

**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**

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**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.**

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

207. Nevertheless, the Majority considers that, if, as a result of the ongoing Prosecution's investigation into the crimes allegedly committed by Omar Al Bashir, additional evidence on the existence of a GoS's genocidal intent is gathered, the Majority's conclusion in the present decision would not prevent the Prosecution from requesting, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir so as to include the crime of genocide.

208. In addition, the Prosecution may always request, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir to include crimes against humanity and war crimes which are not part of the Prosecution Application, and for which the Prosecution considers that there are reasonable grounds to believe that Omar Al Bashir is criminally liable under the Statute.

**B. Whether there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for the crimes mentioned above<sup>226</sup>**

209. The Prosecution alleges that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute for committing genocide, crimes against humanity and war crimes through the "apparatus" of the State of Sudan, including the Sudanese

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<sup>226</sup> Judge Anita Ušacka appends a partly dissenting opinion in relation to paragraphs 214, 216 and 223. See Partly Dissenting Opinion of Judge Anita Ušacka, Part IV.

Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, from March 2003 to 14 July 2008.<sup>227</sup>

210. At the outset, the Chamber highlights that, in the *Lubanga* and the *Katanga and Ngudjolo* cases, the Chamber has held that article 25(3)(a) of the Statute embraces the notion of control of the crime as the determining criterion to distinguish between principal and accessory liability.<sup>228</sup> Furthermore, as the Chamber has held in the said cases, article 25(3)(a) of the Statute also embraces the following four manifestations of the notion of control of the crime: direct perpetration, perpetration through another person or indirect perpetration, co-perpetration based on joint control and indirect co-perpetration.<sup>229</sup>

211. In relation to the notion of indirect perpetration, the Chamber highlighted in the decision on the confirmation of the charges in the *Katanga and Ngudjolo* case that:

The leader must use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organisation to secure compliance with his orders. Compliance must include the commission of any of the crimes under the jurisdiction of this Court.<sup>230</sup>

212. In relation to the notion of co-perpetration based on joint control, the decisions on the confirmation of the charges in the *Lubanga* and *Katanga and Ngudjolo* cases have underscored that:

[t]he concept of co-perpetration based on joint control over the crime is rooted in the principle of division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.<sup>231</sup>

<sup>227</sup> *The Prosecution Application*, paras. 62 and 244.

<sup>228</sup> ICC-01/04-01/06-803-tEN, para. 330.

<sup>229</sup> ICC-01/04-01/06-803-tEN, paras. 326-328.

<sup>230</sup> ICC-01/04-01/07-717, para. 514.

<sup>231</sup> ICC-01/04-01/06-803-tEN, para. 342. See also ICC-01/04-01/07-717, para. 521.

213. As the Chamber has already held, the notion of indirect co-perpetration is applicable when some or all of the co-perpetrators carry out their respective essential contributions to the common plan through another person.<sup>232</sup> As the Chamber has underscored, in these types of situations:

Co-perpetration or joint commission through another person is nonetheless not possible if the suspects behaved without the concrete intent to bring about the objective elements of the crime and if there is a low and unaccepted probability that such would be a result of their activities.<sup>233</sup>

214. The Majority finds that there are reasonable grounds to believe that soon after the April 2003 attack on the El Fasher airport, a common plan to carry out a counter-insurgency campaign against the SLM/A, the JEM and other armed groups opposing the GoS in Darfur, was agreed upon at the highest level of the GoS, by Omar Al Bashir and other high-ranking Sudanese political and military leaders,<sup>234</sup> in particular [REDACTED],<sup>235</sup> [REDACTED],<sup>236</sup> [REDACTED]<sup>237</sup> and [REDACTED].<sup>238</sup>

215. The Chamber also finds that there are reasonable grounds to believe that a core component of such common plan 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 armed conflict in Darfur.<sup>239</sup> Furthermore,

<sup>232</sup> ICC-01/04-01/07-717, para. 522.

<sup>233</sup> ICC-01/04-01/07-717, para. 537.

<sup>234</sup> Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0013, para. 41; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, para. 48.

<sup>235</sup> Witness Statement (Anx B4) DAR-OTP-0147-0071 at 0110-0120; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0016 para. 70; Witness Statement (Anx. J95) DAR-OTP-0095-0002 at 0013, para. 41, and at 0024, para. 88; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0024, para. 88; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, paras. 47 and 48.

<sup>236</sup> Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0610, para. 144; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0013, para. 41, at 0023, para. 81 and at 0029, para. 112.

<sup>237</sup> Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0017, para. 74; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0016-0017, para. 55, at 0025, para. 89, and at 0029, para. 112; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0025, para. 89, and at 0029, para. 112.

<sup>238</sup> Witness Statement (Anx J95) DAR-OTP-0095-0003 at 0025, para. 92.

<sup>239</sup> Witness Statement (Anx B4) DAR-OTP-0147-0071 at 0110-0120; Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0088, para. 51; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0480, para. 32. *The Prosecution Application*, paras. 9 and 240; HRW Report, *Sudan: Darfur in Flames Atrocities in Western Sudan*, April 2004 (Anx 10) DAR-OTP-0003-0185 at 0194; See also, International Crisis Group Report, *Darfur Deadline A New International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055 at 0057, 0059, 0061, 0064, 0065 and 0068; Information Report on Background, *Q&A* (Anx 14) DAR-OTP-0014-0213 at 0214; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0027, 0058,

the Chamber considers that there are reasonable grounds to believe that, according to the common plan, the said civilian population was to be subjected to unlawful attacks, forcible transfers and acts of murder, extermination, rape, torture, and pillage by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.<sup>240</sup>

216. Furthermore, the Majority finds that there are reasonable grounds to believe that Omar Al Bashir and the other high-ranking Sudanese political and military leaders directed the branches of the “apparatus” of the State of Sudan that they led, in a coordinated manner, in order to jointly implement the common plan.

