt by the war as well, and the tribal elders are much more willing to negotiate than the Sudan government and the rebel leaders who are the parties to the current peace negotiations.

Flint and de Waal give a telling account of the chief of the Baggara Rizeigat Arabs, a seventy-year-old hereditary leader who has kept his huge tribe out of the war and who is quietly advocating peace—as well as protecting non-Arabs in his territory. It would help enormously if President Bush and Kofi Annan would jointly choose a prominent envoy, like Colin Powell or James Baker, who would work with chieftains like the head of the Baggara Rizeigat to achieve peace in Darfur. Such an initiative is the best hope we have for peace.

The most obvious response to genocide—strong and widely broadcast expressions of outrage—would also be one of the most effective. Sudan's leaders are not Taliban-style extremists. They are ruthless opportunists, and they adopted a strategy of genocide because it seemed to be the simplest method available. If the US and the UN raise the cost of genocide, they will adopt an alternative response, such as negotiating a peace settlement. Indeed, whenever the international community has mustered some outrage about Darfur, then the level of killings and rapes subsides.

But outrage at genocide is tragi-cally difficult to sustain. There are only a few groups that are trying to do so: university students who have led the anti-genocide campaign and formed groups like the Genocide Intervention Network; Jewish humanitarian organizations, for whom the word "genocide" has intense meaning; the Smith College professor Eric Reeves, who has helped lead the campaign to protest the genocide; some US churches; and aid workers who daily brave the dangers of Dar-fur (like the one who chronicles her experiences in the blog "Sleepless in Sudan"[2]). Some organizations, like Human Rights Watch and the International Crisis Group, have also produced a series of excellent reports on Darfur—underscoring that this time the nations of the world know exactly what they are turning away from and cannot claim ignorance.

Sad to say, one of the best books for understanding the lame international response is Samantha Power's superb *"A Problem from Hell": America and the Age of Genocide* [3]—even though it was written too early even to mention Darfur. But when you read Power's account of international dithering as Armenians, Jews, Bosnians, and others were being slaughtered, you realize that the pattern today is almost exactly the same. Once again, the international response has been to debate whether the word

"genocide" is really appropriate, to point out that the situation is immensely complex, to shrug that it's horrifying but that there's nothing much we can do. The slogan "Never Again" is being transformed into "One More Time."

Notes

[1] Oxford University Press, 1989; revised 2005.

[2] See sleeplessinsudan.blogspot.com.

[3] Basic Books, 2002.

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guardian.co.uk

To put justice before peace spells disaster for Sudan

The overzealous pursuit of Omar al-Bashir could ruin years of diplomatic progress. The human cost will be massive

Julie Flint and Alex de Waal
The Guardian, Friday 6 March 2009

After seven months' deliberation, the judges of the international criminal court finally issued an arrest warrant for Omar al-Bashir, the Sudanese president, this week. Their appeal for retributive justice, in the form of charges of war crimes and crimes against humanity committed in Darfur, was solemnly echoed in European and US capitals, and universally by rights organisations and activist groups. Within hours, however, the Sudan government showed that the court and its backers were powerless to defend or feed the millions of Darfurians in whose name justice is being sought. It summarily expelled the biggest international aid agencies, seized their assets, and closed down Sudanese human rights organisations at gunpoint.

As fuel to run the water pumps in Darfur's massive displaced camps runs low and the worst meningitis epidemic in a decade spreads with lethal speed, the Sudan government will be responsible for the deaths and suffering that will result - not only in Darfur, but in other parts of Sudan where relief work is now curtailed, including the drought-stricken eastern region.

But it was the ICC prosecutor who set the match to the dry tinder that is Sudan. It is quite extraordinary that Luis Moreno-Ocampo and a host of diplomats and activists were capable of condemning the government for the most hideous crimes with one breath and asserting with the next that it would tamely change its spots when threatened with standing trial in The Hague.

In truth, no one knew what the arrest warrant would mean. Rights groups who had supported an independent, permanent court kept their concerns private. Activist commentators and lawyers, often with little knowledge of Sudan, cleaved to the mantra that there is no peace without justice. Warrants against Slobodan Milosevic and Charles Taylor (the former presidents of Yugoslavia and Liberia) had contributed to their speedy overthrow, Geoffrey Robertson argued, and would do the same to Bashir. But Milosevic and Taylor were weak, and the west wanted them gone. Bashir has fought off all challenges for 20 years, and the west has been supporting a fragile and hard-fought peace agreement that kept him in power as the quid pro quo of a transition to democracy.

All this now hangs by a thread. The risks were real, and they were inflated by the way in which Moreno-Ocampo insisted on pursuing Bashir for "ongoing genocide" with, he claimed fantastically, 5,000 people dying a month.

One of our reasons for opposing an arrest warrant when the application was made last year was that the case for genocide was based on flimsy evidence and weak argument. He repeatedly said, with no evidence whatsoever, that the government was orchestrating

"systematic" attacks on the camps to "eliminate African tribes" there. In an encouraging indication that the ICC judges took their job seriously, and had a better command of the facts, they rejected his three charges of genocide, finding that he had failed to demonstrate that Bashir had a case to answer there. This was a stunning rebuff to Moreno-Ocampo, who has insisted in public more than once that Bashir is guilty of genocide and must be removed from office.

Worse, the prosecutor hinted - again repeatedly - that he got his information from humanitarian agencies. The damage done by this is incalculable. Sudanese security believes international agencies have been passing information to the ICC. So far, 11 agencies have been ordered out. Their humanitarian infrastructure has been dismantled and their assets seized. The UN agencies are still there. For the moment. But the World Food Programme relies on two now absent NGOs - Care and Save the Children - to distribute 80% of its rations. Will Khartoum allow the WFP to build a new food distribution infrastructure - a task of many months? Or will it simply insist on doing the job itself? Most likely the latter. Meanwhile, in addition to epidemics and a hunger season, Darfur faces the likelihood of violence as rebels and government militias respond to the new uncertainties by tearing up the local peace agreements that have kept much of Darfur stable for three years.

Last year, according to UN figures, about 150 Darfurians died every month in violence. Fewer than half were civilians; the others were soldiers, militiamen, bandits and rebels. Things could get worse, much worse. There is good reason to believe the aid agency expulsions are only the beginning. Those who have argued that the Sudan government responds to pressure make a critical mistake. Pressure works if the party under pressure can agree with the end point. If that is life imprisonment, pressure only generates counter-pressure. For Khartoum, Moreno-Ocampo's ultimatum is not negotiable. It is a fight to the death.

International justice is a virtuous enterprise, but not risk-free. Sudanese people are already paying a high price for the abandonment of the diplomatic approach that has yielded such benefits over the last four years. We fear there is more to come: NGO expulsions, actions against UN staff members and, worst of all, a go-slow or reversal of commitment to elections and self-determination for Southern Sudan. There will be no justice in Sudan without peace. When peace and justice clash, as they do in Sudan today, peace must prevail.

• Julie Flint and Alex de Waal are the co-authors of Darfur: A New History of a Long War

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-01/09**
Date: **4 March 2009**

PRE-TRIAL CHAMBER I

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

SITUATION IN DARFUR, SUDAN

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

Public Redacted Version

Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Mr Essa Faal, Senior Trial Lawyer

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

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PRE-TRIAL CHAMBER I of the International Criminal Court ("the Chamber" and "the Court", respectively) has been seized of the Prosecution's Application for a warrant of arrest, filed on 14 July 2008 pursuant to article 58(1) of the *Rome Statute* ("the Statute"), in the investigation of the situation in Darfur, Sudan. Having examined the written and oral submissions of the Prosecution, the Chamber

RENDERS THIS DECISION.

I. Background

1. On 31 March 2005, the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593[1] referring the situation in Darfur, Sudan since 1 July 2002 ("the Darfur situation") to the Prosecutor of the International Criminal Court, in accordance with article 13(b) of the Statute.

2. On 21 April 2005, the Presidency issued a decision assigning the Darfur situation to the Chamber, pursuant to regulation 46 of the *Regulations of the Court* ("the Regulations").[2]

3. On 1 June 2005, the Prosecution informed the Chamber of its decision to initiate an investigation into the Darfur situation, pursuant to article 53 of the Statute and rule 104 of the *Rules of Procedure and Evidence* ("the Rules").[3]

4. On 14 July 2008, the Prosecution filed an application under article 58[4] ("the Prosecution Application") requesting the issuance of a warrant of arrest against Omar Hassan Ahmad Al Bashir (hereinafter referred to as "Omar Al Bashir") for his alleged criminal responsibility in the commission of genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups in Darfur from 2003 to 14 July 2008.

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[1] United Nations Security Council Resolution 1593, S/RES/1593 (2005), issued on 31 March 2005 (hereinafter the "UN Security Council Resolution, S/RES/1593 (2005)").
[2] ICC-02/05-1-Corr.
[3] ICC-02/05-2.
[4] ICC-02/05-151-US-Exp and ICC-02/05-151-US-Exp-Anxs1-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxs1 & 2. Public redacted version of the Prosecution Application, ICC-02/05-157-AnxA (hereinafter referred to throughout the present decision as "the Prosecution Application").

5. On 19 September 2008, the Chamber issued a "Decision Convening a Hearing"[5] whereby an *ex parte* hearing with the Prosecution was convened and held on Wednesday 1 October 2008.[6]

6. On 15 October 2008, the Chamber issued a "Decision Requesting Additional Supporting Materials in relation to the Prosecution's Request for a Warrant of Arrest against Omar Hassan Al Bashir",[7] in which the Chamber requested the Prosecution to provide the Chamber with additional supporting materials.

7. On 17 November 2008, the Prosecution filed its additional supporting materials in the "Prosecution's Submission of Further Information in Compliance with "Decision Requesting Additional Supporting Materials in relation to the Prosecution's Request for a Warrant of Arrest against Omar Hassan Al Bashir" dated 15 October 2008".[8]

8. On 11 January 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed the "Application on behalf of Citizens' Organisations of The Sudan in relation to the Prosecutor's Applications for Arrest Warrants of 14 July 2008 and 20 November 2008",[9] whereby they requested, pursuant to rule 103 of the Rules, the leave of the Chamber to make written and oral submissions on the following matters:

> The Applicants request that no arrest warrants are issued by the Pre-Trial Chamber at this time on grounds that (1) issuing such warrants would have grave implications for the peace building process in Sudan and that deference must be given to considerations of national interest and security; (2) that the interests of justice will not be served particularly in light of the Prosecutor's conduct in bringing these applications; (3) that such warrants could entrench the negative perceptions of the ICC and thus contribute to a deterioration of the situation in Sudan; and, (4) that alternative means of transitional justice and resolution are

[5] ICC-02/05-158.
[6] ICC-02/05-T-2-Conf-Exp-ENG ET.
[7] ICC-02/05-160 and ICC-02/05-160-Conf-Exp-Anx1.
[8] ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J.
[9] ICC-02/05-170.

being and will pursued without the need for any consideration of involvement of the ICC at this stage.[10]

9. On 30 January 2009, the Chamber issued the "Decision scheduling an *Ex Parte* Hearing and Providing an Agenda",[11] thereby scheduling an *ex parte* hearing which was held in closed session with the Prosecution, the Registry and Victims and Witnesses Unit on 3 February 2009.[12]

10. On 3 February 2009, the Prosecution filed the "Prosecution's written submissions Pursuant to "Decision scheduling an *Ex Parte* Hearing and Providing an Agenda" dated 30 January 2009".[13]

11. On 3 February 2009, the Registry filed its "First report of the Registry in relation to the "Decision scheduling an *Ex Parte* Hearing and Providing an Agenda" of 30 January 2009".[14]

12. On 4 February 2009, the Prosecution filed the "Provision of Information Pursuant to PTC I Request Made During Hearing on 3 February 2009".[15]

13. On 4 February 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed the "Supplement to the Application and Annexes to the Application on behalf of Citizens' Organisations of The Sudan in relation to the Prosecutor's Applications for Warrants of 14 July 2008 and 20 November 2008",[16] in which they provided further information in support of their request under rule 103 of the Rules.

[10] ICC-02/05-170, para. 8.
[11] ICC-02/05-176 and ICC-02/05-176-Conf-Exp-Anx1.
[12] ICC-02/05-T-4-Conf-Exp-ENG ET.
[13] ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxs1-5.
[14] ICC-02/05-181-Conf-Exp.
[15] ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E.
[16] ICC-02/05-182.

14. On 5 February 2009, the Chamber issued the "Decision Requesting Additional Information from the Prosecution and the Registry".[17]

15. On 5 February 2009, the Chamber issued the "Decision on Application under Rule 103",[18] in which the Chamber rejected the request made by the Sudan Workers Trade Unions Federation and the Sudan International Defence Group pursuant to rule 103 of the Rules as, according to the Statute and the Rules, "the Chamber neither has the power to review, nor is it responsible for, the Prosecution's assessment that, under the current circumstances in Sudan, the initiation of a case against Omar Al Bashir and three alleged commanders of organised armed groups would not be detrimental to the interests of justice."[19]

16. On 6 February 2009, the Prosecution filed the "Prosecution's Additional Submissions Pursuant to Undertaking made during the Hearing on 3 February 2009".[20]

17. On 11 February 2009, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group filed the "Application for Leave to Appeal Against Decision on Application under Rule 103".[21]

18. On 13 February 2009, the Prosecution filed the "Prosecution's Submission of Information Pursuant to Decision of PTC I of 4 February 2009".[22]

19. On 16 February 2009, the Registry filed the "Additional information from the Registry pursuant to the "Decision Requesting Additional Information from the Prosecution and the Registry" dated 4 February 2009".[23]

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[17] ICC-02/05-184-Conf-Exp.
[18] ICC-02/05-185.
[19] ICC-02/05-185, para. 29.
[20] ICC-02/05-186-US-Exp.
[21] ICC-02/05-187.
[22] ICC-02/05-188-US-Exp.
[23] ICC-02/05-190-US-Exp.

20. On 19 February 2009, the Chamber issued the "Decision on the Application for Leave to Appeal Against Decision on Application under Rule 103".[24]

21. On 23 February 2009, the Chamber issued the "Public notice of the Decision on the Prosecution's Application under article 58 of the Statute"[25] in which the Chamber declared that "the decision of the Chamber on the Prosecution Application shall be issued on 4 March 2009 and filed publicly on the same date."

II. Preliminary remarks

22. In the Prosecution Application, the Prosecution requests that a warrant of arrest be issued for Omar Al Bashir for his alleged responsibility in the commission of genocide, crimes against humanity and war crimes against the members of the Fur, Masalit and Zaghawa groups in Darfur from March 2003 to the date of filing of the Prosecution Application on 14 July 2008.[26]

23. The Prosecution also submits that had Omar Al Bashir shown any willingness to appear before this Court, issuing a summons to appear could have been a viable alternative.[27]

24. At the outset, the Chamber emphasises that (i) it falls within the discretion of the Prosecution to decide which materials to present to the Chamber in support of the Prosecution Application for a warrant of arrest against Omar Al Bashir;[28] and that

[24] ICC-02/05-192.
[25] ICC-02/05-193.
[26] *The Prosecution Application*, para. 413.
[27] *The Prosecution Application*, para. 414.
[28] The same approach was followed in the cases of *The Prosecutor v Thomas Lubanga Dyilo* and *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*. See in particular ICC-01/04-01/06-2-tEN, p. 2; ICC-01/04-01/07-1-tENG, p. 2; ICC-01/04-01/07-32 and Annexes.

(ii) the present decision is solely based on the materials provided by the Prosecution in support of the Prosecution Application.[29]

25. In this regard, the Chamber notes that article 58(1) of the Statute provides that:

> At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
>
> (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
>
> (b) The arrest of the person appears necessary:
>
> (i) To ensure the person's appearance at trial,
>
> (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
>
> (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

26. The Chamber also observes that article 58(7) of the Statute provides that:

> As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear.

27. As the Chamber has already held, the term "committed" in article 58(1) or (7) of the Statute includes:

(i) The commission *strictu senso* of a crime by a person "as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible";
(ii) Any other forms of accessory, as opposed to principal, liability provided for in article 25 (3) (b) to (d) of the Statute;
(iii) An attempt to commit any of the crimes provided for in articles 6 to 8 of the Statute;
(iv) Direct and public incitement to commit genocide (the only preparatory act punishable under the Statute); and

[29] The materials in support of the Prosecution Application include the Prosecution filings of 14 July 2008, 17 November 2008 and all materials submitted in relation to the hearings held on 1 October 2008 and 3 February 2009.

(v) The responsibility of commanders and other superiors under article 28 of the Statute.[30]

28. Accordingly, the Chamber is of the view that the Prosecution Application for the issuance of a warrant of arrest for Omar Al Bashir can only be granted if the Chamber is convinced that the three following questions are answered affirmatively:

(i) Are there reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed?

(ii) Are there reasonable grounds to believe that Omar Al Bashir has incurred criminal liability for such crime under any of the modes of liability provided for in the Statute?

(iii) Does the arrest of Omar Al Bashir appear to be necessary under article 58(1) of the Statute?[31]

29. According to article 58(7) of the Statute, the Chamber would only issue a summons to appear for Omar Al Bashir if it is convinced that the first two questions are answered in the affirmative, but his arrest does not appear to be necessary under article 58(1) of the Statute.[32]

30. If the Chamber is not convinced that both of the two first questions are answered affirmatively, it shall decline to issue any warrant of arrest or summons to appear for Omar Al Bashir.

