

**Cour
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Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-01/09-OA

Date: 3 February 2010

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

THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR

Public document

Judgment

**on the appeal of the Prosecutor against the “Decision on the Prosecution’s
Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”**



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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Amicus Curiae
Mr Geoffrey Nice
Mr Rodney Dixon

Legal Representatives of Victims
Mr Nicholas Kaufman

REGISTRY

Registrar
Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” of 4 March 2009 (ICC-02/05-01/09-2-Conf),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” is reversed to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the crime of genocide in view of an erroneous standard of proof. The Pre-Trial Chamber is directed to decide anew, on the basis of the correct standard of proof, whether a warrant of arrest in respect of the crime of genocide should be issued.

REASONS

I. KEY FINDING

1. A Pre-Trial Chamber acts erroneously if it denies to issue a warrant of arrest under article 58 (1) of the Statute on the basis that “the *existence* of [...] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution”.¹

¹ “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-2-Conf, 4 March 2009, para. 159 (emphasis added).

II. PROCEDURAL HISTORY

A. Proceedings Before the Pre-Trial Chamber

2. On 14 July 2008, the Prosecutor filed before Pre-Trial Chamber I an application² under article 58 of the Statute, requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad 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 March 2003 to July 2008 (hereinafter: “Arrest Warrant Application”).

3. On 4 March 2009, the Pre-Trial Chamber rendered the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”³ (hereinafter: “Impugned Decision”). The Pre-Trial Chamber decided to issue an arrest warrant in respect of crimes against humanity and war crimes,⁴ but rejected the Prosecutor’s application in respect of the crime of genocide.⁵

4. On 13 March 2009, the Prosecutor filed the “Prosecution’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”⁶ dated 10 March 2009 (hereinafter: “Application for Leave to Appeal”), requesting leave to appeal the Impugned Decision in respect of three issues.

5. On 24 June 2009, the Pre-Trial Chamber rendered the “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”⁷ (hereinafter: “Decision Granting Leave to Appeal”), granting the Application for Leave to Appeal in respect of one of the issues and rejecting the remainder of the

² “Prosecutor’s Application under Article 58”, ICC-02/05-151-US-Exp; “Corrigendum to Prosecution’s Application under Article 58 filed on 14 July 2008”, ICC-02/05-151-US-Exp-Corr. A public redacted version was filed on 12 September 2009 under the number ICC-02/05-157-AnxA.

³ ICC-02/05-01/09-2-Conf. A public redacted version was filed under the number ICC-02/05-01/09-3. In the present judgment, references are to the public redacted version.

⁴ Impugned Decision, p. 92.

⁵ Impugned Decision, para. 206.

⁶ ICC-02/05-01/09-12.

⁷ ICC-02/05-01/09-21.

application.⁸ The issue in respect of which leave to appeal was granted reads as follows:

Whether the correct standard of proof in the context of Article 58 requires that the only reasonable conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.⁹

B. Proceedings on Appeal

6. On 2 July 2009, the Prosecutor filed the “Prosecution Request for an Extension of the Page Limit for its Document in Support of the Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”¹⁰, in which the Prosecutor requested an extension of the page limit for his document in support of the appeal pursuant to regulation 37 (2) of the Regulations of the Court. The Appeals Chamber granted the Prosecutor’s request on 3 July 2009.¹¹

7. On 6 July 2009, the Prosecutor filed the “Prosecution Document in Support of Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”¹² (hereinafter: “Document in Support of the Appeal”).

8. On 20 July 2009, the Sudan Workers Trade Unions Federation (hereinafter: “SWTUF”) and the Sudan International Defence Group (hereinafter: “SIDG”) filed an application for leave to make observations on the appeal under rule 103 of the Rules of Procedure and Evidence (hereinafter: “Application under Rule 103”),¹³ which the Prosecutor opposed.¹⁴ On 18 September 2009, the Appeals Chamber granted the

⁸ Decision Granting Leave to Appeal, p. 10.


⁹ Decision Granting Leave to Appeal, p. 5.