217. In particular, the Chamber finds that there are reasonable grounds to believe that the common plan was, to a very important extent, implemented through State and local Security Committees in Darfur.

218. In this regard, the Chamber considers that there are reasonable grounds to believe that Local Security Committees (i) were comprised of the head of the locality, and representatives of the Sudanese Armed Forces, the Sudanese Police Forces, and the NISS at the local level; (ii) worked together with local Janjaweed Militia leaders to implement the common plan in the relevant area; and (iii) reported to the State Governor.<sup>241</sup>

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0030-0040; HRW Report, *If We Return, We Will Be Killed Consolidation of Ethnic Cleansing in Darfur, Sudan*, November 2004 (Anx 38) DAR-OTP-0107-1403 at 1405. Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62-63; *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 (Anx 50) DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement at DAR-OTP-0115-0563 at 0567-0638.

<sup>240</sup> Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62-63. *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 (Anx 50) DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement (Anx 44) DAR-OTP-0115-0563 at 0567-0638.

<sup>241</sup> Witness Statement (Anx J6) DAR-OTP-0124-0196 at 0215, para. 120; *National Security Forces Act, 1999*, articles 38-40 (Anx J79) DAR-OTP-0021-0412 at 0424-0425; *The Interim National Constitution of the Republic of the Sudan 2005*, article 150 (Anx. J80) DAR-OTP-0136-0605 at 0663-0664; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0013, paras. 59-60, 64, 66 and 119-121; Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0058, paras. 40 and 62; Unofficial version of the *Armed Forces Memorandum concerning the ICC's inquiries – Military Operations Summary since January 2002*, DAR-OTP-0116-0721, para. 38.



219. The Chamber also considers that there are reasonable grounds to believe that each of the three Darfurian States had one State Security Committee, which (i) was comprised of the State Governor and representatives of the Sudanese Armed Forces, the Sudanese Police Forces and NISS at the State level;<sup>242</sup> (ii) worked together with regional Janjaweed Militia leaders to implement the common plan in the relevant State; and (iii) reported through the Deputy Federal Minister of the Interior [REDACTED].

220. In this regard, in the view of the Chamber, there are reasonable grounds to believe that, while in his position as Deputy Federal Minister of the Interior, Ahmad Harun, who was often in Darfur, was entrusted with the tasks of (i) supervising the three Darfurian State Security Committees, and (ii) acting as a link between the government of the three Darfurian States and the highest level of the GoS in Khartoum.<sup>243</sup>

221. The Chamber also finds that there are reasonable grounds to believe that Omar Al Bashir, as *de jure*<sup>244</sup> and *de facto*<sup>245</sup> President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the common plan.<sup>246</sup>

<sup>242</sup> *The Interim National Constitution of the Republic of the Sudan 2005*, article 150 (Anx. J80) DAR-OTP-0136-0605 at 0663-0064; *The National Security forces Act* (Anx. J79), 1999, article 17. Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 144; 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 0171.

<sup>243</sup> Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0018-0019, paras. 85-86.

<sup>244</sup> *The Interim National Constitution of the Republic of the Sudan 2005*, articles 3, 58 (Anx. J80) DAR-OTP-0136-0605 at 0607, 0625-0626; *National Security Forces Act, 1999*, article 14 (Anx J79) DAR-OTP-0021-0412 at 0416-0417; See, ICTY, *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Appeals Judgment, date 20 February 2001, para. 76: "As noted by the Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia*, "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures" and citing *Case Concerning Certain German Interests in Polish Upper Silesia*, Merits, 25 May 1926, PICJ Rep., Series A, No. 7. p. 19. See also Opinion No 1 of the *Arbitration Commission of the Peace Conference on Yugoslavia*, 29 November 1991, para. 1 c, which states that "the form of internal political organisation and the constitutional provisions are mere facts".

<sup>245</sup> Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 132; and Witness Statement (Anx 28) at DAR-OTP-0097-0619 at 0624, para. 21. See also Amnesty International Report, *Sudan, Darfur 'Too many people killed for no reason*, 3 February 2004 (Anx 18) DAR-OTP-0020-0067 at 0099.

<sup>246</sup> Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0057, para. 40; and at 0068-0069, paras. 94-95.

222. Furthermore, the Chamber finds that, in the alternative, there are reasonable grounds to believe that Omar Al Bashir (i) played a role that went beyond coordinating the implementation of the common plan; (ii) was in full control of all branches 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 (iii) used such control to secure the implementation of the common plan.<sup>247</sup>

223. As a result, the Chamber finds that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator,<sup>248</sup> for those war crimes and crimes against humanity for which the Chamber has already found in the present decision that there are reasonable grounds to believe that they were directly committed, as part of the GoS counter-insurgency campaign, by members of GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.

## **V. Whether the specific requirements under article 58 of the Statute for the issuance of a warrant of arrest have been met**

### **A. The Prosecution’s allegations**

224. In its Application, the Prosecution requests the issuance of a warrant of arrest for Omar Al Bashir.<sup>249</sup>

<sup>247</sup> The following evidence refers to the fact that Ahmad Harun’s orders came directly from Omar Al Bashir: Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 142; Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0091, para. 166. Transcript of Witness Statement (Anx 15) DAR-OTP-0016-0013 at 0013; DAR-OTP-0095-0049 at 0076, para. 128 (Anx. 25); Witness Statement (Anx J86) DAR-OTP-0128-0042 at 0052, para.55. Moreover, according to the Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, para. 47.

<sup>248</sup> See Partly Dissenting Opinion of Judge Anita Ušacka, Part IV.

<sup>249</sup> *The Prosecution Application*, para. 413.