31. Furthermore, if the Chamber decides to issue a warrant of arrest or summons to appear, it shall only issue it in relation to those specific crimes for which it is convinced that the first two above-mentioned questions are answered in the affirmative.

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[30] ICC-01/04-520-Anx2, para. 92.
[31] ICC-01/04-01/06-2-tEN; ICC-01/04-01/07-4.
[32] ICC-02/05-01/07-2-Corr, p. 2.

32. This interpretation of article 58(1) and (7) of the Statute is, in the Chamber's view, the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5(1)(c) of the *European Convention on Human Rights*[33] and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the *American Convention on Human Rights*.[34]

33. Finally, the Chamber highlights that, in discussing whether the Chamber is convinced that the "reasonable grounds to believe" standard and the "appearance" standard required by article 58(1) of the Statute have been met, the Chamber, although under no obligation to do so, will often refer to the materials provided by the Prosecution in support of the Prosecution Application.

34. Nevertheless, the Chamber underscores that the conclusions reached by the Chamber in relation to the findings made in the present decision are not only based on the specific materials expressly discussed, but they are made on the basis of an overall assessment of all information provided by the Prosecution in support of the Prosecution Application.

III. Whether the case against Omar Al Bashir falls within the jurisdiction of the Court and is admissible

A. The case against Omar Al Bashir falls within the jurisdiction of the Court

[33] According to the European Court of Human Rights ("the ECHR"), the reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary deprivation of liberty. See ECHR, *Case of Fox, Campbell and Hartley v United Kingdom*, "Judgment", 30 August 1990, Application No. 12244/86; 12245/86; 12383/86, paras. 31-36. ECHR, *Case of K -F v Germany*, "Judgment", 27 November 1997, Application No. 144/1996/765/962, para. 57. ECHR, *Case of Labita v Italy*, "Judgment", 6 April 2000, Application No. 26772/95, paras. 155-161; ECHR, *Case of Berktay v Turkey*, "Judgment", 1st March 2001, Application No. 22493/93, para. 199; ECHR, *Case of O'Hara v. United Kingdom*,"Judgment", 16 October 2001, Application No. 37555/97, paras. 34-44.

[34] See for instance, Inter-American Court of Human Rights ("the IACHR"), *Case of Bamaca Velasquez v. Guatemala*, "Judgment", 25 November 2000, Series C No.70, paras. 138-144, *Case of Loayza Tamayo v Peru*, "Judgment", 17 September 1997, Series C No.33, paras. 49-55, and IACHR, *Case of Gangaram-Panday v Suriname*, "Judgment", 21 January 1994, Series C No.16, paras. 46-51.

35. Article 19(1) of the Statute requires the Chamber to satisfy itself that any case brought before it falls within the jurisdiction of the Court.

36. In this regard, the Chamber previously stated that:

> [...] a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.[35]
>
> To fall within the Court's jurisdiction, a crime must meet the following three conditions: it must be one of the crimes mentioned in article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in article 11 of the Statute; and the crimes must meet one of the two alternative conditions described in article 12 of the Statute.[36]
>
> [...] article 12 (2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute.[37]

37. In relation to the jurisdiction *ratione loci* and *ratione temporis*, the Chamber recalls that the 31 March 2005 referral by the Security Council pursuant to article 13(b) of the Statute[38] and the 1 June 2005 Prosecution's decision to open an investigation pursuant to article 53(1) of the Statute[39] define the territorial and temporal parameters of the Darfur situation encompassing the territory of the region of Darfur in Sudan (which includes the States of Northern Darfur, Southern Darfur and Western Darfur) since 1 July 2002.

38. The Chamber also notes that the Prosecution Application refers to conduct, including unlawful attacks against civilians, murder, extermination, rape, torture,

[35] ICC-01/04-01/06-8-Corr, para. 21.
[36] ICC-01/04-101-tEN, para. 85.
[37] ICC-02/05-01/07-1-Corr, para. 16.
[38] *The Prosecution Application*, para. 2; See also UN Security Council Resolution, S/RES/1593 (2005).
[39] ICC-02/05-2.

forcible transfer and pillage, alleged to have taken place from March 2003 to the time of the filing of the Prosecution Application on 14 July 2008, in areas and villages of the Darfur region.

39. In relation to the jurisdiction *ratione materiae*, the Chamber observes that, according to the Prosecution, the said conducts give rise to genocide, crimes against humanity and war crimes[40] insofar as they:

i. took place in the context of an armed conflict not of international character on the territory of the Darfur region, which had already started in March 2003 and continued through July 2008;[41]

ii. were part of a widespread or systematic attack directed against the civilian Fur, Masalit and Zaghawa population of Darfur, which started after a speech allegedly given by Omar Al Bashir in El Facher (Northern Darfur) in March 2003, and continued through July 2008;[42] and

iii. were not only intended to destroy a substantial part of the Fur, Masalit and Zaghawa groups as such, but could by themselves effect such destruction or were at least part of a manifest pattern of similar conduct against the targeted groups.[43]

40. Finally, in relation to the jurisdiction *ratione personae*, the Chamber considers that, insofar as the Darfur situation has been referred to the Court by the Security Council, acting pursuant to article 13(b) of the Statute, the present case falls within the jurisdiction of the Court despite the fact that it refers to the alleged criminal liability of a national of a State that is not party to the Statute, for crimes which have been allegedly committed in the territory of a State not party to the Statute.

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[40] In particular, those provided for in articles 6(a), (b) and (c), 7(1)(a), (b), (d), (f), and (g); and 8(2)(e)(i) and (v) of the Statute. *The Prosecution Application*, paras. 1 and 62.
[41] *The Prosecution Application*, paras. 9, 240 and 355.
[42] *The Prosecution Application*, paras. 9, 16, 29-31 and 65.
[43] *The Prosecution Application*, para. 10.

41. Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case.

42. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which "must not go unpunished".[44]

43. Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute provide for the following core principles:

(i) "This Statute shall apply equally to all persons without any distinction based on official capacity;"

(ii) "[...] official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence;" and

(iii) "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

[44] Preamble of the Statute, paras. 4 and 5.

44. Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* and article 21(3) of the Statute.[45]

45. Fourth, as the Chamber has recently highlighted in its 5 February 2009 "Decision on Application under Rule 103", by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.[46]

B. No ostensible cause or self-evident factor impels the Chamber to exercise its discretion to determine the admissibility of the case against Omar Al Bashir at this stage

46. The second sentence of article 19(1) of the Statute bestows upon the Chamber a discretionary *proprio motu* power to determine the admissibility of a case:

> The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

[45] ICC-01/04-168, paras. 22,-24, 32-33 and 39.
[46] ICC-01/05-185, para. 31.

47. Nevertheless, the Chamber observes that the Appeals Chamber, in its 13 July 2006 Judgment,[47] held that when, as in the present case,[48] the Prosecution Application is made on a *confidential* and *ex parte* basis, the Chamber, for the purpose of preserving the interests of the relevant person, must exercise its discretion under article 19(1) of the Statute only in exceptional circumstances,[49] such as when an "ostensible cause" or a "self-evident factor" impels the exercise of such discretion.[50]

48. In this regard, the Chamber has already held that:

> [...] the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17(1)(a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court.[51]

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[47] ICC-01/04-169.
[48] The Chamber also notes that the proceedings for the issuance of warrant of arrest remain confidential and *ex parte*, despite the fact that the Prosecution has filed a public summary of its Application in the record of the Darfur situation. *The Prosecution Application*, paras. 72-74.
[49] ICC-01/04-169, para. 52.
[50] ICC-01/04-169, para. 53.
[51] ICC-01/04-520-Anx2, paras. 29 and 64. In its 10 February 2006 Decision, the Chamber put forward the only existing definition of article 17(1)(d) gravity threshold provided for to date in the jurisprudence of the Court. According to such definition:

> any case arising from an investigation before the Court will meet the gravity threshold provided for in article 17(1)(d) of the Statute if the following three questions can be answered affirmatively:
>
> 1. Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct);
> 2. Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and
> 3. Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crime within the jurisdiction of the Court; and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?

Nevertheless, the Appeals Chamber, in its *obiter dicta* provided for in its 13 July 2006 Decision, stated that this definition of article 17(1)(d) gravity threshold was flawed (ICC-01/04-169, para. 82).

49. The Chamber notes that, in the Prosecution Application, the Prosecution does not raise any issues of admissibility, except to highlight that this case is not being investigated or prosecuted in Sudan.[52]

50. Further, in the view of the Chamber, the materials presented by the Prosecution in support of the Prosecution Application offer no indication that: (i) national proceedings may be conducted, or may have been conducted, at the national level against Omar Al Bashir for any of the crimes contained in the Prosecution Application; or that (ii) the gravity threshold provided for in article 17(1)(d) of the Statute may not be met.

51. In light of the above-mentioned, the Chamber declines to use its discretionary *proprio motu* power to determine, at this stage, the admissibility of the case against Omar Al Bashir as: (i) the Prosecution Application still remains *confidential* and *ex parte*; and (ii) there is no ostensible cause or self-evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute.

IV. Whether the common requirements under article 58(1) of the Statute for the issuance of a warrant of arrest have been met

A. Whether there are reasonable grounds to believe that at least one of the crimes within the jurisdiction of the Court referred to in the Prosecution Application has been committed

52. As the Chamber has already held:

> [...] according to the Statute and the Elements of Crimes, the definition of every crime within the jurisdiction of the Court includes both contextual and specific elements.[53]

[52] *The Prosecution Application*, para. 3.
[53] ICC-01/04-520-Anx2, para. 94.

53. Hence, the Chamber will first analyse whether there are reasonable grounds to believe that the contextual elements of the crimes alleged by the Prosecution in the Prosecution Application are present, and only if the answer is in the affirmative, will the Chamber turn its attention to the question as to whether there are reasonable grounds to believe that the specific elements of any such crime have been met.

54. Moreover, although the Prosecution Application focuses, for the most part, on the three counts of genocide, the Chamber observes that, according to the Prosecution, the alleged crimes were committed as part of a counter-insurgency campaign launched in March 2003 by the Government of Sudan ("the GoS").[54] Hence, the Chamber will first analyse the Prosecution's allegations concerning war crimes and crimes against humanity, and only then will the Chamber turn its attention to the Prosecution's allegations relating to the crime of genocide.

1. War crimes

(a) Whether there are reasonable grounds to believe that the contextual elements of at least one war crime within the jurisdiction of the Court have been met

55. The Prosecution submits that Omar Al Bashir used, from March 2003 to the date of filing of the Prosecution Application on 14 July 2008, the "apparatus" of the State of Sudan, including the Sudan People's Armed Forces ("the Sudanese Armed Forces") and their allied militia groups known as "Janjaweed Militia" (primarily drawn from so-called Arab tribes), the Sudanese Police Forces, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), to commit acts constituting war crimes under paragraphs (2)(e)(i) and (2)(e)(v) of article 8 of the Statute.[55]

[54] *The Prosecution Application*, paras. 9-11.
[55] *The Prosecution Application*, para. 39.

56. In particular, the Prosecution alleges that between March 2003 and 14 July 2008, GoS forces[56] conducted hundreds of unlawful attacks on towns and villages throughout the Darfur region inhabited by members of the Fur, Masalit and Zaghawa groups.[57]

57. According to the Prosecution Application, this conduct took place in the context of an armed conflict, which, by reference to paragraphs (2)(e)(i) and (2)(e)(v) of article 8 of the Statute, the Prosecution appears to characterise as an armed conflict not of an international character.[58]

58. In this regard, the Chamber observes that article 8(2)(f) of the Statute, which defines "armed conflicts not of an international character" for the purpose of article 8(2)(e) of the Statute, states that:

> Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State where there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.

59. As the Chamber has already held in relation to these types of armed conflicts:

> [...] in addition to the requirement that the violence must be sustained and have reached a certain degree of intensity, Article 1.1 of the Protocol Additional II provides that the armed groups must: (i) be under responsible command implying some degree of organisation of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the implementation of the Protocol; and (ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations.[59]
>
> The ICTY Appeals Chamber has held that an armed conflict not of an international character exists whenever there is a resort to 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' This definition echoes the two criteria of Protocol Additional II,

[56] Unless otherwise expressly provided, the term "GoS' forces" is used hereinafter to refer to the forces of the Government of Sudan, which included *inter alia*, the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.
[57] *The Prosecution Application*, para. 237.
[58] *The Prosecution Application*, paras. 1 and 9.
[59] ICC-01/04-01/06-803-tEN, para. 232.

> except that the ability to carry out sustained and concerted military operations is no longer linked to territorial control. It follows that the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character.[60]

60. The Chamber has also highlighted that article 8(2)(f) of the Statute makes reference to "protracted armed conflict between [...] organized armed groups", and that, in the view of the Chamber, this focuses on the need for the organised armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time.[61] In this regard, the Chamber observes that, to date, control over the territory by the relevant organised armed groups has been a key factor in determining whether they had the ability to carry out military operations for a prolonged period of time.[62]

61. According to the Prosecution, since March 2003, an armed conflict has existed in the Darfur region between (i) the GoS; and (ii) the Sudan Liberation Movement/Army ("the SLM/A"), the Justice and Equality movement ("the JEM") and other opposition armed groups seeking political change in the Darfur region.[63]

62. In this regard, the Chamber considers that there are reasonable grounds to believe that the SLM/A and the JEM (i) were the two main groups opposing the GoS in Darfur; (ii) organised themselves between 2001 and 2002; and (iii) began to resort to acts of armed violence in 2002.[64] Moreover, despite internal disputes and splits, the Chamber considers that there are reasonable grounds to believe that, since at least

[60] ICC-01/04-01/06-803-tEN, para. 233.
[61] ICC-01/04-01/06-803-tEN, para. 234.
[62] ICC-01/04-01/07-717, para. 239.
[63] *The Prosecution Application*, paras. 9 and 240.
[64] Human Rights Watch (hereinafter "HRW") Report, *Sudan Darfur in Flames – Atrocities in Western Sudan* (Anx 10) DAR-OTP-0003-0185 at 0194; International Crisis Group Report, *Darfur Deadline A New International Action Plan*, 23 August 2004 (Anx 11) DAR-OTP-0004-0055 at 0057, 0059, 0061, 0064, 0065, 0068; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0027, 0030-0040, 0058; HRW, *If We Return, We Will Be Killed – Consolidation of Ethnic Cleansing in Darfur, Sudan*, November 2004 (Anx 38) DAR-OTP-0107-1403 at 1405.

March 2003, both the SLM/A and the JEM fulfil the organisational requirements contained in article 8(2)(f) of the Statute.[65]

63. Concerning the ability to carry out sustained military operations for a prolonged period of time, the Chamber considers that there are reasonable grounds to believe that the SLM/A and the JEM were involved in numerous military operations against GoS forces, such as those carried out (i) at the end of 2002/beginning of 2003 in the Jebel Marra locality;[66] (ii) in March/April 2003 on government installations in Kutum and Tine;[67] (iii) on 25 April 2003 on the El Fasher airport;[68] (iv) in July 2003 on the police station in Bindisi;[69] (v) in August 2003 on a Central Reservists office in Mukjar[70] and on the military garrison in Arawala;[71] and (vi) on 13 and 22 March 2004 on various official buildings, including the police station and prison in Buram.[72]

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[65] *The Prosecution Application*, paras. 241-242; J. Flint/A. de Waal, *Darfur. A Short History of a Long War*, 2005 (Anx 75) DAR-OTP-0120-0678 at 0772-0775. Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3-4 September 2003 at DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement at DAR-OTP-0115-0563 at 0567-0638.

[66] Witness Statement (Anx 81) DAR-OTP-0148-0110 at 0126, para. 14; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62-63.

[67] Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0026, para. 65; Witness Statement (Anx 28) DAR-OTP-0097-0619 at 0625-0627, paras. 28-38; United Nations Economic and Social Council (hereinafter "ECOSOC"), *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) DAR-OTP-0115-0673 at 0686, para. 48; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur. January 2005. Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0572-0577.

[68] Amnesty International Report, *Sudan Darfur· Too many people killed for no reason* (Anx 18) DAR-OTP-00020-067 at 068, para. 3; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-00018-010 at 026, para. 65; ECOSOC, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights. Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) at DAR-OTP-0115-0673 at 0686, para. 48; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0589-0595.

[69] Witness Statement (Anx 25) DAR-00095-049 at 075, 086, paras. 121, 175; Witness Statement (Anx 65) DAR-OTP-0119-0503 at 0514. 0526, paras. 46 and 106.

[70] Witness Statement (Anx 65) DAR-OTP-0119-0503 at 0517, para. 62; Witness Statement (Anx 25) DAR-OTP-00095-049 at 075, 086, paras. 121 and 176; Witness Statement DAR-OTP-0119-0711 at 0721, para. 52.

[71] Witness Statement (Anx 19) DAR-OTP-00088-129 at 134. para. 22; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur. January 2005. Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0603-0605.

[72] Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005. Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0593, para. 4, and at 0594, para. 3.

64. Furthermore, there are reasonable grounds to believe that, at the relevant time, the SLM/A and the JEM controlled certain areas of the territory in the Darfur region.[73]

65. As a result, the Chamber concludes there are reasonable grounds to believe that, since at least March 2003, both the SLM/A and the JEM had, as required by article 8(2)(f) of the Statute, the ability to carry out sustained military operations for a prolonged period of time.

