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Date: **2 October 2009**

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN
IN THE CASE OF
THE PROSECUTOR v.
OMAR HASSAN AHMAD AL BASHIR ("OMAR AL BASHIR")

Public Document

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

Source: **Office of the Prosecutor**

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Introduction

1. The issue in this Appeal is whether the Pre-Trial Chamber employed the wrong evidentiary standard when determining under Article 58 that there exists reasonable grounds to believe that President Al Bashir committed genocide. In the Impugned Decision, the Pre-Trial Chamber declined to include genocide charges in the warrant of arrest, notwithstanding the implicit acquiescence that one could reasonably infer the suspect's intent. It did so solely because the circumstantial evidence also permitted a finding of unspecified alternative inferences of genocidal intent. By demanding that the inference of genocidal intent be the only reasonable one on the evidence, the Pre-Trial Chamber imported into the context of Article 58 the standard of "proof beyond a reasonable doubt" which under the Statute is exclusively reserved for the trial stage.[1]
2. The Amicus Brief presented by the Sudan Workers Trade Unions Federations (SWTUF) and the Sudan International Defence Group (SDIC) defends the Impugned Decision but offers no substantive authority – be it in the form of commentary or case-law – supporting its position or countering the Prosecution's arguments. The Amicus' arguments, moreover, underscore the flaws in the Pre-Trial Chamber's reasoning.

Procedural Background

3. On 4 March 2009, the Pre-Trial Chamber issued the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" ("Decision").[2] The Chamber issued a warrant of arrest for charges of war crimes and crimes against humanity. However, the Majority of the Pre-Trial Chamber refused to issue the warrant for charges of genocide.
4. On 10 March 2009, the Prosecution sought leave to appeal the Decision pursuant to Article 82(1)(d), in respect of three issues regarding the genocide counts.[3]
5. On 24 June 2009, the Pre-Trial Chamber granted leave to appeal one issue, regarding the proper standard for drawing inferences at the arrest warrant stage.[4]
6. On 6 July 2009, the Prosecution filed its Document in Support of Appeal.[5]

[1] Article 66 (3).
[2] ICC-02/05-01/09-2-Conf and ICC-02/05-01/09-3.
[3] ICC-02/05-01/09-6-Conf. A public redacted version of the Application for Leave to Appeal was filed on 13 March 2009 (ICC-02/05-01/09-12).
[4] ICC-02/05-01/09-21 ("Decision Granting Leave to Appeal").
[5] ICC-02/05-01/09-25 OA.

7. Pursuant to a grant of leave from the Appeals Chamber, authorizing participation "limited to the issue of whether the Pre-Trial Chamber applied the correct legal test under article 58 of the Statute to determine whether there are reasonable grounds to believe that Omar Hassan Al Bashir is criminally responsible for genocide",[6] on 25 September 2009, *amicus curiae* submitted observations on the Prosecution's appeal ("Amicus Brief").[7]

Submissions

The standard set by the Majority is incorrect and finds no support in national or international jurisprudence

8. Article 58 requires that the Chamber be "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".[8] This standard is comparable to the "reasonable suspicion" standard set out in the European Convention on Human Rights (ECHR).[9]

9. In this case, the Majority held that "if the existence of […] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application must be rejected as the evidentiary standard provided for in article 58 of the Statute [i.e., that reasonable grounds exist] would not have been met." [10] In other words, a reasonable conclusion does not necessarily constitute reasonable grounds. Instead, the Majority stated, the Prosecution must "show that the *only* reasonable conclusion to be drawn [from the material presented] is the existence of reasonable grounds to believe" that the conduct was done with the specific intent to commit genocide.[11]

10. This appeal presents the issue whether the Majority correctly applied the prescribed Article 58 standard for the purpose of dealing with proof by inference. The Prosecution submits that, in demanding that the "reasonable suspicion" be established to the level of certainty which a trial court imposes for a conviction, the Majority imposed a standard inconsistent with the Statute.