¹⁰ ICC-02/05-01/09-22.

¹¹ “Decision on the ‘Prosecution Request for an Extension of the Page Limit for its Document in Support of Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’””, ICC-02/05-01/09-24.

¹² ICC-02/05-01/09-25.

¹³ “Application under Rule 103 in respect of Prosecution Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, ICC-02/05-01/09-27, registered on 21 July 2009.

¹⁴ “Prosecution’s Response to Application under Rule 103 in respect of Prosecution Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, ICC-02/05-01/09-29, 11 August 2009. On 24 August 2009, the SWTUF and SIDG filed the “Application for Leave and Reply to the Prosecution’s Response to the Application under Rule 103 in respect of Prosecutions Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, ICC-02/05-01/09-33. 

Application under Rule 103.¹⁵ The reasons for that decision were filed on 9 November 2009.¹⁶ On 25 September 2009, the SWTUF and SIDG submitted their “Observations on behalf of Amici Curiae in respect of the Prosecution Appeal’s [sic] against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”¹⁷ (hereinafter: “Observations”). On 2 October 2009, the Prosecutor responded to the Observations¹⁸ (hereinafter: “Response to Observations”).

9. On 27 August 2009, the applicants for victim status a/0443/09 to a/0450/09 (hereinafter: “Victims”) filed the “Request for an Extension of the Time Limit Prescribed in the Regulations of the Court and Observations on the Victims’ Right to Participate in the Prosecution’s Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir”.¹⁹ The Prosecutor responded to this filing on 4 September 2009.²⁰ On 23 October 2009, the Appeals Chamber rendered the “Decision On the Applications by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ and on the Request for an Extension of Time”,²¹ instructing the Registrar to transmit the applications of the Victims to Pre-Trial Chamber I and rejecting the Victims’ request for an extension of the time limit for the submission of observations in the appeal.

10. On 4 January 2010, and after having been granted victim status by Pre-Trial Chamber I,²² the Victims filed the “Second Request for Participation and

¹⁵ “Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply”, ICC-02/05-01/09-43.

¹⁶ “Reasons for ‘Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply’”, ICC-02/05-01/09-51.


¹⁷ ICC-02/05-01/09-44.

¹⁸ “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’”, ICC-02/05-01/09-47.

¹⁹ ICC-02/05-01/09-35.

²⁰ “Prosecution’s Response to Victims’ Request for Extension of Time and Observations on their Right to Participation in the Prosecution’s Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, ICC-02/05-01/09-39.

²¹ ICC-02/05-01/09-48.

²² See “Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case”, ICC-02/05-01/09-62, dated 10 December 2009 and registered on 15 December 2009. 

Observations on the Prosecution's Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir"²³ (hereinafter: "Second Victims' Request for Participation"). On 6 January 2010, the Appeals Chamber issued an order, setting a time limit for the submission of a response by the Prosecutor to the Second Victims' Request for Participation.²⁴ The Prosecutor responded to the Second Victims' Request for Participation on 11 January 2010²⁵ (hereinafter: "Prosecutor's Response to Second Victims' Request").

11. On 28 January 2010, the Appeals Chamber granted the Victims the right to participate in the present appeal and allowed the substantive submissions made in the Second Victims' Request for Participation.²⁶

III. MERITS

A. Relevant part of the Impugned Decision

12. In the Impugned Decision, the Pre-Trial Chamber stated:

The Prosecution highlights that it relies exclusively on proof by inference to substantiate its allegations concerning Omar Al Bashir's alleged responsibility for genocide. 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.²⁷

13. The Pre-Trial Chamber described the standard of proof that it would apply in such a situation as follows:

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

²³ ICC-02/05-01/09-65-Conf-Exp; a public redacted version was filed on the same day under the number ICC-02/05-01/09-65-Red.

²⁴ "Order on the Filing of a Response to the 'Second Request for Participation and Observations on the Prosecution's Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir'", ICC-02/05-01/09-66.

²⁵ "Prosecution Response to the Victims' 'Second Request for Participation and Observations on the Prosecution's Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir'", ICC-02/05-01/09-68.