66. In the view of the Chamber, there are also reasonable grounds to believe that, as a result of the activities of the SLM/A and the JEM, the GoS issued a general call for the mobilisation of the Janjaweed Militia after the attack on the El Fasher airport in April 2003.[74]

67. The Chamber also finds that there are reasonable grounds to believe that, thereafter, GoS forces began implementing a GoS counter-insurgency campaign throughout the Darfur region against the SLM/A, the JEM and other armed groups opposing the GoS.[75]

68. The Chamber further finds that there are reasonable grounds to believe that the SLM/A and the JEM entered into several agreements with the GoS, most notably (i) the Peace Agreement between the GoS and the SLM/A signed on 3 and 4

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[73] ICC-02/05-01/07-1 para. 39, Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-00018-040 at 041, para. 132.

[74] Unofficial version of the *Armed Forces Memorandum concerning the ICC's Inquiries* (Anx 56) DAR-OTP-0116-0721 at 0727-0729; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 027 paras. 67-69; International Mission of Inquiry on Darfur, Mission to West Darfur, 11-17 November 2004, Compiled notes of meetings and interviews (Anx 16) DAR-00016-139 at 159, Witness Statement (Anx 26) at DAR-OTP-0095-0151 at 0168 paras. 82-86; Witness Statement (Anx 28) DAR-OTP-0097-0619 at 0624, para. 21; ECOSOC, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) DAR-OTP-0115-0673 at 0686, para. 48; Pruiner, G, *Darfur the ambiguous genocide* (Anx 74) at DAR-OTP-0120-0263 at 0304.

[75] United Nations Human Rights Council. *Report on Human Rights Situations that Require the Council's Attention, 28 November 2007* (A/HRC/6/19) (Anx 78) DAR-OTP-0138-0117, at 0124, para. 19; UN Press Release on Humanitarian Situation in Darfur, *Humanitarian situation in Darfur, Sudan, said to be among worst in world*, 8 December 2003 (Anx 79) DAR-OTP-0141-0159; HRW Report, *Darfur in Flames Atrocities in Western Sudan*, April 2006 (Anx 10) DAR-OTP-0003-0185, pp. 12-15 and 22-24; Amnesty International Report, *Darfur "Too many people killed for no reason"*, 3 February 2004 (Anx 18) DAR-OTP-0020-0067, pp. 9-10; Witness Statement (Anx 59) DAR-OTP-0018-0002 at 0019-0022, paras. 75-88, 93-94, 95-101; Transcript of interview (Anx 70) DAR-OTP-0120-0186.

September 2003; (ii) the cease fire agreement signed on 8 April 2004 between the GoS and the SLM/A and the JEM; and (iii) the Darfur Peace Agreement between the GoS and the SLM/A and the JEM signed on 5 May 2006.[76]

69. Nevertheless, in the view of the Chamber, there are reasonable grounds to believe that the said agreements have not been fully implemented, and that, in spite of them, the hostilities between the GoS on the one hand, and the SLM/A, the JEM and other opposition armed groups has continued in the Darfur region.[77]

70. In conclusion, the Chamber finds that there are reasonable grounds to believe that from March 2003 to at least 14 July 2008, a protracted armed conflict not of an international character, within the meaning of article 8(2)(f) of the Statute, existed in Darfur between the GoS and several organised armed groups, in particular the SLM/A and the JEM.

71. Furthermore, the Chamber also finds that there are reasonable grounds to believe that the specific unlawful attacks and acts of pillage alleged by the Prosecution in the Prosecution Application were allegedly committed in the context of and were associated with, the said armed conflict in the Darfur region,[78] insofar as:

> The armed conflict need not be considered the ultimate reason for the conduct and the conduct need not have taken place in the midst of the battle. Nonetheless, the armed conflict must play a substantial role in the perpetrator's decision, in his or her ability to commit the crime or in the manner in which the conduct was ultimately committed.[79]

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[76] African Union, Agreement with the Sudanese Parties on modalities for the establishment of a ceasefire commission (Anx 12) DAR-OTP-00005-308; Peace Agreement between the Government of the Republic of Sudan and the Sudanese Liberation Army (Anx 50) DAR-OTP-0116-0433. The presence and representation of the SLM/A and the JEM at peace talks shows that the GoS considered them to be key actors in the Darfur conflict.

[77] Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0027, paras. 70-72; Witness Statement (Anx 29) DAR-OTP-0097-0639 at 0651, paras. 55-56.

[78] ICC-02/05-01/07-1, para. 47; *The Prosecution Application*, para. 240; African Union, Agreement with the Sudanese Parties on modalities for the establishment of a ceasefire commission (Anx 12) at DAR-00005-308; Peace Agreement between the Government of the Republic of Sudan and the Sudanese Liberation Army (Anx 50) DAR-OTP-0116-0433.

[79] ICC-01/04-01/06-803-tEN, para. 287.

(b) Whether there are reasonable grounds to believe that the specific elements of at least one war crime within the jurisdiction of the Court have been met

72. The Prosecution submits that from March 2003 to 14 July 2008, Omar Al Bashir used the "apparatus" of the State of Sudan to direct hundreds of attacks against the Fur, Masalit and Zaghawa civilian population taking no direct part in hostilities (article 8(2)(e)(i) of the Statute),[80] including, *inter alia* in: (i) Kodoom on or about 15 August 2003 and again on or about 31 August 2003; (ii) Bindisi on or about 15 August 2003; (iii) Mukjar on or about 17 August 2003 and again on one occasion between August and September 2003; (iv) Arawala on or around 10 December 2003; (v) Shattaya town and its surrounding villages on 9 February 2004; (vi) Kailek on or around 9 March 2004; (vii) towns and villages in Buram locality between November 2005 and September 2006; (viii) Muhajeriya on or about 8 October 2007; (ix) Saraf Jidad on 7, 12 and 24 January 2008; (x) Silea on 8 February 2008; (xi) Sirba on 8 February 2008; (xii) Abu Suruj on 8 February 2008; (xiii) civilian centres in Jebel Moon between 18 and 22 February 2008; and (xiv) Shegeg Karo on 5 May 2008.[81]

73. The Prosecution also alleges that GoS forces carried out acts of pillage (article 8(2)(e)(v) of the Statute) upon the seizure of those towns and villages in Darfur primarily inhabited by members of Fur, Masalit and Zaghawa groups, including, but not limited to, those mentioned in the previous paragraph.[82]

74. The Chamber has already found that there are reasonable grounds to believe that, in response to the activities of the SLM/A, the JEM and other opposition armed groups in Darfur, soon after the attack on El Fasher airport in April 2003, the GoS issued a general call for the mobilisation of the Janjaweed Militia, and thereafter

[80] *The Prosecution Application*, paras. 237, 269, 288-290 and 305-310.
[81] *The Prosecution Application*, paras. 107, 202 and 213-233.
[82] *The Prosecution Application*, paras. 213, 221, 223, 225 and 229.

conducted, through GoS forces a counter-insurgency campaign throughout the Darfur region against the said groups.[83]

75. The Chamber also finds that there are reasonable grounds to believe that such counter-insurgency campaign continued until the date of filing of the Prosecution Application on 14 July 2008 and was not confined to targeting (i) members of the SLM/A, the JEM and other armed groups involved in the ongoing armed conflict in Darfur; and (ii) individuals who were taking direct part in hostilities as a result of the support and assistance they were providing to the said groups.

76. In this regard, the Chamber is of the view that there are reasonable grounds to believe that a core component of the GoS counter-insurgency campaign, which was underway for well over five years, was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups[84] - perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur.[85]

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[83] Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0087-0088; Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0583, para. 36; Witness Statement (Anx J92) DAR-OTP-0128-0002 at 0010, para. 33.

[84] *See* Partly Dissenting Opinion of Judge Anita Ušacka, Part III. B.

[85] In relation to the first attack on Kodoom on or about 15 August 2003, see HRW Report *Targeting the Fur: Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 181-182; Witness Statement (Anx J70) DAR-OTP-00094-119 at 133-134, paras. 60-66. In relation to the second attack on Kodoom on or about 31 August 2003, see Witness Statement (Anx J70) DAR-OTP-00094-119 at 138-141, paras. 81-96. In relation to the attack on Bindisi on or about 15 August 2003, see Witness Statement (Anx 20) DAR-OTP-00088-187 at 192-195, paras.23-36; Witness Statement (Anx 21) DAR-OTP-00088-219 at 227-229, paras. 49-61; Witness Statement (Anx J45) DAR-OTP-00088-060 at 065-068, paras. 19-31; and Witness Statement (Anx J70) DAR-OTP-00094-119 at 135, para. 71. In relation to the aerial attack on Mukjar between August and September 2003, see Witness Statement (Anx 21) DAR-OTP-00088-219 at 233-234, paras. 85-86. In relation to the attack on Arawala on or around 10 December 2003, see Witness Statement (Anx 19) DAR-OTP-00088-129 at 135-136, paras. 26-30; Witness Statement (Anx 43) DAR-OTP-0112-0175 at 0192 and 0193, paras. 73-74, 77-79; and Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568, at 064-065. In relation to the attack on Shattaya town and its surrounding villages (including Kailek) in February/March 2004, see Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-00018-010 at 078, paras. 273-274; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, paras. 34-37; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568, at 0597, para. 6 and at 0598 para. 3; Commission's meeting with key personalities from the Kutum area, 8 July 2004 (Anx 63) DAR-OTP-0119-0402 at 0407. In relation to the attack on Muhajeriya on or about 8 October 2007, see United Nations Human Rights Council, *Report on Human Rights Situations that Require the Council's Attention, 28 November 2007* (A/HRC/6/19) (Anx 78) DAR-OTP-0138-0116 at 0145-0146, para (xvii). In relation to the attacks on Saraf Jidad on 7, 12 and 24 January 2008, see Ninth periodic report of the United Nations High Commissioner for Human Rights in the Sudan on the situation of human rights in the Sudan, *Attacks on civilians in Saraf Jidad, Sirba, Silea and Abu Suruj in Januaray and February 2008*, March 2008 (hereinafter the "Ninth periodic report of the UN High

77. Furthermore, the Chamber finds that there are reasonable grounds to believe that, as part of the above-mentioned GoS counter-insurgency campaign, GoS forces systematically committed acts of pillaging after the seizure of those towns and villages that were subject to their attacks.[86]

78. Hence, the Chamber concludes that there are reasonable grounds to believe that, since the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport until 14 July 2008, war crimes within the meaning of articles 8(2)(e)(i) and 8(2)(e)(v) of the Statute were committed by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the

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Commissioner for Human Rights") (Anx J76) DAR-OTP-0136-0369 at 0372 and 0373. In relation to attack on Silea on 8 February 2008, see Prosecution Submission, HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) at DAR-OTP-0143-0273 at 0283 and 0294-0296; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0371, 0373 and 0374. In relation to the attack on Sirba on 8 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) at DAR-OTP-0143-0273 at 0283 and 0292-0294; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374. In relation to the attack on Abu Suruj on 8 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0283 at 0290-0292; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) at DAR-OTP-0136-0369 at 0373. In relation to the attack to Jebel Moon between 18 and 22 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0283 and 0297-0300; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0375.

[86] Commission of Inquiry on Darfur (Anx 17) at DAR-OTP-00018-010 at 065-066; In relation to the first attack on Bindisi on or about 15 August 2003, see Witness Statement (Anx 20) at DAR-OTP-00088-187 at 193, para. 29; Witness Statement (Anx 21) DAR-OTP-00088-187 at 228, para. 53; and at DAR-OTP-00090-173 at 181-182; Witness Statement (Anx 41) DAR-OTP-0110-0054 at 0062; HRW report, *Targeting the Fur Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 180-182; Witness Statement (Anx J70) DAR-OTP-00094-119 at 135, para. 71. In relation to the attack on Arawala on or around 10 December 2003, see Witness Statement (Anx 19) DAR-OTP-00088-129 at 136-138, paras. 30, 36 and 41-42; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604, paras. 2 and 3b. In relation to the attack on Muhajeriya on or about 8 October 2007, see Human Rights Council, Situations that require the Council's attention (Anx 78) DAR-OTP-0138-0116 at 0145-0146, para (xvii). In relation to the attacks on Saraf Jidad on 7, 12 and 24 January 2008, see Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0602, para. 3, and at 0603, para. 1; Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0373. In relation to attack on Silea on 8 February 2008, see Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568, at 0602, para. 3, and at 0603, para. 1; HRW report, *They shot at us as we fled* (Anx 80) DAR-OTP-0143-0273 at 0283, 0294-0296; and Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0371, 0374-0375. In relation to the attack on Sirba on 8 February 2008, see HRW report, *They shot at us as we fled* (Anx 80) at DAR-OTP-0143-0273 at 0283, 0292-0294; and Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) at DAR-OTP-0136-0369 at 0374. In relation to the attack on Abu Suruj on 8 February 2008, see HRW report, *They shot at us as we fled* (Anx 80) DAR-OTP-0143-0273 at 0283, 0290-0292; Ninth periodic report of the UN High Commission for Human Rights, Sudan (Anx J76) at DAR-OTP-0136-0369 at 0373. In relation to the attack on Mukjar on 3 August 2003, see Witness Statement (Anx 24) DAR-OTP-00094-423 at 432; HRW report, *Targeting the Fur Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 180-182.

Sudanese Police Forces, the NISS and the HAC, as part of the said GoS counter-insurgency campaign.

2. *Crimes against humanity*

(a) *Whether there are reasonable grounds to believe that the contextual elements of at least one crime against humanity within the jurisdiction of the Court have been met*

79. The Prosecution submits that, from March 2003 to 14 July 2008, Omar Al Bashir used the "apparatus" of the State of Sudan to implement a policy of attacking the Fur, Masalit and Zaghawa civilian population of Darfur including, *inter alia*, in: (i) the towns of Kodoom, Bindisi, Mukjar and Arawala, and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur in August/September and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; (vi) Shegeg Karo and al-Ain areas in North Darfur in May 2008.[87]

80. The Chamber observes that article 7(1) of the Statute defines crimes against humanity as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

[87] *The Prosecution Application*, paras. 214-217, 199-200. 222. 225, 228-229 and 233.

81. Although the terms "widespread" and "systematic" are not specifically defined in the Statute,[88] the Chamber has previously held that this language excludes random or isolated acts of violence, and that the term "widespread" refers to the large-scale nature of the attack, as well as to the number of victims, while the term "systematic" pertains to the organised nature of the acts of violence and to the improbability of their random occurrence.[89]

82. Furthermore, the Chamber notes that article 7(2)(a) of the Statute provides the following definition of the term "attack directed against any civilian population":

> [...] 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 attack. [90]

83. As found in the previous section, the Chamber considers that there are reasonable grounds to believe that a core component of the GoS counter-insurgency campaign, and consequently a GoS policy, was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups[91] - perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur.[92]

84. The Chamber also considers that there are reasonable grounds to believe that the above-mentioned attack on the said part of the civilian population of Darfur was

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[88] Lee, R. S. (Ed.), *The International Criminal Court. Elements of Crimes and Rules of Evidence*, New York, Transnational Publishers, 2001, p. 78: "agreement was quickly reached among most delegations that such issues should not be addressed in the Elements and should be left to evolving jurisprudence."
[89] ICC-01/04-01/07-717, paras. 394-397; ICC-02/05-01/07-l-Corr, para. 62, quoted in ICC-01/04-01/07-4, para. 33. Cited jurisprudence: ICTY, *The Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, 17 December 2004, para. 94; *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, paras. 545-546.
[90] See METTRAUX, G., *International Crimes and the ad hoc Tribunals*, Oxford, Oxford University Press, 2005, p. 156.
[91] *See* Partly Dissenting Opinion of Judge Anita Ušacka, Part III. B.
[92]. Witness Statement (Anx 28) DAR-OTP-0097-0619 at 0624, para. 21; Witness Statement (Anx 33) DAR-OTP-0107-0313 at 0331, para. 73; Witness Statement (Anx 41) DAR-OTP-0024-0200 at 0067, para. 52; Witness Statement (Anx J45) DAR-OTP-0088-0060 at 071-072, para. 45; Witness Statement (Anx 42) DAR-OTP-0112-0142 at 0151, para. 45; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 77) DAR-OTP-0143-0273 at 0017, para. 52; Report of the International Commission of Inquiry on Darfur, (Anx 17) DAR-OTP-0018-0010 at 084,086, paras. 304 and 315.

large in scale, as it affected hundreds of thousands of individuals[93] and took place across large swathes of the territory of the Darfur region.[94]

85. Furthermore, the Chamber finds that there are also reasonable grounds to believe that the above-mentioned attack was systematic as it lasted for well over five years and the acts of violence of which it was comprised followed, to a considerable extent, a similar pattern. For instance, attacks on towns and villages inhabited mainly by members of the Fur, Masalit and Zaghawa groups are consistently described in the materials provided by the Prosecution as coordinated ground attacks in which the attackers had previously encircled the targeted village or came to such village with tens or hundreds of vehicles and camels, forming a sort of wide line.[95] Moreover, such materials also refer to the fact that such ground attacks were often preceded by aerial bombings by planes bearing the markings or indications of the State of Sudan,[96] and that Janjaweed Militia arrived on horse or camel-back along with, or shortly followed by, members of the Sudanese Armed Forces in motor vehicles.[97]

86. Finally, the Chamber is mindful that, in order to constitute a crime against humanity, article 7(1) of the Statute also requires that the relevant acts of violence be committed with "knowledge of the attack" such that the perpetrator "knew that the

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[93] *The Prosecution Application*, para. 213; Witness Statement (Anx J45) DAR-OTP-0088-0060 at 065-066, paras. 19-24; Witness Statement (Anx J70) DAR-OTP-0094-0119 at 135-136, paras. 69-75; Witness Statement (Anx 19) DAR-OTP-0088-0129 at 135-136, paras. 26-28; Amnesty International Report, *Darfur. Too Many People Killed for No Reason* (Anx J5) at DAR-OTP-0002-0207 at 0209-0211; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369; International Crisis Group Report, *Darfur Deadline: A new International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055.