11. Judge Meron, former President of the Appeals Chamber of the ICTY, identified a similar issue to the one underlying this appeal in a presentation before the American Society of International Law in 2007. Introducing a panel discussion of the decision of the

[6] ICC-02/05-01/09-43 OA, 18 September 2009; specifically, para. 1.
[7] ICC-02/05-01/09-44 OA.
[8] Decision para. 157, cited in Amicus Brief para. 25. See also Amicus Brief, p. 5 and paras. 8-9.
[9] Amicus Brief, paras. 9, 26.
[10] Decision, para. 159.
[11] Decision, para. 158; see also para. 205.

International Court of Justice in Bosnia and Herzegovina v. Serbia and Montenegro, Judge Meron noted that the ICJ required a higher standard of proof to establish genocide that is ordinarily required in civil cases. He explained:

> [t]he close nexus to criminal law shows itself in another area: the standard of proof applied by the ICJ. […] The ICJ speaks about how "for a pattern of conduct to be accepted as evidence of [genocidal intent], it would have to be such *that it could only point to the existence of such intent*" (para. 373). *This sounds a lot to me like the reasonable doubt standard and the requirement that guilt be the only reasonable inference from the facts*. Indeed, in one instance in paragraph 422, the court says that certain facts, and I quote again, "have not been established beyond any doubt in the argument between the parties." The ICJ's decision to impose *such a high standard of proof* is noteworthy.[12]

12. Judge Meron substantiates in those remarks the Prosecution's argument in this case: a requirement that there be only one possible inference is in reality a requirement that the matter be proven beyond a reasonable doubt. As Judge Meron noted, the resulting standard exceeds the standard ordinarily applicable in civil cases and, the Prosecution submits it exceeds the "reasonable grounds to believe" standard that Article 58 provides at the arrest warrant stage.

13. The Amicus Brief defends the standard and the analysis of the Majority Decision. It finds the justification for the standard in the provision in Article 58 that the Pre-Trial Chamber be "satisfied" that the evidence presented establishes reasonable grounds. According to the Amicus, it is the need for the Chamber to be satisfied that imports the separate and additional requirement of certainty; the Chamber will not be satisfied unless the evidence is unequivocal and the conclusion excludes all other possibilities.

14. The Amicus analysis is incorrect. The language in Article 58 that the Pre-Trial Chamber "[be] satisfied" does not establish a separate and higher standard of proof. It is saying that a warrant will issue if the Pre-Trial Chamber finds, objectively and on the evidence submitted, that there are reasonable grounds to believe the suspect committed the alleged crime. If subjective satisfaction were achieved only by absolute certainty that the evidence exclude all hypotheses inconsistent with the requisite statutory elements of the alleged crime, then the lower threshold showing of "reasonable grounds" would be meaningless.

[12] Theodor Meron, "Breaking Developments in International Law: A Conversation on the ICJ's Opinion in Bosnia and Herzegovina v. Serbia and Montenegro", Introductory Remarks by Theodor Meron, *Proceedings at the American Society of International Law*, Vol. 101, p.215-228, 216 (2007) (emphasis added).

15. Notably, the Amicus Brief cannot cite any authority for the proposition that the Chamber asked to issue an arrest warrant must necessarily be unsatisfied by (and therefore must necessarily reject) an application if there is any reasonable explanation other than the inference the Prosecution seeks to draw. Nor does it address the legal authorities cited by the Prosecution in its brief or the decisions of international tribunals equating the "only reasonable inference" requirement with proof beyond a reasonable doubt. That the Amicus Brief fails to acknowledge the contrary authorities does not diminish their persuasive reasoning

16. Both the Decision and the Amicus Brief are unsupported and contrary to relevant jurisprudence, which confirms that because "a conclusion must be established beyond reasonable doubt" at trial, "[i]t is not sufficient [for conviction] that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available."[13] The Decision and the Amicus Brief are both also logically flawed. The Amicus Brief presents two alternatives: either "the existence of reasonable grounds must be the only conclusion"; or the "opposite" conclusion is that reasonable grounds do not exist.[14] The Amicus therefore believes that reasonable grounds cannot exist unless they are the *only* conclusion. However, as both Judge Ušacka explained[15] and the Prosecution argued,[16] it is entirely possible for more than one conclusion to be reasonable at this stage of the proceedings. All that is required under Article 58 is that the evidence supports a reasonable belief that the person may have committed a crime, sufficient to issue a warrant and initiate the justice process.[17] There is no requirement that any or all other possibilities be excluded.