²⁶ "Decision on the Second Application by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", ICC-02/05-01/09-70.

²⁷ Impugned Decision, para. 147, (footnotes omitted).

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.²⁸

14. The Pre-Trial Chamber assessed the evidence presented by the Prosecutor against the standard developed in paragraphs 158 and 159 of the Impugned Decision²⁹ and concluded 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 [the crime of genocide]”.³⁰

B. The Dissenting Opinion

15. Judge Ušacka filed a separate and partly dissenting opinion to the Impugned Decision³¹ (hereinafter: “Dissenting Opinion”). She underlined that the Statute provides for an increasingly demanding evidentiary threshold from the arrest warrant stage to conviction.³² She disagreed with the test adopted by the Pre-Trial Chamber, stating that it was “tantamount to requiring the Prosecution to present sufficient evidence to allow the Chamber to be convinced of genocidal intent beyond a reasonable doubt”.³³ In her view, it is sufficient that the inference of genocidal intent be a reasonable one, but it is not necessary that it be the only reasonable conclusion based on the evidence.³⁴ Judge Ušacka assessed the evidence presented by the Prosecutor and concluded that the existence of genocidal intent was indeed a

²⁸ Impugned Decision, paras 158-159 (footnotes omitted).

²⁹ See Impugned Decision, paras 162-205.

³⁰ Impugned Decision, para. 206.

³¹ ICC-02/05-01/09-3, pp. 96-146.

³² Dissenting Opinion, paras 7-10.

³³ Dissenting Opinion, para. 31.

³⁴ Dissenting Opinion, paras 32, 34.

reasonable conclusion.³⁵ In her opinion, the Pre-Trial Chamber should have issued a warrant of arrest in respect of genocide.³⁶

C. Arguments of the Prosecutor

16. In his Document in Support of the Appeal, the Prosecutor submits that he proved the genocidal intent of Mr Al Bashir before the Pre-Trial Chamber.³⁷ He argues that the Pre-Trial Chamber incorrectly required that genocidal intent be the only reasonable conclusion to be drawn on the basis of the evidence.³⁸ In the Prosecutor's view, the Pre-Trial Chamber "effectively required proof of an inference beyond reasonable doubt in order to establish 'reasonable grounds to believe' under Article 58".³⁹ The Prosecutor submits that article 58 of the Statute does not require that "a conclusion be the only reasonable conclusion. Nor is this a generic requirement for proof by inference at all stages".⁴⁰ The Prosecutor notes that although the Pre-Trial Chamber explained in the Decision Granting Leave that it had not required proof beyond reasonable doubt, the Chamber failed to explain why it nevertheless required that genocidal intent be the only reasonable conclusion.⁴¹ In the view of the Prosecutor, this amounted to the imposition of an incorrect two-stage test.⁴² The Prosecutor also contends that the Pre-Trial Chamber "implicitly acknowledged" that the inference of Mr Al Bashir's genocidal intent was reasonable.⁴³

17. The Prosecutor emphasises that at the arrest warrant stage, he is not required to present his full case, but must meet only the lowest standard of proof set out in the Statute.⁴⁴ In his submission, this threshold is met if the evidence provides "reasonable (not conclusive or definitive) grounds to believe that the person committed a crime within the jurisdiction of the Court".⁴⁵ He recalls that the Statute does not differentiate between various categories of evidence and that the test should not be different for

³⁵ Dissenting Opinion, para. 86.

³⁶ Dissenting Opinion, para. 105.

³⁷ Document in Support of the Appeal, para. 19.

³⁸ Document in Support of the Appeal, paras 20-21.

³⁹ Document in Support of the Appeal, para. 27.

⁴⁰ Document in Support of the Appeal, para. 29.

⁴¹ Document in Support of the Appeal, para. 30.

⁴² Document in Support of the Appeal, para. 30.

⁴³ Document in Support of the Appeal, paras 32, 33.

⁴⁴ Document in Support of the Appeal, para. 42.