[94] ICC-02/05-151-US-Exp-Anx1; Office of UN Resident and Humanitarian Coordinator for the Sudan report (Anx J69) at DAR-OTP-0149-0537, HRW Report, *Sudan Darfur in Flames' Atrocities in Western Sudan*, April 2004 (Anx 10) at DAR-OTP-0003-0185; International Crisis Group Report, *Darfur Deadline. A new International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055.

[95] *The Prosecution Application*, paras. 106 and 361; Report of the International Commission of Inquiry on Darfur (Anx 17) at DAR-OTP-0018-0010 at 0057, para. 186.

[96] Witness Statement (Anx J45) DAR-OTP-0088-0060 at 065-066, paras. 19-24; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, para. 34; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan, (Anx J76) DAR-OTP-0136-0369 at 0373 and 0375.

[97] Witness Statement (Anx J70) DAR-OTP-0094-0119 at 0133-0134, paras. 60-64; Witness Statement (Anx J45) DAR-OTP-0088-0060 at 065-066, paras. 19-24; Witness Statement (Anx 19) DAR-OTP-0088-0129 at 0136, paras. 27-28; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, para. 34; Ninth periodic report of the United Nations High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0373; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0291 and 0292-0294.

conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population."[98]

87. As the Chamber has already held, such knowledge should "not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization."[99] On the contrary, this Chamber has previously understood this phrase to mean that the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack.[100]

88. In the present case, the Chamber considers that there are reasonable grounds to believe that such a requirement is met as: (i) the attack against the above-mentioned part of the civilian population of Darfur affected at least hundreds of thousands of individuals during a period of more than five years; and (ii) numerous United Nations reports,[101] several Security Council resolutions[102] and the Report of the United Nations Commission of Inquiry,[103] which referred to the existence of a widespread and systematic attack by GoS forces on the above-mentioned part of the civilian population in Darfur, were released during the relevant time period and were widely publicised.

89. The Chamber thus concludes that there are reasonable grounds to believe that the contextual elements referred to in article 7(1) of the Statute have been met.

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[98] Elements of Crimes, paragraph 2 of the Introduction to article 7 of the Elements of Crimes.
[99] Elements of Crimes, paragraph 2 of the Introduction to article 7 of the Elements of Crimes.
[100] ICC-01/04-01/07-717, para. 401. *See also* ICTY, *The Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A. Appeals Judgment, 17 December 2004, para. 99; ICTY, *The Prosecutor v Blaškić*, Case No. IT-95-14-A, Appeals Judgment, 29 July 2004, para.124; ICTR, *The Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 332.
[101] ECOSOC, *Report of the UN High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Situation of Human Rights in the Darfur region of the Sudan*, 7 May 2004 (Anx 45) DAR-OTP-0115-0673 at 0694-0695, paras. 92-96.
[102] United Nations Security Council Resolution 1547, S/RES/1547 (2004); United Nations Security Council Resolution 1556, S/RES/1556 (2004); United Nations Security Council Resolution S/RES/1564 (2004); United Nations Security Council Resolution 1574, S/RES/1574 (2004); United Nations Security Council Resolution 1590, S/RES/1590 (2005).
[103] Report of the International Commission of Inquiry on Darfur, DAR-OTP-0018-0010 (Anx 17) at 0161-0163, paras. 630-638.

(b) Whether there are reasonable grounds to believe that the specific elements of at least one crime against humanity within the jurisdiction of the Court have been met

90. The Prosecution submits that, since March 2003 to 14 July 2008, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, killed thousands of individuals from the Fur, Masalit and Zaghawa groups, throughout the Darfur region, including, *inter alia*, in: (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur in August/September and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.[104]

91. Moreover, the Prosecution submits that GoS forces systematically destroyed the means of survival - including food, shelter, crops, livestock and, in particular, wells and water pumps - of the Fur, Masalit and Zaghawa civilian population in Darfur because "[t]he aim was to ensure that those inhabitants not killed outright would be unable to survive without assistance."[105] In this regard, the Prosecution submits that:

> Given Darfur's hostile desert environment and lack of infrastructure, livelihood strategies historically have centred on the village. It is difficult to survive outside the communal setting. 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

[104] *The Prosecution Application*, paras. 62 (Count 1, 3, 4, 5), 371-372), 199, 214-217, 223, 226 and 232-233.
[105] *The Prosecution Application*, para. 175.

> repeatedly destroyed, polluted or poisoned these wells so as to deprive the villagers of water needed for survival. In a number of cases, water installations were bombed.[106]

92. The Chamber observes that, as there was an ongoing armed conflict at the relevant time, the killing of the following two categories of individuals, without violating international humanitarian law, cannot be considered unlawful, and therefore cannot be taken into consideration in assessing the Prosecution's allegations for crimes against humanity:

(i) those members of the SLM/A, the JEM or any other armed group opposing the GoS in the ongoing armed conflict in Darfur; and

(ii) those other individuals who, despite not being members of the said armed groups, were assisting any of them in such a way as to amount to taking direct part in the hostilities.

93. Moreover, the Majority considers that, although there are reasonable grounds to believe that GoS forces at times contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked,[107] there are no reasonable grounds to believe that such a contamination was a core feature of their attacks.[108]

94. Nevertheless, in light of the materials provided by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of murder

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[106] *The Prosecution Application*, paras. 175 and 176.
[107] One source mentions three incidents of destruction of water sources see Physicians for Human Rights, Report *Darfur Assault on Survival, A call for Security, Justice, and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0679 and see *The Prosecution Application* at paras. 174-176. However, neither of the UN High Commissioner for Human Rights reports on attacks by government forces in the Sudan make reference to the destruction of water sources – see Third Periodic report (Anx J75) at DAR-OTP-0108-0563, Ninth Periodic report (Anx J76) DAR-OTP-0136-0369. Indeed the Prosecution implies that many towns were sufficiently habitable for the land to be usurped by other tribes, see *The Prosecution Application*, paras. 179-184.
[108] United Nations High Commissioner for Human Rights Third Periodic report on the human rights situation in the Sudan (Anx J75) DAR-OTP-0108-0563 at 0572, para. 34.

by GoS forces, between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.[109]

95. The Prosecution alleges that the materials submitted in support of the Prosecution Application in relation to the crime against humanity of murder, also provide reasonable grounds to believe that acts of extermination were committed, during the relevant period in the Darfur region, by GoS forces, against civilians from the Fur, Masalit and Zaghawa groups.[110]

96. In this regard, the Chamber highlights that, according to the Elements of Crimes, the crime of extermination requires that the relevant killings constitute or

[109] In relation to the first attack on Kodoom on or about 15 August 2003, see HRW Report, *Targeting the Fur: Mass Killings in Darfur* 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 182; Witness Statement (Anx J70) DAR-OTP-00094-119 at 133-134, para. 66. In relation to the second attack on Kodoom on or about 31 August 2003, see and HRW Report, *Targeting the Fur· Mass Killings in Darfur*, 21 January 2005 (Anx 22) DAR-OTP-00090-173 at 182; In relation to the attack on Bindisi on or about 15 August 2003, see Witness Statement (Anx 20)DAR-OTP-00088-187 at 192-194, paras. 23-27 and 32; Witness Statement (Anx 21) DAR-OTP-00088-219 at 227-228, paras. 47-49 and 32; Witness Statement (Anx J45) DAR-OTP-00088-060 at 065-066, paras. 20-23; Witness Statement (Anx 65) DAR-OTP-0119-0503 at 0521, 0522. paras. 81 and 85; and Witness Statement (Anx J70) at DAR-OTP-00094-119 at 135, para. 72. In relation to the aerial attack on Mukjar between August and September 2003, see Witness Statement (Anx 21) DAR-OTP-00088-219 at 233-234, paras. 85-86. In relation to the attack on Arawala on or around 10 December 2003, see Witness Statement (Anx 19) DAR-OTP-0088-0129 at 0136, paras. 27-28; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed. Volume 2 (Anx 52) DAR-OTP-0116-0568, at 0605. In relation to the attack on Shattaya town and its surrounding villages (including Kailek) in February/March 2004, see Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-00018-010 at 078, paras. 273-274; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, paras. 34-37. In relation to attacks in Buram locality between November 2005 and September 2006, see Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 32 and 35-37. In relation to the attack on Muhajeriya on or about 8 October 2007. see United Nation Human Rights Council, *Report on Human Rights Situations that require the Council's attention* (A/HRC/6/19) (Anx 78) DAR-OTP-0138-0116 at 0145-0146, para (xvii). In relation to the attacks on Saraf Jidad on 7, 12 and 24 January 2008, see Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0373. In relation to attack on Silea on 8 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0294-0295; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374-0375. In relation to the attack on Sirba on 8 February 2008, see HRW Report, *They shot at us as we fled*. 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0292-0293; and Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374. In relation to the attack on Abu Suruj on 8 February 2008, see HRW Report, '*They shot at us as we fled*', 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0290-0291; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0373. In relation to the attack to Jebel Moon between 18 and 22 February 2008, see HRW Report, *They shot at us as we fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0297-0299; Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0375. In relation to the attack on Shegeg Karo and al-Ain in May 2008, see Press Article, The Nation, *Death in Darfur*, 6 May 2008(Anx 4, line 168) DAR-OTP-0149-0383 and Press Article, Sudan Tribune, *School Bombed in North Darfur, six children killed*, 9 May 2008 (Anx 4. line 168) DAR-OTP-0149-0387.
See also UN News Service, *At five-year mark, Darfur crisis in only worsening – UN aid Chief*, 22 April 2008(Anx J27) DAR-OTP-0147-1068.

[110] *The Prosecution Application*, para. 235.

take place as part of "a mass killing of members of a civilian population". The Chamber observes that this has also been the interpretation adopted by the case law of the ICTY[111] and the ICTR.[112]

97. In this regard, and based on a review of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber is of the view that there are reasonable grounds to believe that acts of extermination, such as the alleged killing of over a thousand civilians in connection with the attack on the town of Kailek on or around 9 March 2004, were committed by GoS forces against civilians primarily from the Fur, Masalit and Zaghawa groups, in the Darfur region, during the relevant period.[113]

98. The Prosecution further submits that, from March 2003 to 14 July 2008, GoS forces forcibly transferred up to 2.7 million civilians from the Fur, Masalit and Zaghawa groups residing throughout the Darfur region,[114] including, *inter alia*, from: (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur, between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur, between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu

[111] ICTY, *The Prosecutor v Jokic*, Case No. IT-02-60-T, Trial Judgement. 17 January 2005, paras.571 and 573; ICTY. *The Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgement, 2 August 2001, paras. 497, 501 and 502; ICTY *Prosecutor v Vasiljević*, Case No. IT-98-32-T, Trial Judgement, 29 November 2002, paras. 219-220, 222 and 227.
[112] ICTR, *The Prosecutor v Karera*, Case No. ICTR-01-74-T, Trial Judgement, 7 December 2007, paras.551 and 552 ; ICTR, *The Prosecutor v Simba*, Case No. ICTR-2001-76-T, Trial Judgement. 13 December 2005. para. 422.
[113] Witness Statement, (Anx 66) DAR-OTP-0119-0711 at 0718-0719, paras. 34-37 (describing how the witness was given a list of 1700 persons killed, or presumed dead, in an attack on Kailek); Witness Statement (Anx 38) DAR-OTP-0150-0255 at 0263 (saying the dead, missing or captured during the Kailek attacks numbered 1350); Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0078. paras. 273 and 274 (the commission stated it confirmed 'mass killings of civilians' in Kailek).
[114] *The Prosecution Application*, para. 157.

Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur, between January and February 2008.[115]

99. Moreover, the Prosecution submits that the forcible transfer of a substantial part of the Fur, Masalit and Zaghawa civilian population was accompanied by the subsequent usurpation of their land by members of those tribes that were allied to the GoS. According to the Prosecution:

> 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 PDF troops at Al Fashir airport, AL BASHIR declared that "I only want land." [...] 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.[116]

100. Based on an analysis of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of forcible transfer by GoS forces between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.[117]

101. Furthermore, the Chamber also considers that there are reasonable grounds to believe that, at times, GoS forces encouraged members of other tribes, which were

[115] *The Prosecution Application*, paras. 199, 221, 224, 227-228, 232.
[116] *The Prosecution Application*, paras. 179-180.
[117] UN Security Council Press release, 22 April 2008 (Anx J38) DAR-OTP-0147-0859 at 0860; UN Security Council 5872nd meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061; UNCOI Material, (Anx J72) DAR-OTP-0038-0060 at 0065; Commission of Inquiry into allegations surrounding human rights violations committed by armed groups in the States of Darfur, January 2005, Reviewed, Volume 2 (Anx 52) DAR-OTP-0116-0568 at 0604; United Nations Inter-agency Report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0067; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, paras. 27, 35, 39, 44; United Nation Human Rights Council, *Report on Human Rights Situations that require the Council's attention* (A/HRC/6/19) (Anx 78) at DAR-OTP-0138-0116 at 0145-0146; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0300, 0291-0296; Ninth periodic report of the United Nations High Commissioner for Human Rights. Sudan (Anx J76) DAR-OTP-0136-0369 at 0372-0374.

allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups.[118]

102. The Prosecution further alleges that, from March 2003 to 14 July 2008, GoS forces tortured numerous civilians from the Fur, Masalit and Zaghawa groups in the Darfur region,[119] including, *inter alia*, in: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality, West Darfur in February 2008.[120]

103. The Majority observes that the Prosecution's allegations in relation to torture refer, for the most part, to acts of torture allegedly committed during, or in the immediate aftermath of the attacks conducted by GoS forces against towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups.[121] The Majority also notes that the Prosecution makes no allegations concerning the existence of reasonable grounds to believe that GoS forces established in Darfur long-lasting detention camps where inmates were systematically mistreated and tortured.

104. Based on an analysis of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject to acts of torture by GoS forces in the Darfur region between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.[122]

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[118] Witness Statement (Anx J47) DAR-OTP-0125-0665 at 0716, para. 255.
[119] *The Prosecution Application*, paras. 119, 120, 146-147, 220 and 237.
[120] *The Prosecution Application*, paras. 200-201, 220, 228 and 232.
[121] *The Prosecution Application*, paras.146, 151-154, 220 and 232(c).
[122] HRW Report, *They Shot at Us as We Fled*, 18 May 2008 (Anx 80) DAR-OTP-0143-0273 at 0290-0300; Witness Statement (Anx 24) DAR-OTP-0094-0423 at 0434, para. 46; Witness Statement (Anx J62) DAR-OTP-0012-0105 at 0105, para. 10; Second Periodic Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Sudan, 27 January 2006 (Anx J35) DAR-OTP-0136-0263 at 0282 and 0283; Witness Statement (Anx 66) DAR-OTP-0119-0711 at 0718, para. 36; UN General Assembly, Human Rights Council, *Human Rights Situations that Require the Council's Attention* (A/HRC/7/22), 3 March 2008 (Anx J28) DAR-OTP-0148-0259 at 0269-0270, paras. 45 and 46.

105. Finally, the Prosecution alleges that from March 2003 to 14 July 2008, GoS forces raped thousands of women from the Fur, Masalit and Zaghawa groups throughout the Darfur region,[123] including, *inter alia*, in: (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.[124]

106. In particular, the Prosecution submits that:

> Witnesses interviewed by the Prosecution, the UNCOI, other UN bodies and numerous NGOs 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. Girls as young as five and women as old as 70 have been raped. Gang rape - the rape of one or more victims by more than one perpetrator - has been a distinctive feature of sexual violence in Darfur [...] Rape has been used as a weapon during the attacks on villages and has been *"a critical element in the sweeping, scorched-earth campaign by the Janjaweed and the GoS against the non-Arab Darfurians."* Rape has also been a characteristic of the abuses in and around the camps for the internally displaced persons. Most of these rapes have been attributed by victims to members of the Armed Forces, Militia/Janjaweed and other GoS agents.[125]

107. Moreover, the Chamber observes that, according to the Prosecution's allegations, most instances of rape took place when civilian women left the IDP Camps, as opposed to when GoS forces (i) seized those towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups; or (ii) entered IDP Camps within Darfur.[126]

108. Based on an analysis of the materials submitted by the Prosecution in support of the Prosecution Application, the Chamber concludes that there are reasonable grounds to believe that thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups were subject, throughout the Darfur region, to acts of

[123] *The Prosecution Application*, p. 22, Count 8 and paras. 120-137, 201, 213. 218-219 and 237.
[124] *The Prosecution Application*, paras. 201-202. 218-219 and 232.
[125] *The Prosecution Application*, paras. 121 and 122.
[126] *The Prosecution Application*, paras.124-125, 132, 137 and 143-144.

rape by GoS forces between the start of the GoS counter-insurgency campaign soon after the April 2003 attack on El Fasher airport and 14 July 2008.[127]

109. The Chamber is therefore satisfied that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport to 14 July 2008, the GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, committed crimes against humanity of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(1)(a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region, pursuant to the GoS policy to unlawfully attack, as a core component of its counter-insurgency campaign, that part of the civilian population of Darfur - belonging to a large extent to the Fur, Masalit and Zaghawa groups[128] - perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur.