17. Neither the Amicus Brief nor the Majority Decision provides any authority for the far higher standard that they would impose: that the Chamber cannot issue an arrest warrant stage unless it is effectively certain that no alternatives exist, and that it must reject an application if there is an alternative inference inconsistent with the Prosecution's Application.[18] Nor does either document acknowledge where this higher standard comes from.

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[13] As a result, "[i]f there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be *acquitted*" - *Prosecutor v Delalic et al*, IT-96-21-A, Appeal Judgment, 20 February 2001, para. 458 (emphasis added). See also *Prosecutor v Vasiljevic*, IT-98-32-A, Appeal Judgment, 25 February 2004, para. 120 (footnote 20, below).
[14] Amicus Brief, para. 5.
[15] Dissenting Opinion, paras. 32-33.
[16] Appeal Brief, paras. 24, 27-30.
[17] Dissenting Opinion, paras. 31-34; see further Appeal Brief, paras. 37, 40, 42.
[18] The jurisprudence of the ECHR recognises that there may be uncertainty at this early stage of the proceedings: see e.g. *Erdagoz v. Turkey***,** Judgment 22 October 1997, at para. 51, under the equivalent Article 5(1), "for there

18. As the Prosecution explained, "the only reasonable inference" standard is a direct result of applying, and is the logical equivalent of, the "beyond reasonable doubt" standard imposed at trial.[19] The requirement that an inference be the only reasonable one means that any reasonable doubt (i.e. any other reasonable inference that is inconsistent with guilt) has been excluded.[20] It is not, as the Majority and the Amicus Brief claim, a generic requirement that all Chambers must apply to be satisfied that any given standard of proof is met.[21]

The Dissenting Opinion provides the correct analysis

19. The Prosecution's Brief explained that the Dissenting Opinion provides the correct legal analysis. In response, the Amicus Brief misinterprets the standard applied by Judge Ušacka.[22]

20. Judge Ušacka explained that in order to find reasonable grounds to believe, the Prosecution must present sufficient evidence to establish that the inference is indeed a reasonable one. Even when more than one reasonable inference may be available at this early stage, "[a]ll that is required in order to obtain an arrest warrant is for the Prosecution to establish reasonable grounds to believe that an allegation is true" unless other evidence

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to be reasonable suspicion there must be facts or information which would satisfy an objective observer that the person concerned *may* have committed an offence" (emphasis added).

[19] Appeal Brief, para. 29; see also paras. 24, 27-28, 30. Thus, some trial courts require that if guilt is predicated on inference from circumstantial evidence, the "inference must be the only reasonable one available on the evidence." See e.g. *Prosecutor v Krstic*, IT-98-33-A, Appeal Judgment, 19 April 2004, para. 41; *Prosecutor v Kvocka*, IT-98-30/1-A, Appeal Judgment, 28 February 2005, para. 237; *Prosecutor v Seromba*, ICTR-01-66-A, Appeal Judgment, 12 March 2008, para. 221 ; *Prosecutor v Nahimnana*, ICTR-96-11, Appeal Judgment, 28 Novemebr 2007, para. 524. See further, *Prosecutor v Karera*, ICTR-01-74-A, Appeal Judgment, 2 February 2009, para. 34, *Prosecutor v Ntagerura*, ICTR-96-10A, Appeal Judgment, 7 July 2006 , para. 306, and authorities referred to in para.16, above.

[20] Appeal Brief, para. 29. See further *Prosecutor v Delalic et al*, IT-96-21-A, Appeal Judgment, 20 February 2001, para. 458: "[A] conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted". See also *Prosecutor v Vasiljevic*, IT-98-32-A, Appeal Judgment, 25 February 2004, para. 120: "the standard of proof to be applied is beyond a reasonable doubt, and the burden lies on the Prosecution as the accused enjoys the benefit of the presumption of innocence. […] when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence"..