⁴⁵ Document in Support of the Appeal, para. 38.

circumstantial evidence than for direct evidence; in his view, the Court has to assess the circumstantial evidence to determine whether the requisite standard of proof is met.⁴⁶ He underlines that there will rarely be direct evidence of a person's state of mind.⁴⁷

18. To support his argument that the Pre-Trial Chamber's standard was erroneous, the Prosecutor refers to previous practices of this Court. He underlines that in relation to other cases, Pre-Trial Chamber I has never required that the existence of a mental element of a crime be the only reasonable conclusion to be drawn from the evidence.⁴⁸ He submits that requiring such proof might actually endanger witnesses, and that it is impossible at this stage of the proceedings to obtain proof beyond reasonable doubt.⁴⁹

19. Finally, the Prosecutor refers the Appeals Chamber to the jurisprudence of the *ad hoc* international criminal tribunals,⁵⁰ of the European Court of Human Rights,⁵¹ and to national practice,⁵² emphasising that none of these jurisdictions require at the arrest warrant stage that the existence of reasonable grounds to believe be the only reasonable conclusion that can be drawn on the basis of the evidence.

20. As to the relief sought, the Prosecutor submits that the Appeals Chamber should, on the basis of the factual findings made by the Pre-Trial Chamber, make a determination that there are reasonable grounds to believe that Mr Al Bashir has committed genocide, and should remand the matter to the Pre-Trial Chamber "with direction to authorize the arrest of President Al Bashir for genocide".⁵³ The Prosecutor contends that the factual findings of the Pre-Trial Chamber support reasonable grounds to believe Mr Al Bashir committed the crime of genocide.⁵⁴ The Prosecutor submits that the Appeals Chamber has the power to make factual determinations, as long as it has before it the relevant information.⁵⁵ In the alternative,

⁴⁶ Document in Support of the Appeal, para. 40.

⁴⁷ Document in Support of the Appeal, para. 41.

⁴⁸ Document in Support of the Appeal, paras 44-45.

⁴⁹ Document in Support of the Appeal, para. 46.

⁵⁰ Document in Support of the Appeal, paras 47-48.

⁵¹ Document in Support of the Appeal, para. 49.

⁵² Document in Support of the Appeal, para. 50.

⁵³ Document in Support of the Appeal, para. 53.

⁵⁴ Document in Support of the Appeal, paras 55-61.

⁵⁵ Document in Support of the Appeal, para. 54.

he requests that the Appeals Chamber should remand the matter to the Pre-Trial Chamber for a new decision.⁵⁶

D. Observations of the SWTUF and the SIDG and response of the Prosecutor thereto

21. The SWTUF and the SIDG submit that the Pre-Trial Chamber did not err when rejecting the Prosecutor's Arrest Warrant Application in respect of the crime of genocide.⁵⁷ They underline that article 58 of the Statute stipulates that the Pre-Trial Chamber must be "satisfied" that reasonable grounds to believe exist, and that both the Pre-Trial Chamber and Judge Ušacka in her dissenting opinion noted that this standard was the test to be applied.⁵⁸ The SWTUF and SIDG accept that a different standard of proof applies at the trial level.⁵⁹ However, in their view, the Pre-Trial Chamber must be certain that the standard of reasonable grounds to believe is met, failing which the Chamber would not be "satisfied" of the standard.⁶⁰ To support their submission, the SWTUF and the SIDG refer the Appeals Chamber to previous jurisprudence of the Pre-Trial Chambers.⁶¹

22. The SWTUF and the SIDG submit furthermore that the Pre-Trial Chamber found that the Prosecutor had not presented sufficient evidence to establish reasonable grounds to believe regarding genocidal intent.⁶² The SWTUF and SIDG recall that throughout the Impugned Decision, the Pre-Trial Chamber referred to the correct standard under article 58 of the Statute.⁶³ They also emphasise that the divergence of views between the Pre-Trial Chamber and Judge Ušacka is one that relates to the assessment of the evidence and the conclusions drawn therefrom, but not to the standard itself.⁶⁴

23. The SWTUF and the SIDG submit that the Prosecutor is incorrect when he argues that the Pre-Trial Chamber implicitly accepted that there were reasonable

⁵⁶ Document in Support of the Appeal, para. 64.