3. *Genocide*[129]

(a) Introduction

1. Prosecution allegations

110. The Prosecution submits that there are reasonable grounds to believe that Omar Al Bashir bears criminal responsibility under article 25(3)(a) of the Statute for the crime of genocide as a result of:

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[127] UN General Assembly, Human Rights Council, *Human Rights Situations that Require the Council's Attention* (A/HRC/7/22), 3 March 2008 (Anx J28) at DAR-OTP-0148-0259 at 0270, para. 47; Witness Statement, (Anx 20) DAR-OTP-0088- 0187 at 0196, para. 41; Witness Statement, (Anx 21) DAR-OTP-0088-0219 at 0230, para. 67; Witness Statement (Anx J15), DAR-OTP-0088-0306 at 0325, para. 146; Witness Statement, (Anx 66) DAR-OTP-0119-0711 at 0718, para. 36; see Ninth periodic report of the UN High Commissioner for Human Rights, Sudan (Anx J76) DAR-OTP-0136-0369 at 0374-0375; HRW Report, *They Shot at Us as We Fled*, 18 May 2008, (Anx 80) DAR-OTP-0143-0273 at 0296; Third periodic report of the United Nations High Commissioner for Human Rights on the human rights situation in the Sudan, April 2006 (Anx J75) DAR-OTP-0108-0562 at 0570-0572, para. 44.

[128] *See* Partly Dissenting Opinion of Judge Anita Ušacka, Part III. B.

[129] Judge Anita Ušacka dissents from the findings of the Majority in relation to genocide. *See* Partly Dissenting Opinion of Judge Anita Ušacka, Part III.

i. the killing of members of the Fur, Masalit and Zaghawa ethnic groups (article 6(a) - Count 1);
ii. causing serious bodily or mental harm to members of the Fur, Masalit and Zaghawa ethnic groups (article 6(b) - Count 2); and
iii. deliberately inflicting on the Fur, Masalit and Zaghawa ethnic groups conditions of life calculated to bring about the groups physical destruction (article 6(c) - Count 3).[130]

111. Nevertheless, the Prosecution acknowledges that (i) it does not have any direct evidence in relation to Omar Al Bashir's alleged responsibility for the crime of genocide;[131] and that therefore (ii) its allegations concerning genocide are solely based on certain inferences that, according to the Prosecution, can be drawn from the facts of the case.[132]

112. The Majority observes that the crime of genocide is defined in article 6 of the Statute as follows:

> For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

113. The Majority also notes that the Elements of Crimes elaborate on the definition of genocide provided for in article 6 of the Statute, establishing that the three following elements must always be fulfilled for the existence of the crime of genocide under the Statute:

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[130] *The Prosecution Application*, pp. 20-21.
[131] *The Prosecution Application*, paras. 371-373.
[132] *The Prosecution Application*, para. 373.

i. the victims must belong to the targeted group;

ii. the killings, the serious bodily harm, the serious mental harm, the conditions of life, the measures to prevent births or the forcible transfer of children must take place "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction"; and

iii. the perpetrator must act with the intent to destroy in whole or in part the targeted group.

114. The Majority highlights that the crime of genocide is characterised by the fact that it targets a specific national, ethnic, racial or religious group. In the view of the Majority, its purpose is to destroy in whole or in part the existence of a specific group or people, as opposed to those individuals who are members thereof.[133] In this regards, the Majority notes the explanation by Raphael Lemkin concerning the creation of the word "genocide" from the Greek *genos*, meaning race or tribe, and the Latin *caedere*, meaning to kill.[134]

115. The Majority also observes that, in the present case, the Prosecution claims that three different groups have been targeted: the Fur, the Masalit and the Zaghawa. As the definition of the crime of genocide aims at protecting the existence of a specific group or people, the Majority is of the view that the Prosecution should have articulated the counts in a different manner according to the following structure:

i. one count of genocide against the Fur ethnic group;
ii. one count of genocide against the Masalit ethnic group;

[133] See International Court of Justice ("the ICJ"), *Case concerning the Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment (No.91), 26 February 2007 [hereinafter 'ICJ Judgment on Genocide']. para.193.
[134] Lemkin, R., *Axis Rule in Occupied Europe. laws of occupation, analysis of government, proposals for redress*, Lawbook Exchange, 1944, p. 79.

iii. one count of genocide against the Zaghawa ethnic group.[135]

116. Nevertheless, as, for each of the three counts of genocide included in the Prosecution Application, the Prosecution makes a separate analysis of the alleged underlying facts in relation to each of the three targeted groups, the Majority is in a position to analyse the Prosecution's allegations concerning genocide.

2. Contextual elements of the crime of genocide

117. The Majority observes that the definition of the crime of genocide in article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 ("the 1948 Genocide Convention") does not expressly require any contextual element.[136]

118. The Majority also notes that article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia ("the ICTY") and article 2 of the Statute of the International Criminal Tribunal for Rwanda ("the ICTR") have adopted the same definition of Genocide as the one provided for in article II of the 1948 Genocide Convention.

119. The Majority highlights that the case law of the ICTY and the ICTR has interpreted this definition as excluding any type of contextual element, such as a genocidal policy or plan.[137] Hence, for the case law of the ICTY and the ICTR, the crime of genocide is completed by, *inter alia*, killing or causing serious bodily harm to

[135] Each count of genocide would include those acts provided in article 6 of the Statute allegedly committed against the members of the relevant group (killing, causing serious bodily or mental harm and imposing conditions of life calculated to bring about the total or partial destruction of the Fur).
[136] Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entered into force on 12 January 1951.
[137] ICTY, *The Prosecutor v Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 400; ICTR, *The Prosecutor v Akayesu*, Case No.ICTR-96-4-T, Trial Judgment, 2 September 1998, paras. 520 and 523. See also Cryer, R., Friman, H., Robinson, D. and Wilmshurst E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 168 and 177-178. See also Cassese, A., *International Criminal Law*, 2nd edition, New York, Oxford University Press, 2008, pp. 140-141.

a single individual with the intent to destroy in whole or in part the group to which such individual belongs.[138] As a result, according to this case law, for the purpose of completing the crime of genocide, it is irrelevant whether the conduct in question is capable of posing any concrete threat to the existence of the targeted group, or a part thereof.[139]

120. As a consequence, according to the case law of the ICTY and the ICTR, the protection offered to the targeted groups by the penal norm defining the crime of genocide is dependent on the existence of an intent to destroy, in whole or in part, the targeted group.[140] As soon as such intent exists and materialises in an isolated act of a single individual, the protection is triggered, regardless of whether the latent threat to the existence of the targeted group posed by the said intent has turned into a concrete threat to the existence in whole or in part of that group.[141]

121. The Majority observes that the definition of the crime of genocide provided for in article 6 of the Statute is the same as that included in article II of the 1948 Genocide

[138] ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 521; ICTY, *The Prosecutor v Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 400 and ICTY, *The Prosecutor v Blagojević and Jović*, Case No. IT-02-60, Trial Judgment, 17 January 2005, para. 645. See also Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, p. 168. See also Cassese, A., *International Criminal Law*, 2nd edition, New York, Oxford University Press, 2008, p. 134. See also Schabas, W.A., *Genocide in International Law The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, p. 112.

[139] ICTY, *The Prosecutor v Krštić*, Case No. IT-98-33-A, Trial Judgment, 19 April 2004, para. 133; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 498 and ICTR, *The Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 170. See also Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 182-185.

[140] For this reason, some commentators have qualified the crime of genocide as 'a crime of *mens rea*.' See Cassese, A. (Ed.) *The Rome Statute of the International Criminal Court a commentary*, Vol. 1, New York, Oxford University Press, 2002, p. 338. See also Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 182-185. See also Zahar, A. and Sluiter, G., *International Criminal Law*, New York, Oxford University Press, pp. 163 and 172-173. See also Schabas, W.A., "Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia", Westlaw 25 FDMILJ 23, 2001, pp. 9-10.

[141] Werle, G. *Principles of International Criminal Law*, The Netherlands, TMC Asser Press, 2005, p. 192, para. 565. See also Ambos K., "Current Issues in International Criminal Law" in Criminal Law Forum, vol. 14 no. 3, , Kluwer Academic Publishers, 2003, 225-259.

Convention, and that the Elements of Crimes elaborate upon it by, *inter alia*, requiring a contextual element.[142]

122. The Majority also notes that the Prosecution underlines the existence of this contextual element of the crime of genocide at paragraph 76 of the Prosecution Application.

123. The Majority further observes that, according to this contextual element provided for in the Elements of Crimes, the conduct for which the suspect is allegedly responsible, must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group.

124. In the view of the Majority, according to this contextual element, the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof. In other words, the protection offered by the penal norm defining the crime of genocide – as an *ultima ratio* mechanism to preserve the highest values of the international community – is only triggered when the threat against the existence of the targeted group, or part thereof, becomes concrete and real, as opposed to just being latent or hypothetical.

125. The Majority is aware that there is certain controversy as to whether this contextual element should be recognised.[143]

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[142] Some authors have referred to this element as a jurisdictional element insofar as the Elements of Crimes of genocide do not expressly require that it be covered by the knowledge of the perpetrator. According to these authors, this marks a significant difference with the provision on crimes against humanity because, according to article 7(1) of the Statute, the perpetrator must be aware that his or her actions or omission are part of a widespread or systematic attack against a civilian population. See Werle, G. *Principles of International Criminal* Law, The Netherlands, TMC Asser Press, 2005, pp. 191-194. See also Ambos K., "*Current issues in international criminal law*" in Criminal Law Forum, 14, 225-260, Kluwer Academic Publishers, 2004, pp. 247-248. However, the Majority observes that, in the absence of an express subjective requirement in relation to the contextual element of genocide, the general subjective element provided for in article 30 of the Statute would be applicable. On the application of the general subjective element provided for in article 30 of the Statute, see ICC-01/04-01/07-717, paras. 226-228, 251, 271, 295, 315, 316, 331, 346, 359 and 372.

[143] See Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*. United Kingdom, Cambridge University Press, 2007, pp. 177-179. See also Schabas, W.A., *Genocide in International Law. The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press. 2009,

126. In this regard, the Majority recalls that, according to article 21(1)(a) of the Statute, the Court must apply "in the first place" the Statute, the Elements of Crimes and the Rules. Moreover, as already held in the previous section on jurisdiction, those other sources of law provided for in paragraphs (1)(b) and (1)(c) of article 21 of the Statute, can only be applied when the following two conditions are met: (i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria provided for in articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* and article 21(3) of the Statute.[144]

127. It is in this scenario that, in the view of the Majority, article 10 of the Statute becomes meaningful insofar as it provides that the definition of the crimes in the Statute and the Elements of Crimes shall not be interpreted "as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

128. As a result, the Majority considers that the Elements of Crimes and the Rules must be applied unless the competent Chamber finds an irreconcilable contradiction between these documents on the one hand, and the Statute on the other hand. If such irreconcilable contradiction is found, the provisions contained in the Statute must prevail.

129. In the Majority's view, this interpretation is not inconsistent with a literal interpretation of article 9(1) of the Statute, which states that "elements of the crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8."

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pp. 245-248. See also Werle, G. *Principles of International Criminal* Law. The Netherlands, TMC Asser Press, 2005, pp.191-194.

[144] ICC-01/04-01/07-717, para. 64; ICC-01/04-01/06-803-tEN, para. 69.

130. Furthermore, it is supported by the contextual interpretation of article 9(1) of the Statute in light of article 21(1) of the Statute and by the existence of the same requirements for the amendment of the Elements of Crimes and the Rules.[145]

131. The Majority considers that this interpretation is also supported by the object and purpose of article 9(1) of the Statute, which consists of furthering the *nullum crimen sine lege* principle embraced in article 22 of the Statute, by providing *a priori* legal certainty on the content of the definition of the crimes provided for in the Statute.[146] In the Majority's view, had the application of the Elements of Crimes been fully discretionary for the competent Chamber, the safeguards provided for by the article 22 *nullum crimen sine lege* principle would be significantly eroded.

132. In the case at hand, the Majority does not observe any irreconcilable contradiction between the definition of the crime of genocide provided for in article 6 of the Statute and the contextual element provided for in the Elements of Crimes with regard to the crime of genocide.

133. Quite the contrary, the Majority considers that the definition of the crime of genocide, so as to require for its completion an actual threat to the targeted group, or a part thereof, is (i) not *per se* contrary to article 6 of the Statute; (ii) fully respects the requirements of article 22(2) of the Statute that the definition of the crimes "shall be strictly construed and shall not be extended by analogy" and "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted"; and (iii) is fully consistent with the traditional consideration of the crime of genocide as the "crime of the crimes".[147]

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[145] According to articles 9(2) and 51(1), the amendments to the Elements of Crimes and to the Rules must be adopted by a two-thirds majority of the members of the Assembly of States Parties.

[146] See Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*. United Kingdom, Cambridge University Press, 2007, pp. 178-179. See also Schabas, W.A., *Genocide in International Law The Crimes of Crimes*, 2nd edition. Galway, Cambridge University Press, 2009, pp. 110-111.

[147] Killing or causing serious bodily harm to a single individual with the intent to destroy in whole or in part the group to which such individual belongs can hardly be said to amount to 'the crime of the crimes'. See Schabas,

3. Specific elements of the crime of genocide

134. The Majority observes that, in addition to the above-mentioned contextual element, the Elements of Crimes provide for the following two elements, which are common to the above-mentioned five categories of genocidal acts provided for in article 6 of the Statute: (i) the victims must belong to a particular national, ethnic, racial or religious group; and (ii) the perpetrator must act with the intent to destroy in whole or in part that particular group.

135. In relation to the first element, the Majority is of the view that the targeted group must have particular positive characteristics (national, ethnic, racial or religious), and not a lack thereof.[148] In this regard, it is important to highlight that the drafters of the 1948 Genocide Convention gave "close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics."[149] It is, therefore, a matter of who the targeted people are, not who they are not.[150] As a result, the Majority considers that negative definitions of the targeted group do not suffice for the purpose of article 6 of the Statute.

136. The Majority considers that there are no reasonable grounds to believe that nationality, race and/or religion are a distinctive feature of any of the three different groups - the Fur, the Masalit and the Zaghawa – that, according to the Prosecution, have been targeted. In this regard, the Majority highlights that the members of these

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W.A. Genocide in International Law: The Crime of Crimes (2nd ed), United Kingdom, Cambridge University Press, 2008, pp. 1, 11, 15, 269, 301, 652, 653, 654.

[148] ICJ Judgment on Genocide, paras. 191-194. ICTR, *The Prosecutor v Akayesu*, Case No.ICTR 96-4-T, Trial Judgment, 2 September 1998, paras. 510-516; ICTY, *The Prosecutor v Krstic*, Case No IT-98-33-T, Trial Judgment, 2 August 2001, paras. 551-561; ICTY, *The Prosecutor v. Stakić*, Case No.IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 20-28.

[149] ICJ Judgment on Genocide, paras. 191-194. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.

[150] ICJ Judgment on Genocide, paras. 191-194. ICTR, *The Prosecutor v Akayesu*, Case No. ICTR 96-4-T, Trial Judgment, 2 September 1998, paras. 510-516; ICTY, *The Prosecutor v Krstic*, Case No.IT-98-33-T, Trial Judgment, 2 August 2001, paras. 551-561; ICTY *The Prosecutor v Stakić*, Case No.IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 20-28.

three groups, as well as others in the region, appear to have Sudanese nationality, similar racial features, and a shared Muslim religion.[151]

137. As a result, the question arises as to whether any of the three said groups is a distinct ethnic group. In this regard, the Majority finds that there are reasonable grounds to believe that this question must be answered in the affirmative as there are reasonable grounds to believe that each of the groups (the Fur, the Masalit and the Zaghawa) has its own language, its own tribal customs and its own traditional links to its lands.[152]

138. In relation to the second element, the crime of genocide is characterised by the fact that any of the five categories of genocidal acts provided for in article 6 of the Statute must be carried out with the "intent to destroy, in whole or in part, a national, ethnic, racial or religious group." In the view of the Majority, this introduces a subjective element that is additional to the general intent and knowledge requirement provided for in article 30 of the Statute.[153]

139. As a result, the Majority considers that the crime of genocide is comprised of two subjective elements:

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[151] Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-00018-010 at paras. 41, 52-53 and 60.

[152] Report of the International Commission of Inquiry on Darfur (Anx 17) at DAR-OTP-0018-0010 at 023, para. 52. The Majority notes that neither the Statute nor the rules provide for a definition of "ethnic group". The Majority also observes that international case law has not provided either a clear definition of what an "ethnic group" is. In this regard, the Majority observes that the ICJ, in its recent Judgment on Genocide, did not rule on whether a wholly objective (based on anthropological considerations), a wholly subjective (based only upon the perception of the perpetrators), or a combined objective/subjective approach to the definition of the relevant group should be adopted (see ICJ Judgment on the Genocide, para. 191). However, the Majority considers that, for the purpose of the present decision, it is unnecessary to further explore this issue.