[21] If the Amicus Brief was correct, then this requirement would apply equally to all standards of proof. For example, the formulation for proof by inference at the conclusion of trial would be that "the only reasonable inference is that the element has been proved beyond reasonable doubt"; whereas the standard the Trial Chambers apply is simply that the "inference must be the only reasonable inference available on the evidence" (see e.g *Prosecutor v Krstic*, IT-98-33-A, Appeal Judgment, 19 April 2004, para. 41). Similarly, the ECHR standard of "reasonable suspicion" does not require that *the only reasonable inference is* the existence of a reasonable suspicion.

[22] Amicus Brief, paras. 18, 22-23; see also p. 6 and para. 32.

makes that inference unreasonable.[23] This is correct, since the conclusion that a given inference is reasonable must be based on the totality of the evidence.[24]

21. Though the Amicus suggests that the Majority and the Dissent share a common analysis,[25] in fact Judge Ušacka's approach is very different from the Majority's assessment. The Majority rejected a reasonable inference of genocidal intent as legally insignificant because there also existed other reasonable inferences inconsistent with such intent, but it never found that the inferences proposed by the Prosecution were unreasonable.[26] Judge Ušacka considered only the reasonableness of the inference proposed by the Prosecution, without regard to potential alternative inferences,[27] leaving to a later stage in the criminal process the weighing and choice between competing reasonable inferences.[28]

The "only reasonable inference" requirement has never previously been applied at the arrest warrant stage by other chambers of the ICC or other tribunals

22. Contrary to the Amicus's submissions, the findings of Pre-Trial Chambers in other decisions also were not conducted "in exactly the same way as the Majority".[29] In none of the examples presented did the Pre-Trial Chambers require that the conclusion be the only reasonable one available. Pre-Trial Chambers at the ICC instead consistently have assessed whether the evidence presented supported an inference of criminal responsibility appropriate to the standard of proof applicable for issuing an arrest warrant or confirming charges, without imposing any additional requirement that this be the only reasonable conclusion.[30]

23. The Amicus Brief claims that "words such as 'concludes', 'finds', and 'considers' that reasonable grounds exist, serve the same purpose as 'the only reasonable conclusion is

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[23] Dissenting Opinion, paras. 32-34; see Appeal Brief, paras. 25, 38 and 43.
[24] As the Amicus Brief states, "An inference after all is only a conclusion drawn on the basis of all the evidence" (p. 6).
[25] Amicus Brief, paras. 18, 22-23; see also p. 6 and para. 32.
[26] See paras. 28-32, below.
[27] Dissenting Opinion, paras. 31-34.
[28] The Amicus Brief also misrepresents the findings of Judge Ušacka in the *Katanga* Confirmation Decision (Amicus Brief, paras. 13-15). In her minority opinion to that decision, Judge Ušacka did not base her finding on the existence of *other* reasonable explanations. Instead, consistent with her approach in the current case she examined whether the inference which the Prosecution sought to draw *was* reasonable (finding in that case that it was not).
[29] Amicus Brief, para. 17.
[30] For example, in the confirmation decision in *Prosecutor v Bemba* (ICC-01/05-01/08-424, 15 June 2009), the Pre-Trial Chamber explicitly drew inferences without any suggestion that the finding need be the only reasonable conclusion (e.g., paras. 126, 187). See also *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-717, 26 September 2008, paras. 550, 551. The Prosecution has also previously demonstrated that Pre-Trial Chambers have made inferential findings of "reasonable grounds to believe" without any requirement that they be the only reasonable conclusions – see Appeal Brief, paras. 44-46 and authorities cited therein.

that there are reasonable grounds to believe'",[31] and asserts that the Majority "need only have stated, as it indeed found on all of the evidence considered individually and as a whole, that it concluded that reasonable grounds do not exist."[32] However, despite the attempts by the Amicus Brief to explain and recharacterise the Majority's findings, this is not what the Majority held and the legal standard it applied. Furthermore, there is nothing in the Decision to suggest that when making its other findings, the Majority considered and excluded all other reasonable conclusions that might additionally be drawn.