⁵⁷ Observations, para. 4.

⁵⁸ Observations, paras 8-9.

⁵⁹ Observations, para. 10.

⁶⁰ Observations, para. 11.

⁶¹ Observations, paras 16-17.

⁶² Observations, para. 19.

⁶³ Observations, para. 20.

⁶⁴ Observations, para. 23.

grounds to believe that Mr Al Bashir had genocidal intent.⁶⁵ They refer the Appeals Chamber to the Pre-Trial Chamber's analysis of the evidence in the Impugned Decision,⁶⁶ underlining that the Pre-Trial Chamber did not make a finding that there were reasonable grounds to believe genocidal intent existed.⁶⁷

24. As to the appropriate relief, the SWTUF and the SIDG argue that the only issue on appeal is whether the Pre-Trial Chamber applied the correct evidentiary test when rejecting the Prosecutor's Arrest Warrant Application in respect of genocide,⁶⁸ but not whether the Pre-Trial Chamber analysed the evidence correctly.⁶⁹ In their view, if the Appeals Chamber were to conclude that the Pre-Trial Chamber erred in respect of the standard of proof, the matter should be remanded to the Pre-Trial Chamber for a new decision.⁷⁰ They argue that the Appeals Chamber cannot overturn the Pre-Trial Chamber's finding without itself assessing all the evidence fully.⁷¹

25. The Prosecutor refutes the submissions of the SWTUF and the SIDG, repeating many of the arguments raised in his Document in Support of the Appeal. He emphasises that article 58 (1) of the Statute does not require that there be "absolute certainty that the evidence exclude all hypotheses inconsistent with the requisite statutory elements of the alleged crime, [because] then the lower threshold showing of 'reasonable grounds' would be meaningless".⁷² The Prosecutor submits that the SWTUF and SIDG do not refer to any authority to support their view that a Pre-Trial Chamber must be certain that the standard of reasonable grounds is met, otherwise the Chamber would not be "satisfied" of the standard.⁷³ The Prosecutor insists that both the Impugned Decision and the Observations are logically flawed because they are based on the premise that reasonable grounds can only exist if they are the only

⁶⁵ Observations, paras 27-29.

⁶⁶ Observations, paras 33-48.

⁶⁷ Observations, para. 30.

⁶⁸ Observations, paras 49, 53.

⁶⁹ Observations, para. 53.

⁷⁰ Observations, paras 50, 53.

⁷¹ Observations, para. 51.

⁷² Response to Observations, para. 14.

⁷³ Response to Observations, para. 15.

reasonable conclusion,⁷⁴ and that the “only reasonable conclusion” standard is the “logical equivalent” of the “beyond reasonable doubt” standard.⁷⁵

26. The Prosecutor rejects the argument that the Pre-Trial Chamber and Judge Ušacka in her Dissenting Opinion agreed on the standard and merely assessed the evidence differently, submitting that under the Pre-Trial Chamber’s standard a reasonable inference would not be sufficient to establish reasonable grounds to believe.⁷⁶ Finally, the Prosecutor submits that the argument that the Appeals Chamber cannot overturn a factual finding by the Pre-Trial Chamber unless it assesses all evidence itself is misconstrued in the context of the present appeal.⁷⁷

E. Submissions of the Victims and response of the Prosecutor thereto

27. The Victims generally support the Prosecutor’s arguments on appeal.⁷⁸ In their view, the Pre-Trial Chamber developed a standard of proof that was “unduly stringent”, and which was neither supported by the wording or intent of the Statute nor by precedent.⁷⁹ The Victims submit that the Pre-Trial Chamber’s standard did not provide the flexibility required during the investigation stage of the proceedings.⁸⁰ They refer the Appeals Chamber to decisions of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: “ICTY”), which reflect a lower standard of proof,⁸¹ and which even indicate that the mental element does not have to be established at the pre-trial stage of proceedings at the ICTY.⁸² The Victims are of the view that the Pre-Trial Chamber was “involving itself in an overly critical evaluation of the evidence”.⁸³ The Victims request that the matter be remitted to the Pre-Trial Chamber for a new evaluation of the evidence, in the course of which the Pre-Trial Chamber should also take into account information supplied by two of the Victims.⁸⁴

⁷⁴ Response to Observations, para. 16.