[153] The Chamber has defined this requirement in its 29 January 2006 Decision on the Confirmation of the Charges in the case of *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-803-tEN, paras. 351 et *seq*, and its 30 September 2008 Decision on the Confirmation of the Charges in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, paras. 527 *et seq* In its recent Judgment on Genocide, the ICJ has defined the general subjective element that must cover the specific genocidal acts as follows: "It is well established that the acts – [*here the ICJ enumerates the acts*] – themselves include mental elements. "killings" must be intentional, as must "causing serious bodily or mental harm". Mental elements are made explicit in paragraphs *(c)* and *(d)* of Article II by the words "deliberately" and "intended", quite apart from the implications of the words "inflicting" and "imposing"; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts." (para. 186).

i. a general subjective element that must cover any genocidal act provided for in article 6(a) to (e) of the Statute, and which consists of article 30 intent and knowledge requirement; and

ii. an additional subjective element, normally referred to as "*dolus specialis*" or specific intent, according to which any genocidal acts must be carried out with the "intent to destroy in whole or in part" the targeted group. [154]

140. The Majority observes that, in relation to the additional subjective element, the International Court of Justice ("the ICJ") has recently held in its Judgment on Genocide that:

> In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part... [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph *(a)*, that deliberate unlawful killings of members of the group have

[154] ICJ Judgment on Genocide, para. 186. ICTY, *The Prosecutor v. Jelisic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 66 and 79; ICTY, *The Prosecutor v Jelisic*, Case No. IT-95-10-A, Appeal Judgment, 5 July 2001, para. 45-46. ICTY, *The Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 550-552, 569, 571. A number of authors have put forward in the recent years an innovative approach to the subjective elements of the crime of genocide, known as 'knowledge-based approach' See also Kress, C., "*The Darfur Report and Genocidal Intent*", J Int Criminal Justice, pp. 562-578, Oxford University Press, March 2005, see in particular pp. 565-572. See also Schabas, W.A., *Genocide in International Law The Crimes of Crimes*, 2nd edition, Galway, Cambridge University Press, 2009, pp. 241-264. According to this approach, direct perpetrators and mid-level commanders can be held responsible as principals to the crime of genocide even if they act without the *dolus specialis*/specific intent to destroy in whole or in part the targeted group. According to these authors, as long as those senior political and/or military leaders who planned and set into motion a genocidal campaign act with the requisite *dolus specialis*/ulterior intent, those others below them, who pass on instructions and/or physically implement such a genocidal campaign, will commit genocide as long as they are aware that the ultimate purpose of such a campaign is to destroy in whole or in part the targeted group. The 'knowledge-based approach' does not differ from the traditional approach in relation to those senior political and/or military leaders who planned and set into motion a genocidal campaign: they must act with the intent to destroy in whole or in part the targeted group because, otherwise, it would not be possible to qualify a campaign of violence against the members of a given group as a genocidal campaign. Moreover, when, as in the present case, those who allegedly planned and set into motion a genocidal campaign are prosecuted pursuant to article 25(3)(a) of the Statute as indirect (co) perpetrators, the mental element of the direct perpetrators becomes irrelevant. As explained in the Decision on the Confirmation of the Charges in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, the reason being that, according to article 25(3)(a) of the Statute, such senior political and military leaders can be held liable as principals of the crime of genocide regardless of whether the persons through which the genocidal campaign is carried out are criminally liable (ICC-01/04-01/07-717, paras. 571-572, 573-576, 579-580). As a result, the "knowledge-based approach" would only differ from the traditional approach to the subjective elements of the crime of genocide in those cases in which mid-level superiors and low-level physical perpetrators are subject to prosecution before this Court. In this regard, the literal interpretation of the definition of the crime of genocide in article 6 of the Statute and in the Elements of Crimes makes clear that only those who act with the requisite genocidal intent can be principals to such a crime pursuant to article 25(3)(a) of the Statute. Those others, who are only aware of the genocidal nature of the campaign, but do not share the genocidal intent, can only be held liable as accessories pursuant to articles 25(3)(b) and (d) and 28 of the Statute. See Decision on the Confirmation of the Charges in the Case of *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06-803-tEN), paras. 373, 375-376, 396, 398 and 401-402.

> occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis;* in the present Judgment it will usually be referred to as the "specific intent (*dolus specialis*)." It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.[155]

141. Given the factual allegations made by the Prosecution in the Prosecution Application, the Majority considers it to be of particular relevance for the purpose of the present case to distinguish between:

i. the *dolus specialis*/specific intent required for the crime of genocide (genocidal intent consisting of the intent to destroy in whole or in part a national, ethnic, racial or religious group); and

ii. the *dolus specialis*/specific intent required for the crime against humanity of persecution (persecutory intent consisting of the intent to discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, against the members of a group, by reason of the identity of the group).

142. The Majority observes that the ICJ has underlined the importance of this distinction in its recent Judgment on Genocide by stating that:

> The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY" or "the Tribunal") did in the Kupreškić et al. case:
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> > "The *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an

[155] ICJ Judgment on Genocide, para. 187. ICTY, *The Prosecutor v Jelisic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 66, 79; ICTY, *The Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 550-552, 569 and 571.

> offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide." (IT-95-16-T, Judgment, 14 January 2000, para. 636)[156]

143. In the view of the Majority, the distinction between genocidal intent and persecutory intent is pivotal in cases of ethnic cleansing, a practice consisting of "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area".[157] This distinction is particularly relevant in cases such as the one at hand, in which allegations of forcible transfer and/or deportation of the members of the targeted group are a key component.

144. In this regard, the Majority observes that the practice of ethnic cleansing is not referred to in the 1948 Genocide Convention or in article 6 of the Statute. A proposal made during the drafting of the 1948 Genocide Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted.[158] Moreover, the ICJ has recently emphasised in its Judgment on Genocide that:

> Neither the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is "to destroy in whole or in part" a particular group, and deportation

[156] ICJ Judgment on Genocide, para. 188. ICTY, *The Prosecutor v Jelisic*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 62, 66; ICTR, *The Prosecutor v Athanase Seromba*, Case No. ICTR-2001-66-I, Trial Judgment, 13 December 2006, paras. 316 and 319-320.
[157] ICJ Judgment on Genocide, para. 190. ICTY, *The Prosecutor v. Jelisic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 562 and 578.
[158] ICJ Judgment on Genocide, para. 190. See also the Syrian proposal and amendment (UN Doc. A/C6/234) rejected by 29 votes to 5, with 8 abstentions.

> and displacement of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.[159]
> As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing' [...] yet "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide".[160]

145. Nevertheless, in the view of the Majority, this does not mean that the practice of ethnic cleansing - which usually amounts to the crime against humanity of persecution - can never result in the commission of the crime of genocide. In this regard, the Majority considers that such a practice may result in genocide if it brings about the commission of the objective elements of genocide provided for in article 6 of the Statute and the Elements of Crimes with the *dolus specialis*/specific intent to destroy in whole or in part the targeted group.

146. Finally, in relation to the meaning of the term "part of the group" in the definition of the crime of genocide, the Majority notes that, the ICJ, following the case law of the ICTY and the ICTR, has recently held as follows:

> In the first place, the intent must be to destroy at least a substantive part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR).[161]
> Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe" (*ibid.*) The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant. (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para.13) This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the

[159] ICJ Judgment on Genocide, para. 190. ICTY, *The Prosecutor v Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, paras. 520-522.
[160] ICJ Judgment on Genocide, para. 190. ICTY, *The Prosecutor v Krstic*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 562; ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, para. 519; ICTY, *The Prosecutor v Karadžić*, Case No. IT-95-18-R61, IT-95-5-R61, Transcript of Hearing, 28 June 1996, p. 10.
[161] ICJ Judgment on Genocide, para. 198.

> opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide. (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para.523)[162]
> A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstic* case put the matter in these carefully measured terms:
>
> > "The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition, to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4". [163]

4. The application of the law on the proof by inference to the article 58 evidentiary standard in relation to the alleged GoS's genocidal intent

147. The Prosecution highlights that it relies exclusively on proof by inference to substantiate its allegations concerning Omar Al Bashir's alleged responsibility for genocide.[164] In particular, the Prosecution relies on inferences to prove the existence of Omar Al Bashir's *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.[165]

148. In this regard, the Majority observes that, according to the Prosecution, Omar Al Bashir was in full control of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, and used such State apparatus to carry out a genocidal campaign against the Fur, Masalit and Zaghawa groups.[166]

149. As a result, the Majority considers that if the materials provided by the Prosecution support the Prosecution's allegations in this regard, the existence of reasonable grounds to believe that Omar Al Bashir had a genocidal intent would

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[162] ICJ Judgment on Genocide, para. 199.
[163] ICJ Judgment on Genocide, para. 200.
[164] *The Prosecution Application*, para. 364. See also ICC-02/05-T-2-Conf-Exp-ENG-ET at p.3, line 18 to p.4, line 5, p.6, line 12-14 and p.21, line1-9.
[165] *The Prosecution Application*, paras 365 and 366.
[166] *The Prosecution Application*, paras. 244, 250-269.

automatically lead to the conclusion that there are also reasonable grounds to believe that a genocidal campaign against the Fur, Masalit and Zaghawa groups was a core component of the GoS counter-insurgency campaign.

150. However, the situation would be different if the materials provided by the Prosecution show reasonable grounds to believe that Omar Al Bashir shared the control over the "apparatus" of the State of Sudan with other high-ranking Sudanese political and military leaders. In this situation, the Majority is of the view that the existence of reasonable grounds to believe that one of the core components of the GoS counter-insurgency campaign was a genocidal campaign against the Fur, Masalit and Zaghawa groups would be dependant upon the showing of reasonable grounds to believe that those who shared the control of the "apparatus" of the State of Sudan with Omar Al Bashir agreed that the GoS counter-insurgency campaign would, *inter alia*, aim at the destruction, in whole or in part, of the Fur, Masalit and Zaghawa groups.

151. It is for this reason that the Majority refers throughout the rest of the present decision to "the GoS's genocidal intent" as opposed to "Omar Al Bashir's genocidal intent".

152. Moreover, regardless of whether Omar Al Bashir had full control, or shared control with other high-ranking Sudanese political and military leaders, over the *apparatus* of the State of Sudan, the mental state of mid level superiors and low level physical perpetrators is irrelevant for the purpose of determining whether the materials provided by the Prosecution show reasonable grounds to believe that the crime of genocide against the Fur, Masalit and Zaghawa groups was part of the GoS counter-insurgency campaign that started soon after the April 2003 attack on

El Fasher airport and continued until the filing of the Prosecution Application on 14 July 2008.[167]

153. The Majority observes that, according to the Prosecution, an inference of the GoS's genocidal intent "may properly be drawn from all evidence taken together, even where each factor on its own may not warrant such an inference."[168]

154. Furthermore, the Prosecution submits that, in order for such an inference to be drawn, the existence of the GoS's genocidal intent "must be the only reasonable inference available on the evidence."[169]

155. The Majority also notes that the Prosecution, in support of its submissions on the applicable law concerning the proof by inference, places particular reliance on the case law of the Appeals Chamber of the ICTY.[170] In this regard, the Prosecution emphasises that, in applying the law on the proof by inference at the current stage of the proceedings, the Chamber must take into consideration that (i) the ICTY's case law refers to a "beyond reasonable doubt" standard; and that (ii) "for the purpose of an Art. 58 application of the lower standard of reasonable grounds will instead be applicable".[171]

156. The Majority finds the Prosecution's submissions to be a correct statement of the law on the proof by inference applicable before this Court. In the Majority's view, they are not only fully consistent with the ICTY[172] and ICTR[173] case law on the matter,

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[167] See Decision on the Confirmation of the Charges in the Case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, paras. 571-572, 573-576, 579 and 580.
[168] *The Prosecution Application*, para. 365.
[169] *The Prosecution Application*, para. 366.
[170] *The Prosecution Application*, paras. 365-366, footnotes 504 and 505.
[171] *The Prosecution Application*, para. 366, footnote 505.
[172] ICTY, *The Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 53-57; ICTY, *The Prosecutor v. Vasiljević*, Case No IT-98-32-A, Appeals Judgment, 25 February 2004, paras. 120 and 128; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, para. 333; and *The Prosecutor v Krnojelac* Case No. IT-97-25-T, Trial Judgment, 15 March 2002, para. 83.
[173] ICTR, *The Prosecutor v Seromba*, Case No. ICTR-01-66-A, Appeals Judgment, 12 March 2008, para. 176; ICTR, *The Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 523; ICTR, *The Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93 and 94.

but they are also supported by international human rights standards,[174] as well as article 22(2) of the Statute,[175] which fully embraces the general principle of interpretation *in dubio pro reo*.

157. In this regard, the Majority recalls that, according to the consistent interpretation of article 58 of the Statute by this Chamber, a warrant of arrest or a summons to appear shall only be issued in relation to a specific crime if the competent Chamber is satisfied that there are reasonable grounds to believe that the relevant crime has been committed and the suspect is criminally liable for it under the Statute.[176]

158. In applying the law on the proof by inference to the article 58 evidentiary standard in relation to the existence of a GoS's genocidal intent, the Majority agrees with the Prosecution in that such a standard would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS's *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups.

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

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[174] See, in particular, Article 11 of the Universal Declaration of Human Rights, Article 15 of the International Covenant on Civil and Political Rights, Article 7 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights, Article 7 of the African Charter on Human and People's Rights.
[175] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (A/CONF.183/DC/R.33), 27 June 1998; see also Lee, R.S. (ed) *The International Criminal Court. The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, pp. 194-195 and 212-213. See also Triffterer, O. *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition. Munich, CH Beck Hart Nomos, 2008, pp. 716-717 and 723-726. See also Cassese, A. (Ed.) *The Rome Statute of the International Criminal Court. a commentary*, Vol. 1, New York, Oxford University Press, 2002, pp. 746-756.
[176] ICC-01/04-01/07-717, paras. 263, 284, 307, 326, 338, 354, 364 and 377; ICC-01/04-01/06-803-tEN, paras. 321 and 410.

160. In the Majority's view, this conclusion, besides being fully consistent with the case law of the ICTY[177] and ICTR[178] on the matter, is also required by the application of the general principle of interpretation *in dubio pro reo*, embraced by article 22(2) of the Statute.[179] Moreover, it constitutes the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5(1)(c) of the *European Convention on Human Rights*[180] and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the *American Convention on Human Rights*.[181]

161. In this regard, the Majority highlights that a different interpretation would result in either an impermissible extension of the applicable law on proof by inference or in an impermissible lowering of the standard of proof that, according to article 58 of the Statute, must be met for the issuance of an arrest warrant or a summons to appear, in relation to any crime within the jurisdiction of the Court.

(b) Whether the materials provided by the Prosecution show reasonable grounds to believe in the existence of a GoS's intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups

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[177] ICTY, *The Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 53-57; ICTY, *The Prosecutor v Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, para. 333; ICTY, *The Prosecutor v Vasiljević*, Case No IT-98-32-A, Appeals Judgment, 25 February 2004, paras. 120 and 128.

[178] ICTR, *The Prosecutor v Seromba*, Case No. ICTR-01-66-A, Appeals Judgment, 12 March 2008, paras. 74-77 and 87; ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998 para. 523; ICTR, *The Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93-94.

[179] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (A/CONF.183/DC/R.33), 27 June 1998. See also Lee, R.S. (ed) *The International Criminal Court The Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, pp.194-195 and 212-213. See also Triffterer, O *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Munich, CH Beck Hart Nomos, 2008, pp. 716-717 and 723-726.

[180] According to the ECHR, the reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary deprivation of liberty. See ECHR, *Case of Fox, Campbell and Hartley v United Kingdom*, "Judgment", 30 August 1990, Application No. 12244/86; 12245/86; 12383/86, paras. 31-36, ECHR, *Case of K-F v. Germany*, "Judgment", 27 November 1997, Application No. 144/1996/765/962, para. 57, ECHR, *Case of Labita v Italy*, "Judgment", 6 April 2000, Application No. 26772/95, paras. 155-161, ECHR, *Case of Berktay v Turkey*, "Judgment", 1 March 2001, Application No. 22493/93, para. 199; ECHR, *Case of O'Hara v United Kingdom*,"Judgment", 16 October 2001, Application No. 37555/97, paras. 34-44.

[181] See for instance IACHR, *Case of Bámaca Velásquez v Guatemala*, "Judgment", 25 November 2000, Series C No.70, paras. 138-144, IACHR, *Case of Loayza-Tamayo v Peru*, "Judgment", 17 September 1997, Series C No.33, paras. 49-55, and IACHR, *Case of Gangaram-Panday v Suriname*, "Judgment", 21 January 1994, Series C No.16, paras. 46-51.

162. In the absence of direct evidence, the Prosecution submits that:

> 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 consideration of [a number of] factors.[182]

163. The Majority observes that the Prosecution, at paragraphs 366 *et seq* of the Prosecution Application, provides for nine different factors from which to infer the existence of a GoS's genocidal intent.

164. In the Majority's view, they can be classified into the following categories:

i. the alleged existence of a GoS strategy to deny and conceal the crimes allegedly committed in the Darfur region against the members of the Fur, Masalit and Zaghawa groups;[183]

ii. some official statements and public documents, which, according to the Prosecution, provide reasonable grounds to believe in the (pre) existence of a GoS genocidal policy;

iii. the nature and extent of the acts of violence committed by GoS forces against the Fur, Masalit, and Zaghawa civilian population.

1. Alleged GoS strategy to deny and conceal the crimes committed in Darfur, GoS official documents, and statements of Omar Al Bashir and other GoS officials

165. In relation to the alleged existence of a GoS strategy to deny and conceal the alleged commission of crimes in Darfur, the Majority considers that, even if the existence of such strategy was to be proven, there can be a variety of other plausible

[182] *The Prosecution Application*, para. 366.
[183] *The Prosecution Application*, paras. 396-398.

reasons for its adoption, such as the intention to conceal the commission of war crimes and crimes against humanity.