24. The Amicus Brief also claims that when issuing a warrant of arrest the Pre-Trial Chamber is performing a function similar to a national court, albeit at the end of a prosecution case.[33] First, it is well-settled that, when determining whether to hold the person for trial, if the inference advanced by the Prosecution "*could* be drawn, then it is of no concern to the preliminary inquiry judge that there are additional competing inferences pointing to the innocence of the accused."[34]

25. Second, the standard at the close of the prosecution case in a criminal trial is "whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question".[35] If the evidence is sufficient, the defence will be given the opportunity to put on its case and argue its points, and the trier of fact will then decide. If it is not sufficient, the court will acquit. There is no requirement even at that stage, however, that the evidence exclude all other reasonable inferences.[36]

26. Thus, the ICTY, for example, rejected a defence submission that proof beyond a reasonable doubt and the only available inference standards should be applied under Rule 98*bis* -- the Chamber declined to dismiss certain charges because "it *may* be possible to draw inferences as to [the defendant's] state of mind".[37] As the Prosecution explained in its Appeal Brief, ICTY and ICTR Chambers "make any reasonably possible inferences" at

[31] Amicus Brief, para. 20; see also para. 19.
[32] Amicus Brief, para. 20.
[33] Amicus Brief, p. 6.
[34] Appeal Brief, para. 43 (quoting *R. v. Gillespie*, 2006 YKSC 66, 2006 CarswellYukon 121, (Dec. 15, 2006) at para 29); see also para. 50 and authorities cited therein.
[35] *Prosecutor v. Jelisic*, IT-95-10-A, Appeals Judgement, 5 July 2001, para. 37.
[36] Appeal Brief, para. 50 and authorities cited therein. In particular, "Where 'more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered.' […] If there are competing inferences, these are for the trier of fact to resolve. A preliminary inquiry judge commits jurisdictional error where he weighs competing inferences or chooses among them" - *R. v. Munoz*, 205 C.C.C. (3d) 70, 2006 CarswellOnt 673, (Feb. 8, 2006) at paras 21-22. Once the reasonable basis for an inference of guilt has been established it "is of no concern to the preliminary inquiry judge that there are additional competing inferences pointing to the innocence of the accused. It is exclusively for the trier of fact to determine whether it will draw such competing inferences and what weight it will give them" - *R. v. Gillespie*, 2006 YKSC 66, 2006 CarswellYukon 121, (Dec. 15, 2006) at para 10.
[37] *Prosecutor v Kordic and Cerkez*, IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, paras. 2 (submissions of the defence), 26 (rejecting this position), and 33 (emphasis added).

that stage of proceedings.[38] And national systems considering whether there is a case to answer, which the Amicus claim is analogous to the present proceedings,[39] have concluded that "Circumstantial evidence may give rise to a number of inferences, but if at least one inference is indicative of guilt of the crime charged, then there is a case to answer".[40]

27. In contrast to the uniform practice of national and international tribunals, the Amicus Brief would equate the standards of proof for all stages – from request for arrest through finding close to verdict. This analysis is both erroneous and illustrative of its confusion. Applying the standard which the Majority and Amicus seek to impose would leave no purpose for subsequent procedures before the ICC such as the confirmation hearing.

The factual findings of the Majority and their relevance to the issue on appeal

28. The Amicus Brief argues that the factual findings of the Majority summarised in paragraphs 202-208 Decision show that the Majority applied the correct standard of proof.[41] The Amicus makes submissions with respect to all the factual findings summarised in paragraphs 204 of the Majority Decision.

29. As a threshold matter, most of these submissions contain factual arguments supporting the evaluation of the evidence by the Majority and its conclusions drawn on the basis of this evidence. These arguments go beyond the scope this appeal and should be dismissed *in limine*.[42]

30. The argument is, in any event, also incorrect. In fact, the manner in which the Majority applied the standard of proof set out in the Decision[43] to the facts in this case demonstrates that the Majority erred with respect to the applicable standard under Article 58.[44] The