⁷⁵ Response to Observations, para. 18.

⁷⁶ Response to Observations, para. 21.

⁷⁷ Response to Observations, para. 34.

⁷⁸ Second Victims’ Request for Participation, para. 25.

⁷⁹ Second Victims’ Request for Participation, para. 26.

⁸⁰ Second Victims’ Request for Participation, para. 27.

⁸¹ Second Victims’ Request for Participation, para. 30.

⁸² Second Victims’ Request for Participation, para. 31.

⁸³ Second Victims’ Request for Participation, para. 32.

⁸⁴ Second Victims’ Request for Participation, para. 34.

28. The Prosecutor supports the submissions of the Victims, noting that the Victims endorse the submissions he has made in the Document in Support of the Appeal.⁸⁵ As to the Victims' request that the Pre-Trial Chamber should take into account the information provided by two of the Victims when evaluating anew the Prosecutor's evidence regarding genocidal intent, the Prosecutor notes that the present appeal is confined to a "precise legal matter", and that the Victims' submissions therefore should be disregarded.⁸⁶

F. Determination by the Appeals Chamber

29. Article 58 (1) of the Statute reads, in relevant part, as follows:

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) [...]

30. In the view of the Appeals Chamber, the evidentiary threshold of "reasonable grounds to believe" for the issuance of a warrant of arrest must be distinguished from the threshold required for the confirmation of charges ("substantial grounds to believe", article 61 (7) of the Statute) and the threshold for a conviction ("beyond reasonable doubt", article 66 (3) of the Statute). It is evident from the wording of the provisions that the standards of "substantial grounds to believe" and "beyond reasonable doubt" are higher standards of proof than "reasonable grounds to believe". Accordingly, when disposing of an application for a warrant of arrest under article 58 (1) of the Statute, a Pre-Trial Chamber should not require a level of proof that would be required for the confirmation of charges or for conviction.

31. The Appeals Chamber notes that the Pre-Trial Chamber equated⁸⁷ the "reasonable grounds to believe" standard with the "reasonable suspicion" standard as a prerequisite for lawful arrest or detention under article 5 (1) (c) of the European

⁸⁵ Prosecutor's Response to Second Victims' Request, para. 24.

⁸⁶ Prosecutor's Response to Second Victims' Request, para. 25.

⁸⁷ See Impugned Decision, para. 160.

Convention on Human Rights.⁸⁸ In this context it is instructive to recall that the European Court of Human Rights has interpreted “reasonable suspicion” under article 5 (1) (c) of the European Convention on Human Rights as “presuppos[ing] the existence of facts or information which would satisfy an objective observer that the person concerned *may* have committed the offence”.⁸⁹ Thus, at this preliminary stage, it does not have to be certain that that person committed the alleged offence. Certainty as to the commission of the crime is required only at the trial stage of the proceedings (see article 66 (3) of the Statute), when the Prosecutor has had a chance to submit more evidence.

32. In the Impugned Decision, the Pre-Trial Chamber developed a specific test to determine whether “reasonable grounds to believe” have been established by way of ‘proof by inference’. The Pre-Trial Chamber stated that the “reasonable grounds” standard would be met (and a warrant would be issued) if the evidence provided by the Prosecutor “show[s] that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence” of the requisite specific genocidal intent.⁹⁰ The Chamber further explained its understanding of the applicable standard as follows:

[I]f the *existence* of [...] 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.⁹¹

33. In the view of the Appeals Chamber, requiring that the existence of genocidal intent must be the *only* reasonable conclusion amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt. If the only reasonable conclusion based on the evidence is the existence of genocidal intent, then it cannot be said that such a finding establishes merely “reasonable grounds to believe”. Rather, it establishes genocidal intent “beyond reasonable doubt”.