2. Official statements and public documents allegedly related to a GoS genocidal policy

Public Documents

166. The Prosecution places particular reliance on the following documents:

i. A Secret Bulletin issued by the NIF (intelligence services) in 1992, which is described by the Prosecution as follows:

> In 1992, following Bolad's defeat, the NIF issued a secret bulletin advocating the exclusion of the Fur from key Government positions in the intelligence service, the military and the police administration. The bulletin also advocated the destabilization of Fur areas to force the removal of the Fur from Darfur. This idea was also being propagated by a group known as the "*Arab Gathering*".[184]

ii. A decree issued by Omar Al Bashir in 1994, which according to the Prosecution shows that:

> 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.[185]

iii. A local reform enacted in March 1995 by Muhammad Ahmad Al-Fadul, which the Prosecution describes as follows:

> 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. 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. This reform provoked another war in Dar Masalit from 1996 to 1999 during which tribal Militias backed by AL BASHIR's Government

[184] *The Prosecution Application*, para. 351.
[185] *The Prosecution Application*, para. 352.

killed at least 2,000 Masalit civilians and displaced 100,000, 40,000 of whom fled to Chad.[186]

iv. A 1986 Armed Forces Memorandum and some minutes of meetings held in 2003 by the State Security Committee from West Darfur, which the Prosecution refers to in the following terms:

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 the mechanism of the plan established by AL BASHIR to ensure the coordination required [...] 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.", 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." [...] 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*.[187]

167. In the Majority's view, the first three documents (the 1992 NIF Secret Bulletin, the 1994 Decree and 1995 Local Reform) do not provide, by themselves, any *indicia* of a GoS's genocidal intent. In this regard, the Majority considers that they provide, at best, *indicia* of the GoS's intent to discriminate against the members of the Fur, Masalit and Zaghawa groups by excluding them from federal government and implementing political arrangements aimed at limiting their power in their homeland (Darfur).[188] Whether a different conclusion is merited when assessed in

[186] *The Prosecution Application*, para. 354.
[187] *The Prosecution Application*, paras. 380-382.
[188] In this regard, the Majority observes that in paragraph 392 of its recent Judgment on Genocide, the ICJ found that the "Decision on the Strategic Goals of the Serbian People in Bosnia and Herzegovina", issued on 12 May 1992 by Momcilo Krajišnik (the President of the National Assembly of the self-proclaimed Serb Republic of Bosnia, Republic Srpska), did not constitute evidence of intent to destroy the Bosnian Muslim group. The relevant document reads as follows: "The Strategic Goals, i.e. the priorities of the Serbian people of Bosnia and Herzegovina are: (1) Separation as a state from the other two ethnic communities; (2) A corridor between Semberija and Krajina; (3) The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states; (4) The establishment of a border on the Una and Neretva rivers; (5) The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part; (6) An outlet to the sea for the Republika Srpska."

light of the rest of the materials provided by the Prosecution in support of the Prosecution Application is a question that shall be analysed below by the Majority.

168. In relation to the 1986 Armed Forces Memorandum and the 2003 West Darfur State Security minutes, the Majority considers that they are only evidence of the internal organisation and coordination among the three different levels of government in Sudan (Federal, State and Local), and among the different bodies within each of these levels of government.

169. In the Majority's view, evidence of close coordination provides *indicia* of the existence of a well organised governmental structure through which decisions taken in the upper levels of the GoS can be effectively implemented. Nevertheless, considering the ongoing armed conflict between the SLM/A, the JEM and other armed groups (which appear to have broad social support in Darfur) and the GoS, the Majority sees no *indicia* of unlawfulness in securing a close coordination among the military, the police, the intelligence services and the civil administration, as well as among the federal, the state and the local levels of government.

Official Statements

170. The Prosecution places particular reliance on two statements allegedly made by Omar Al Bashir in March/April 2003, at a time in which peace talks with the SLM/A and the JEM broke off, and the GoS preparations for its counter-insurgency campaign were starting:

i. In March 2003, Omar Al Bashir is said to have declared in front of a number of members of the Sudanese Armed Forces in

El Facher that the rebellion is to be quelled in two weeks and that no prisoners or wounded are to be brought back;[189]

ii. In April 2003, Omar Al Bashir, again in El Facher, is said to have stated in front of Northern Darfur State officials and members of the Sudanese Armed Forces officials that he "did not want any villages or prisoners, only scorched earth".[190]

171. The Prosecution also relies on a statement allegedly given on national television by Omar Al Bashir in January 2004. According to the Prosecution, Omar Al Bashir is said to have confirmed the concept of the operation in Darfur and is said to have told the Sudanese public that he had given the Sudanese Armed Forces *carte blanche* in Darfur not to take prisoners or inflict injuries.[191]

172. The Majority is of the view that the above-mentioned statements allegedly made by Omar Al Bashir do not provide, by themselves, any *indicia* of a GoS's genocidal intent. In this regard, the Majority considers that they provide, at best, *indicia* of Omar Al Bashir's alleged individual criminal responsibility, pursuant to article 25(3)(a) of the Statute, for those war crimes and crimes against humanity that were allegedly a core component of the GoS counter-insurgency campaign. Whether a different conclusion is merited when assessed in light of the rest of the materials provided by the Prosecution in support of the Prosecution Application is a question that shall be analysed below by the Majority.

173. Finally, the Prosecution also relies on public speeches made by other members of the GoS,[192] and in particular by Ahmad Muhammad Harun ("Ahmad Harun"),

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[189] *The Prosecution Application*, para. 271.
[190] *The Prosecution Application*, para. 271.
[191] *The Prosecution Application*, para. 275.
[192] The Prosecution also refers to some statements by low level perpetrators, such as those captors of Arawala women who told them "little dogs, this land is not for you", see *Prosecution Application*, para.138. Likewise, direct perpetrators are said to have told their victims "*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*", see *Prosecution Application*, paras. 277 and 385.

Deputy Minister for Internal Affairs from April 2003 until his appointment as Minister for Humanitarian Affairs in 2005:

i. On or around 23 July 2003, at Khirwaa, Ahmad Harun is said to have addressed an audience that included two to three hundred conscripts who were wearing military uniforms, saying that there was a need to teach the rebels a lesson and that he had provided enough soap and that the conscripts had to do the remaining cleaning job.[193]

ii. At a public meeting in Al Geneina in July 2003, where Ahmad Harun is said to have called on the people to go to their sons and ask them to lay down their firearms, he is also said to have stated that "the President had handed over to him the Darfur security file and given him all the power and authority to kill or forgive in Darfur for the sake of peace and security", and that "for the sake of Darfur, they were ready to kill ¾ of the people in Darfur so that a ¼ could live";[194] and

iii. At a public meeting in Mukjar on 7 August 2003, Ahmad Harun is said to have stated that there was a rebellion against the State in Darfur, and that, since the children of the Fur had become rebels, all the Fur and what they had, had become booty for the Mujahidin";[195]

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[193] Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0020, paras.70-71;
[194] Witness Statement (Anx 25) DAR-OTP-00095-049 at 076-077.
[195] Witness Statement (Anx 65) DAR-OTP-0119-0518, at 076-077. Moreover, the Prosecution, in AnxE1 to the 17 November 2008 Prosecution Submission of Supporting Material, refers to the following excerpts of witness statements, that have not been provided to the Chamber in full: (i) in August 2003, Ahmad Harun is said to have stated in Camp2 that "The Fur are making headache to us [...] We managed the south and the east, but now [...] they are making trouble [...] "God willing, we will kill them and make then homeless [...] and Darfur land will be suitable for people better than them; (ii) at an unknown time and location, Ahmad Harun is reported to have said that "Darfur land will not be dirtied by the ... by the western [...] And upon your arrival we will never hear about those who belong to the west in Darfur"; and (iii) at an unknown time and location, Ahmad Harun is said to have told local leaders that "You the emirs...uh.... Clean Darfur; wipe out the blacks and this land will be to you and your friends from Niger, from Mahamid tribe will come and... and live with you on this land and we are capable to change even the name of this land". See (Anx E1) DAR-OTP-0158-1165 at 1192-1193 and (Anx E1) DAR-0158-0964 at 1001-1007 and at 1016-1021.

174. In the Majority's view, Ahmad Harun's statements contain the harsher language used by GoS officials that can be found in the materials provided by the Prosecution in support of the Prosecution Application.

175. Nevertheless, the Majority notes that there are reasonable grounds to believe that Ahmad Harun, who spent important amounts of time in Darfur, was not actually part of the highest level of the GoS in Khartoum and that his role was that of a link between the State Governors in the three Darfurian States and the said highest level of the GoS in Khartoum.[196]

176. Furthermore, the Majority underscores that, when the Prosecution requested the issuance of a summons to appear for Ahmad Harun in 2007, for his alleged responsibility in some of the most brutal acts of violence that allegedly occurred in the Darfur region against members of the Fur, Masalit and Zaghawa civilian population, the Prosecution did not see any *indicia* of genocidal intent on his part as it was only alleged that he acted with a persecutory intent.[197]

3. Nature and extent of the acts of violence against members of the Fur, Masalit and Zaghawa groups

[196] ICC-02/05-01/07-2-Corr, p. 5; ICC-02/05-01/07-1-Corr, para. 128; *The Prosecution Application*, paras. 254-262; Meeting with Ahmed Harun, 15 January 2005 (Anx 15) DAR-OTP-0016-0013 at 0013-0016; Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0076-0077, paras. 128-129.

[197] The case of *The Prosecutor v against Ahmad Harun and Ali Kushayb* focuses on following four specific areas of the State of Western Darfur where there are reasonable grounds to believe that the acts of violence against the Fur population were particularly widespread and brutal (thousands of persons killed, numerous acts of rape, outrages upon personal dignity, imprisonment, torture, inhumane acts, pillaging, destruction of property and forcible transfer of the population): (i) Kodoom and surrounding areas; (ii) Bindisi and surrounding areas; (iii) Mukjar and surrounding areas; and (iv) Arawala and surrounding areas. See Warrant of Arrest for Ahmad Harun ICC-02/05-01/07-2-Corr, Count 1-9 (regarding Kodoom), Count 10-20 (regarding Bindisi), Count 21-38 (regarding Mukjar) and Count 39-51 (regarding Arawala).

Conditions within the IDP camps in Darfur and alleged GoS hindrance of humanitarian assistance as the key component of the Prosecution's allegations of the existence of a GoS's genocidal intent

177. As a result of previous findings, and as the Prosecution itself acknowledges,[198] the Prosecution's allegations concerning the existence of reasonable grounds to believe in a GoS's genocidal intent are essentially based on the inference that can be drawn from the alleged clear pattern of mass-atrocities committed by GoS forces between 2003 and 2008 against the Fur, Masalit and Zaghawa civilian population throughout Darfur region.

178. In particular, the Majority observes that, in order to show the existence of a GoS's genocidal intent, the Prosecution relies heavily on what the Prosecution considers to be a key component of an alleged GoS genocidal campaign: the subjection of a substantial part of the Fur, Masalit and Zaghawa civilian population of Darfur (up to 2.700.000 individuals) to unbearable conditions of life within IDP Camps due to the: (i) insufficient allocation of resources by the GoS for IDPs within Sudan; (ii) acts of violence (including murder, rape and mistreatment) committed by GoS forces within the IDP Camps; (iii) unlawful arrest of community leaders and subsequent mistreatment/torture in the facilities of HAC (which was allegedly comprised of former members of the NISS); and (iv) the GoS hindrance of access to international aid.

Prosecution's allegations concerning the GoS insufficient allocation of resources in the IDP Camps in Darfur

[198] *The Prosecution Application*, paras. 364-366 and 373-374.

179. In relation to the alleged insufficient resources allocated by the GoS to ensure adequate conditions of life in IDP Camps in Darfur, the Majority considers that the Prosecution's allegation is vague in light of the fact that, in addition to the Prosecution's failure to provide any specific information as to what possible additional resources could have been provided by the GoS, there existed an ongoing armed conflict at the relevant time and the number of IDPS s, according to the United Nations, was as high as two million by mid 2004, and as high as 2.7 million today.[199]

Situation within the IDP Camps as reflected in the materials provided by the Prosecution

180. In relation to conditions inside the IDP Camps, the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application reflect a situation within the IDP Camps which significantly differs from the situation described by the Prosecution in the Prosecution Application. The Majority reaches this conclusion as a result of an overall assessment of the materials provided by the Prosecution[200] - including the following account of the conditions since February 2004 in one of the largest IDP Camps in Darfur ("the Kalma Camp") given in the latest report issued on 23 January 2009 by the United Nations High Commissioner for

[199] See UN Press Conference by Assistant Secretary-General for Humanitarian Affaires on Humanitarian Situation in Darfur, 31 August 2007 (Anx J60) at DAR-OTP-0147-0891 at 0891.

[200] Including, *inter alia*: Security Council 5872nd meeting, 22 April 2008 (Anx J52) DAR-OTP-0147-1057 at 1061-1064; United Nations Office for the Coordination of Humanitarian Affairs – Intergrated Regional Information Networks, *Humanitarian access blocked in Darfur*, 12 January 2004 (Anx J54) DAR-OTP-0141-0175; HRW Report, *Darfur Humanitarian Aid under Siege*, May 2006 (Anx J55) DAR-OTP-0107-1076 at 1081-1084; United Nation's System Standing Committee on Nutrition, *Nutrition information in crisis situations – Report number 1*, 29 February 2004 (Anx J56) DAR-OTP-0141-0165; United Nations Resident Coordinator, *Darfur Crisis, Sudan: UN Darfur Task Force Situation Report 11 Mar 2004*, 11 March 2004 (Anx J57) DAR-OTP-0141-0162; United Nations Resident Coordinator, *Darfur Crisis, Sudan. UN humanitarian situation report, 15 Apr 2004*, 15 April 2004 (Anx J58) DAR-OTP-0141-0177; Press Article, USA Today. *Malnutrition, Lawlessness are increasing in Darfur* (Anx J59) DAR-OTP-0147-0889; United Nations Mission in Sudan, *Media Monitoring Report*, 6 May 2008 (Anx J61) DAR-OTP-0147-1077 at 1080; United Nations Inter-agency Fact Finding Mission report, 25 April 2004 (Anx J63) DAR-OTP-0030-0066 at 0069-0071; Médecins Sans Frontières, *Mornay Camp, West Darfur State, Sudan No relief in sight*. 21 June 2004 (Anx J68) DAR-OTP-0149-0529 at 0529-0532; Office of UN Resident and humanitarian co-ordinator for the Sudan, *Darfur Humanitarian Profile No 4*, 1 July 2004 (Anx J69) DAR-OTP-0149-0537 at 0543-0550.

Human Rights on the situation in Sudan, which indicates, *inter alia*, that during the relevant period in the Kalma Camp: (i) several violent exchanges between armed elements within the Camp and GoS forces took place; (ii) several sources referred to by UNAMID as "credible, independent sources", reported on the presence in the Camp of "light and heavy arms"; (iii) the conflict between the GoS forces and the armed elements within the Camp was a very important factor in exacerbating the tension between the IDP community and the GoS; and (iv) poor living conditions in the Camps were not systematically, but only "at times", exacerbated by measures introduced by the GoS on security grounds, and, in some circumstances, such measures were lifted at the intervention of UNAMID:

> The incident at Kalma IDP camp should be analysed in the context of the long-standing tension between the residents of the camp and the Government of Sudan regarding control of the camp. South Darfur governmental authorities have frequently asserted that there is a presence of political, criminal and armed movement elements within the camp. Kalma camp was established in February 2004. As one of the largest camps in Darfur, the total population of Kalma camp is estimated at approximately 80,000 individuals: the majority being from the Fur, followed by the Dajo, Zaghawa, Massalit, Birgit and Tunjer tribes. The camp is one to two kilometers' long and extends seven kilometers' along the railway track from east to west. The camp is located 15 km east of Nyala and is divided into eight sectors; each dominated by one or more ethnic group and headed by a sheik nominated by the IDPs in the area. The camp has become tribally fragmented and is plagued by internal divisions and quasi-urban problems that often reflect the political aspirations of the different ethnic groups living in it.
>
> Living conditions in the camp are very poor due to overcrowding, water and food shortages and the lack of basic sanitation infrastructure, which at times have been exacerbated by measures introduced by government on security grounds. For example, prior to the incident IDPs and humanitarian agencies were often unable to operate the pumps to draw water from the wells due to Government imposed fuel restrictions, forcing them at times to utilize unclean water sources, such as rainwater. In some of these circumstances, the measures were lifted at the intervention of UNAMID.
>
> The Government maintains a presence approximately two kilometres from the camp, through two checkpoints (one National Intelligence and Security Services (NISS) and the other of the Humanitarian Aid Commission (HAC).
>
> Prior to the incident, UNAMID police maintained a daily presence at Kalma camp. Following the incident and requests by IDP leadership for increased UNAMID protection, on 13 September 2008, UNAMID began maintaining a 24/7 presence in the camp.
>
> The Government has stated that supporters of Sudanese Liberation Army/Abdul Wahid faction (SLA/AW), Sudanese Liberation Army/Minni Minnawi faction

(SLA/MM) and a much smaller presence of Justice and Equality Movement (JEM) reportedly live within the camp.

According to the Advisory Council for Human Rights of the Government of the Sudan (ACHR), between 2004 and August 2008, the South Darfur State authorities registered 75 cases of criminal offences, including numerous acts of killings and armed robberies, which are believed to have been perpetrated by gangs or individuals sheltered or living within the camp.