[38] Appeal Brief, para. 48, quoting *Prosecutor v. Rukundo*, ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, 22 May 2007, para 2. Other chambers have similarly held that they are "entitled to any inferences or presumptions which a reasonable trier of fact could make" - *Prosecutor v. Bagosora et al*, ICTR-98-41-7, Decision on Motions for judgment of acquittal, 2 February 2005, para 10, citing *Prosecutor v Kvocka et al.*, Decision on Defence Motions for Acquittal, 15 December 2000, para. 13. In a similar vein, in *Prosecutor v Milosevic*, the Prosecution argued in respect of para. 55 of the Croatia indictment that "there is sufficient evidence to support the allegations because a reasonable inference can be drawn from exhumation evidence", and the Chamber upheld these charges (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 116).
[39] Amicus Brief, p. 6.
[40] Appeal Brief, para. 43 (quoting *Smith v. HM Advocate*, 2008 HCJAC 7, at para. 15, (7 Feb. 2008)).
[41] Amicus Brief, paras. 33-47; see in particular para. 35.
[42] Amicus Brief, paras. 37, 38, 39, 40, 43 and 46.
[43] The Chamber generally ruled that "if the existence of the 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" (para. 159).
[44] Appeal Brief, paras. 31-36.

following factual findings demonstrate the error of the Majority with respect to the standard of proof under Article 58:

- The Majority declined to find genocidal intent to be indicated by the GoS strategy to deny and conceal the crimes committed in Darfur, because "there can be a variety of plausible reasons for its adoption, such as the intention to conceal the commission of war crimes and crimes against humanity".[45]
- The Majority found that "hindrance of humanitarian assistance, as well as cutting off supplies of food and other essential goods," was not proof of genocidal intent because, as an alternative explanation, those acts "can be carried out for a variety of reasons other than intending to destroy in whole or in part the targeted group".[46]
- The Majority found that the nature and extent of the war crimes and crimes against humanity committed by GoS forces was not proof of genocidal intent because those acts "can reasonably be explained by reasons other than the GoS's genocidal intent".[47]
- When assessing all evidence and previous findings together, the Majority concluded that the existence of the GoS's genocidal intent "is not the only reasonable conclusion that can be drawn therefrom".[48]

In these instances, however, and contrary to the contention of the Amicus,[49] the Majority did not weigh the contrary inferences or find that the inference of genocidal intent was unreasonable. It instead rejected the inference solely because an alternative explanation existed.[50]

31. In contrast, where the Majority concluded that a particular inference was unreasonable (as opposed to not the only reasonable inference) it used different language. Instead of noting

[45] Decision, paras. 165 and 204(i).
[46] Decision, para. 181. The Majority links this finding to a finding of fact of the International Court of Justice (see Decision, paras. 182-183), which applies a different and significantly higher standard of proof and made its findings against a different, and not comparable, factual background. This is further proof of the Majority's error. The ICJ has ruled that "the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation" (ICJ Judgement on Genocide, para. 210). Regarding the different factual basis, the Majority relied on the ICJ's finding that "the cutting of supplies and food and other essential goods, is another tactic used to force Muslims and ethnic Croatians to flee". However, it omitted to consider the substantially different situation of the refugees in Bosnia and Herzegovia, who, according to the ICJ were transported in an organized manner by Serbian armed forces to territory held by the Bosnian Muslim army or across the boarder to Croatia or Hungary, where they were safe (see ICJ Judgement on Genocide, paras. 278, 287, 288, 329 and 331). The situation was entirely different for the refugees in Darfur (see Decision para. 188 and Dissenting Opinion, para. 98).
[47] Decision, para. 204(v); see also para. 201.
[48] Decision, para. 205.
[49] Amicus Brief, para. 30.
[50] Contrasting that approach, in a comparable case before the ICTY a Trial Chamber evaluated against the Rule 98bis standard (see para. 26, above) whether the factors identified by the Prosecution constituted evidence from which genocidal intent could be inferred. In that case, the Trial Chamber expressly ruled with respect to each of those factors that it was unreasonable to infer genocidal intent (see *Prosecutor v. Sikirica* et al., IT-95-8, Judgment on Defence Motion to Acquit, 3 September 2001, paras. 91-97).

that the inference was not the "only reasonable" one that could be drawn, the Majority indicated that the facts proffered did not support the inference at all:

- The Majority found that particular documents presented by the Prosecution "do not provide, by themselves, any *indicia* of the GoS's genocidal intent. […] [T]hey provide at best, *indicia* of the GoS's intent to discriminate against the members of the […] groups".[51]
- In relation to other documents, the Majority rejected the Prosecution's submissions that these documents are proof of the GoS's genocidal policy.[52] It considered that "they are only evidence of the internal organisation and coordination among the three different levels of government in Sudan".[53]
- With respect to two official statements by President Al Bashir, the Majority found that these statements "do not provide, by themselves, any *indicia* of a GoS's genocidal intent".[54] It found that they "provide only *indicia* of a GoS's persecutory intent".[55]

32. The above examples and the choice of language adopted by the Majority for its factual findings demonstrate that the Majority implicitly recognized that the inference that President Al Bashir had genocidal intent is one, out of more, reasonable conclusions that can be drawn from the evidence. The Majority implicitly found that:

- The intention to commit genocide is one, out of more, plausible reason for the adoption a policy to deny and conceal the crimes committed in Darfur.[56]
- Hindrance of humanitarian assistance, as well as cutting off supplies of food and other essential goods, can be carried out also for the reasons of intending to destroy in whole or in part the targeted group.[57]
- The nature and extent of the war crime and crimes against humanity committed by GoS forces can reasonably be explained also by GoS' genocidal intent.[58]
- Finally, when assessing all evidence and previous findings together, the existence of the GoS' genocidal intent is one, out of more reasonable conclusions that can be drawn therefrom.[59]

[51] Decision, para. 167. In spite of this finding, the Majority allowed for the possibility that a different conclusion may be merited when these three documents are assessed in light of the rest of the evidence (para. 167).
[52] See title of section 2 on page 59 of the Decision.
[53] Decision, para. 168.
[54] Decision, para. 172.
[55] Decision, para. 204(vi).
[56] Decision, paras. 165 and 204(i).
[57] Decision, para. 181.
[58] Decision, para. 204(v); see also para. 201.
[59] Decision, para. 205.

Whether there can be a factual determination by the Appeals Chamber

33. The Amicus correctly stated that "the legal test for Article 58 is the only issue on appeal"[60] and that "matters of interpretation and assessment of the evidence […] are not the subject of this appeal".[61] The Prosecution thus submitted that "the Appeals Chamber should, *on the basis of the facts found by the Pre-Trial Chamber*, determine that there are reasonable grounds to believe that President Al Bashir is criminally responsible for the three counts of genocide".[62] The Appeals Chamber has the power to enter a finding based on the factual conclusions accepted by the Pre-Trial Chamber, which fully support a finding of President Al Bashir's criminal responsibility with respect to the three counts of genocide.[63] Contrary to the Amicus's submissions, this Chamber is in as good a position as the Pre-Trial Chamber to draw its conclusions from the relevant facts and that a factual finding by the Appeals Chamber in this case is in the interest of justice.[64]

34. The Amicus' submissions to the contrary do not address any of the arguments and authorities advanced by the Prosecution. The Amicus also fail to provide any authorities in support of their position.[65] To argue that the Appeals Chamber cannot overturn any factual finding of the Pre-Trial Chamber without performing a full examination of all of the evidence[66] -- as the Amicus do -- misconstrues the particular features of this appeal, the authority of the Appeals Chamber and the corrective nature of its decisions.

Relief Sought

35. In light of the foregoing, the Prosecution requests that the Appeals Chamber disregard the arguments advanced by the Amicus Curiae and grant in its entirety the relief requested in the Prosecution's Appeal Brief.

[60] Amicus Brief, para. 49.
[61] Amicus Brief, para. 53.
[62] Appeal Brief, para. 53, emphasis added.
[63] Appeal Brief, paras. 54-61.
[64] Appeal Brief, paras. 62-64.
[65] See in particular the arguments advanced in para. 51 of the Amicus Brief.
[66] Amicus Brief, para. 51.

Luis Moreno-Ocampo,
Prosecutor

Dated this 2nd day of October 2009

At The Hague, The Netherlands