⁸⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), signed 4 November 1950, as amended by Protocol 11, entered into force 3 September 1953, 213 United Nations Treaty Series 2889.

⁸⁹ European Court of Human Rights, *Fox, Campbell and Hartley v. United Kingdom*, “Judgment”, Application no. 12244/86, 12245/86, 12383/86, 30 August 1990, para. 32 (emphasis added).

⁹⁰ Impugned Decision, para. 158.

⁹¹ Impugned Decision, para. 159 (emphasis added).

34. The Pre-Trial Chamber not only developed an erroneous standard regarding ‘proof by inference’, but actually applied this standard to the evidence put forward by the Prosecutor in respect of Mr Al Bashir’s alleged genocidal intent. Notably, in paragraph 195 of the Impugned Decision, the Pre-Trial Chamber found that:

[T]here 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.⁹²

35. The “number of additional factors” to be considered by the Pre-Trial Chamber were subsequently evaluated in paragraphs 196 to 200 of the Impugned Decision.

36. The Pre-Trial Chamber summed up its analysis of the Prosecutor’s evidence as follows:

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, 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;

⁹² Emphasis added.

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.⁹³

37. The Pre-Trial Chamber stated:

[W]hen 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 [genocidal] 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.⁹⁴

38. Based on this conclusion, the Pre-Trial Chamber found “that the materials provided by the Prosecution [...] fail to provide reasonable grounds to believe that the GoS acted with [genocidal intent] [...], and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to [genocide] counts 1 to 3”.⁹⁵

39. The above indicates that the Pre-Trial Chamber would be satisfied that there were reasonable grounds to believe that Mr Al Bashir acted with genocidal intent only if the existence of such intent was the only reasonable conclusion. The Appeals Chamber finds that, although the Pre-Trial Chamber appreciated the appropriate standard to be “reasonable grounds to believe”,⁹⁶ it applied this standard erroneously. The standard it developed and applied in relation to ‘proof by inference’ was higher

⁹³ Impugned Decision, para. 204.

⁹⁴ Impugned Decision, para. 205 (emphasis added).

⁹⁵ Impugned Decision, para. 206.

⁹⁶ See for e.g., Impugned Decision, paras 155-157.

and more demanding than what is required under article 58 (1) (a) of the Statute. This amounted to an error of law.

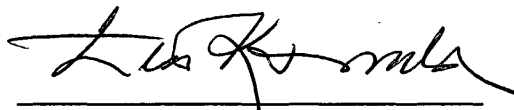
IV. APPROPRIATE RELIEF

40. On an appeal under article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence).

41. In the instant case, the Pre-Trial Chamber applied an erroneous standard of proof when evaluating the evidence submitted by the Prosecutor and, consequently, rejected his application for a warrant of arrest in respect of the crime of genocide. Therefore, the decision by the Pre-Trial Chamber not to issue a warrant of arrest in respect of that crime was materially affected by an error of law. It is therefore appropriate to reverse the Impugned Decision to that extent.

42. The Appeals Chamber notes that the Prosecutor has requested the Appeals Chamber to “apply the correct standard to the facts found by the Pre-Trial Chamber, entering a finding that there are reasonable grounds to believe that President Omar Al Bashir is criminally responsible for genocide”.⁹⁷ He also requests the Appeals Chamber to “direct the Pre-Trial Chamber to issue a warrant of arrest on those counts”.⁹⁸ The Appeals Chamber is of the view that the substance of the matter should be considered by the Pre-Trial Chamber, and not by the Appeals Chamber. Therefore, the matter is remanded to the Pre-Trial Chamber for a new decision, using the correct standard of proof.

Done in both English and French, the English version being authoritative.



Judge Erkki Kourula
Presiding Judge

Dated this 3rd day of February 2010

At The Hague, The Netherlands

⁹⁷ Document in Support of the Appeal, para. 65.

⁹⁸ Document in Support of the Appeal, para. 65.