Since the establishment of Kalma camp, there have been several violent exchanges between armed elements within the camp and Government security forces. For example, in November 2004 members of a movement attacked the police compound outside of Kalma camp, killing 25 police officers. On 21 August 2007, the Nyala police conducted an operation at Kalma camp in which at least 35 camp residents were arrested on suspicion of alleged involvement in armed attacks on two police stations in nearby Al Salaam IDP camp on 15 August 2007 and in Um Kunduwa on 16 August 2007. The police stated that the attackers later sought refuge and hid stolen weapons in Kalma camp. Credible, independent sources have reported the presence of light and heavy arms in Kalma camp although this information has not been verified by UNAMID.

The conflict between the Government and armed elements has exacerbated tensions between the IDP community and the Government. This tension may stem from attempts by the Government to uproot armed elements as well as significant abuses at the hands of the Government forces and its allied militia. These abuses include rape, arbitrary arrest and detention, assault, intimidation, shooting incidents, commercial bans and other forms of violence. Aid entities conducting humanitarian assistance activities in Kalma camp have faced harassment, restricted movement or entry into the camp, visa denial and other impediments impacting their ability to provide assistance in the camp. The government has also imposed fuel cuts from time to time on the camp on the grounds that fuel supplies destined for humanitarian purposes are being diverted to the movements.

Efforts to dismantle the Kalma camp or break it into smaller more manageable camps began in November 2004 at the suggestion of the Humanitarian Aid Commission. In June 2005, humanitarian agencies initiated an information campaign for voluntary relocation from Kalma Camp to Al Salaam camp, which was rejected by the Kalma IDPs due to their concern that this was the initial stages of a forced relocation.

On 21 August 2008, Judge Kamal El-Deen Ali Mohamed El-Zaki from the Nyala Crimial Court, issued a General Search Order authorizing the police to search "all centres of Kalma IDP camp" for "arms, drugs, stolen property, detainees and anything which violates the law". Although the warrant refers to suspicion of crimes related to unlawful possession of weapons, kidnapping, receipt of stolen property, theft and robbery, the warrant does not refer to specific individuals, locations or previously committed crimes, and appears to be a blanket warrant to search the entire camp.

In more general terms, the lack of protection of civilians, and in particular of IDPs, remains one of the most salient concerns in Darfur. Throughout Darfur, increased presence of Government security forces and armed movements in and around IDP camps has resulted in heightened vulnerability of the IDP community. Following the Kalma incident, IDP leaders in several camps expressed their concern to

UNAMID that similar operations would be conducted in other IDP camps throughout Darfur.[201]

Level of GoS hindrance of medical and other humanitarian assistance in the IDP Camps in Darfur as reflected in the materials provided by the Prosecution

181. In relation to the Prosecution's allegations concerning the alleged GoS hindrance of medical and other humanitarian assistance in the IDP Camps in Darfur,[202] the Majority considers that hindrance of humanitarian assistance, as well as cutting off supplies of food and other essential goods, can be carried out for a variety of reasons other than intending to destroy in whole or in part the targeted group. As a result, the Prosecution's claim must be assessed in light of the extent and systematicity, duration and consequences of the alleged GoS obstruction.

182. The Majority observes that this approach has also been taken by the ICJ in its recent Judgment on Genocide. There, the ICJ found that "civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities."[203] In reaching this conclusion, the ICJ placed particular emphasis on the fact that "UNHCR food and fuel convoys had been 'obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces.'"[204] The ICJ also stressed the findings contained in the conclusion of the report of the UN Commission of Experts, according to which, the blockade of humanitarian aid had been used as an important tool in the siege of Sarajevo.[205] Furthermore, the ICJ

[201] Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, *Killing and injuring of civilians on 25 August 2008 by government security forces. Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union, ICC-02-05-179-Conf-Exp-Anx2, section on "Background and Context", pp. 3-5.
[202] *The Prosecution Application*, paras. 185-188; ICC-02/05-T-2-Conf-Exp-ENG ET, p. 4, line 3 to p. 5, line 3, p. 14, lines 3-9 and p. 24, lines 21-23.
[203] ICJ Judgment on Genocide, para. 328.
[204] ICJ Judgment on Genocide, para. 324.
[205] ICJ Judgment on Genocide, para. 324.

underscored the following evidence in relation to the siege of towns of Bosnia and Herzegovina other than Sarajevo:

> For instance, with regard to Gorazde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient.[...] In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off [...]. Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment [...]. Similar patterns occurred in Bihac, Tuzla, Cerska, and Maglaj.[206]

183. Nevertheless, despite these findings, the ICJ concluded that it had not been conclusively established that the acts were committed with the *dolus specialis*/specific intent to destroy the targeted group in whole or in part.[207] In making such finding, the ICJ gave particular weight to the fact that:

> The Special Rapporteur of the United Nations Commission on Human Rights was of the view that "[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croatians to flee.[208]

184. In relation to the extent, systematicity, duration and consequences of the alleged GoS hindrance of medical and other humanitarian assistance needed to sustain life in the IDP Camps in Darfur, the Majority observes that in the additional materials provided by the Prosecution, at the request of the Chamber on 18 November 2008, the Prosecution included a chronology on the evolution of this alleged GoS practice from 2003 to the end of 2007.

185. According to the reports included in this chronology, the higher level of obstruction to humanitarian aid took place during the first year of the conflict until June 2004, at a time in which GoS forces appear to have launched their two main offensives (summer 2003 and January 2004). The lack of humanitarian assistance is

[206] ICJ Judgment on Genocide, para. 327.
[207] ICJ Judgment on Genocide, para. 328.
[208] ICJ Judgment on Genocide, para. 328.

explained in some reports by the GoS's attempt to hide the magnitude of the crisis.[209] Yet, in one of the reports, the United Nations Office for Humanitarian Affairs emphasised the late reaction and lack of coordination of the international community.[210]

186. The reports provided by the Prosecution also underline that, after the conclusion of the Moratorium on Restrictions (July 2004),[211] access to the IDP Camps improved substantially and permitted Darfur to eventually become the site of "the largest world humanitarian effort".[212]

187. Finally, the said reports also highlight that bureaucratic barriers and difficulties in accessing a number of areas increased again in 2006. Nevertheless, despite increasing difficulties it appears that aid programmes continued to operate.[213]

188. This, in the Majority's view, is consistent with the account given by the latest report of the United Nations High Commissioner for Human Rights in relation to the Kalma Camp, where it is stressed that the poor living conditions existing in the

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[209] For year 2003, see ICC-02/05-161-Conf-AnxF, paras. 124-126. For January-June 2004, see ICC-02/05-161-Conf-AnxF, paras. 127-130.

[210] *Evaluation by UN Office for Humanitarian Affairs of Situation during the previous year* OCHA DHP No.3 June 2004, page 6, reported that access to many areas has remained hindered due to the difficulties resulting from a lack of capacity on the part of UN and other operational agencies, which had been further exacerbated by continued Government of Sudan (GoS) delays in issuing visas and travel permits for humanitarian personnel and the slow release of essential humanitarian supplies and equipment. As of 20 May, there were at least 116 humanitarian workers awaiting either entry visas or travel permits to work in Darfur. The earliest application date pending from 3 April. (ICC-02/05-161-Conf-AnxF, para. 106).

[211] According to the Prosecution (ICC-02/05-161-Conf-AnxF, para. 131), under international pressure, the GoS finally agreed to the July 2004 Moratorium on Restrictions wherein the text of the Joint Communiqué states that the Sudanese government commits to Implement a 'moratorium on restrictions' for all humanitarian work in Darfur –thereby recognizing restrictions – and remove any other obstacles to humanitarian work, including (i) suspension of visa restrictions for all humanitarian workers and permitting freedom of movement for aid workers throughout Darfur; (ii) permitting immediate temporary NGO registration through a simple notification process that OCHA will offer to manage on behalf of NGOs permanent registration shall be processed within 90 days; and (iii) suspension of all restrictions for the importation and use of all humanitarian assistance materials, transport vehicles, aircraft and communication equipment. According to Human Rights Watch (ICC-02/05-161-Conf-AnxF, para. 132): "To a large extent, this new process heavily contributed to the massive increase in humanitarian personnel and programs in Darfur in 2004 and 2005."

[212] On a statement issued on 27 March 2007, John Holmes (UN Under–Secretary General for Humanitarian Affairs) referred to the aid efforts in Darfur as "the world's largest aid effort" (ICC-02/05-161-Conf-AnxF, para. 135).

[213] For the year 2006, see ICC-02/05-161-Conf-AnxF, para. 133. For the year 2007, ICC-02/05-161-Conf-AnxF, paras. 134-137.

Kalma Camp since its establishment in February 2004 "at times have been exacerbated by measures introduced by government on security grounds".[214]

189. As a result, the Majority considers that the materials submitted by the Prosecution in support of the Prosecution Application provide reasonable grounds to believe that the extent, systematicity and consequences of the GoS hindrance of medical and humanitarian assistance in IDP Camps in Darfur varied greatly over time. Consequently, the Majority finds that such materials reflect a level of GoS hindrance of medical and humanitarian assistance in IDP Camps in Darfur which significantly differs from that described by the Prosecution in the Prosecution Application.

Prosecution's reliance on the nature and extent of the war crimes and crimes against humanity allegedly committed by GoS forces as evidence of a GoS's genocidal intent

190. The Majority observes that the second component of the Prosecution's submissions in relation to the inference of the existence of a GoS's genocidal intent from the clear pattern of mass-atrocities allegedly committed by GoS forces between 2003 and 2008 against the Fur, Masalit and Zaghawa civilian population, is based on the underlying facts of the Prosecution's allegations for war crimes and crimes against humanity that have been discussed in previous sections.

191. In this regard, the Majority notes that the Chamber has already found that there are reasonable grounds to believe that a core component of the GoS counter-insurgency campaign, which started soon after the April 2003 attack on the El Fasher

[214] Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan, *Killing and injuring of civilians on 25 August 2008 by government security forces Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union (ICC-02-05-179-Conf-Exp-Anx2, p. 5).

airport and lasted for well over five years, was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups - perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing conflict in Darfur.[215]

192. In particular, the majority observes that there are reasonable grounds to believe that as part of the GoS counter-insurgency campaign, GoS forces:

i. carried out numerous unlawful attacks, followed by systematic acts of pillage, on towns and villages, mainly inhabited by civilians belonging to the Fur, Masalit and Zaghawa groups;[216]

ii. subjected thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of murder, as well as to acts of extermination;[217]

iii. subjected thousands of civilian women, belonging primarily to the said groups to acts of rape;[218]

iv. subjected hundreds of thousands of civilians belonging primarily to the said groups to acts of forcible transfer;[219] and

v. subjected civilians belonging primarily to the said groups to acts of torture.[220]

193. Nevertheless, the Majority considers that the existence of reasonable grounds to believe that GoS forces carried out such serious war crimes and crimes against humanity in a widespread and systematic manner does not automatically lead to the

[215] *See section above on War Crimes.*
[216] *See section above on War Crimes.*
[217] *See section above on Crimes against Humanity.*
[218] *See section above on Crimes against Humanity.*
[219] *See section above on Crimes against Humanity.*
[220] *See section above on Crimes against Humanity.*

conclusion that there exist reasonable grounds to believe that the GoS intended to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups.

194. In this regard, the Majority observes that a similar approach has recently been taken by the ICJ in its Judgment on Genocide, in which, leaving aside the specific events following the fall of Srebrenica, the ICJ declined to infer that the Bosnian Serb leadership acted with a genocidal intent from the existence of a clear pattern of mass-atrocities affecting hundreds of thousands of Bosnian Muslims for a period of five years, including *inter alia:*

i. the mass killings of tens of thousands of Bosnian Muslim civilians and prisoners of war;

ii. the mass rapes of tens of thousands of Bosnian Muslim civilian women;

iii. the deportation and forcible displacement of hundreds of thousands of Bosnian Muslim civilians;

iv. the widespread and systematic beatings, torture and inhumane treatment (malnutrition and poor health conditions) in dozens of detention camps throughout Bosnia and Herzegovina;

v. the siege of Bosnian Muslim civilians in cities throughout Bosnia and Herzegovina, such as Sarajevo, where shelling, sniping and starvation by hindering humanitarian aid was a matter of course; and

vi. the destruction of cultural, religious and historical property in an attempt to wipe out the traces of the existence of the Bosnian-Muslim group from Bosnia and Herzegovina.[221]

[221] See ICJ Judgment on Genocide, paras. 276-277, 319, 328, 334, 344 and 354.

195. Moreover, the Majority finds that there are a number of additional factors, resulting from the materials provided by the Prosecution, that must be taken into consideration in determining whether the existence of reasonable grounds to believe that the GoS acted with genocidal intent is the only reasonable conclusion from the commission by GoS forces, in a widespread and systematic manner, of the above-mentioned war crimes and crimes against humanity.

196. First, in relation to the attacks conducted by the GoS forces on towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups, the Majority finds that there are reasonable grounds to believe that in most of such attacks, the large majority of their inhabitants were neither killed nor injured despite the fact that the attackers, in addition to often counting on aerial support, either had previously encircled the targeted village or came to such village with tens or hundreds of vehicles and camels forming a wide line.[222]

197. Second, the Majority observes that the Prosecution does not claim that GoS forces established in Darfur long-lasting detention camps where inmates were systematically mistreated, tortured and executed.

198. Third, in relation to forcible displacement resulting from the attacks, the Majority is of the view that there are reasonable grounds to believe that GoS forces did not attempt to prevent civilians belonging to the Fur, Masalit and Zaghawa groups from crossing the border to go to refugee camps in Chad,[223] and that the great majority of those who left their villages after the attacks by GoS forces reached IDP Camps in Darfur or refugee camps in Chad.

199. Fourth, in the view of the Majority, the Prosecution has failed to substantiate its claim that the materials that it submitted provide reasonable grounds to believe

[222] *The Prosecution Application*, paras. 106 and 112. See section above on Crimes *against Humanity*.
[223] *The Prosecution Application*, paras. 160-162, 166, and 167. *See section above on Crimes against Humanity.*

that Janjaweed militiamen were stationed around IDP Camps for the purpose of raping those women and killing those men who ventured outside the camps.[224]

200. Fifth, the Chamber observes that, in the case of *The Prosecutor v. Ahmad Harun and Ali Kushayb*, the Prosecution never claimed that the existence of reasonable grounds to believe in a GoS's genocidal intent could be inferred from the facts of the case, although there are reasonable grounds to believe that the crimes that are the subject of such case are allegedly among the gravest that occurred in Darfur in terms of their systematicity and brutality.

201. As a result, the Majority considers that the existence of reasonable grounds to believe that the GoS acted with genocidal intent is not the only reasonable conclusion of the alleged commission by GoS forces, in a widespread and systematic manner, of the particularly serious war crimes and crimes against humanity mentioned above. Whether a different conclusion is merited when assessed in light of the other materials provided by the Prosecution in support of the Prosecution Application shall be analysed by the Majority in the following section.

4. Conclusion

202. The Majority observes that the Prosecution acknowledges that it has no direct evidence of the GoS's genocidal intent and that it therefore relies on proof by inference.[225]

203. In light of this circumstance, the Majority agrees with the Prosecution in that the article 58 evidentiary standard would be met only if the materials provided by

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[224] *The Prosecution Application*, paras.123-124, 132, 137, 144, 145, 158, 163, 165 and 170; Witness Statement (Anx J90) DAR-OTP-0119-0048 at 0053-0054, 0061; US Agency for International Development Report, *The use of rape as a weapon of war in the conflict in Darfur, Sudan*, October 2004 (Anx J18) DAR-OTP-0005-0108 at 0126-0127, 0129-0131; UN General Assembly, Human Rights Council, *Human Rights Situations that Require the Council's Attention* (A/HRC/7/22), 3 March 2008 (Anx J28) DAR-OTP-0148-0259 at 0269-0270; UN monthly report of the Secretary-General on Darfur, 8 November 2006 (Anx J33) DAR-OTP-0147-1102 at 1105-1106; UNSC, Report of the Secretary-General on Darfur, 27 July 2007 (Anx J34) DAR-OTP-0147-1111 at 1115.

[225] *The Prosecution Application*, paras. 364-366 and 400; ICC-02/05-T-2-Conf-Exp-ENG ET, p. 3, lines 16-20, p. 6, lines 9-14, p. 71, lines 8-16 and p. 74, lines 20-23.

the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe that the GoS acted with a *dolus specialis*/specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups.

204. In this regard, the Majority recalls that the above-mentioned analysis of the Prosecution's allegations concerning the GoS's genocidal intent and its supporting materials has led the Majority to make the following findings:

i. even if the existence of an alleged GoS strategy to deny and conceal the crimes committed in Darfur was to be proven, there can be a variety of plausible reasons for its adoption, including the intention to conceal the commission of war crimes and crimes against humanity;

ii. the Prosecution's allegations concerning the alleged insufficient resources allocated by the GoS to ensure adequate conditions of life in IDP Camps in Darfur are vague in light of the fact that, in addition to the Prosecution's failure to provide any specific information as to what possible additional resources could have been provided by the GoS, there existed an ongoing armed conflict at the relevant time and the number of IDPS s, according to the United Nations, was as high as two million by mid 2004, and as high as 2.7 million today;

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

iv. the materials submitted by the Prosecution in support of the Prosecution Application reflect a level of GoS hindrance of medical and humanitarian

assistance in IDP Camps in Darfur which significantly differs from that described by the Prosecution in the Prosecution Application;

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

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

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

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