

Standard of Proof Required to Issue an Arrest Warrant for Genocide

Case ICC-02/05-01/09, *The Prosecutor v Omar Hassan Ahmad Al Bashir*, judgement of the International Criminal Court (Appeals Chamber) of 3 February 2010

Enrique Carnero Rojo

Keywords

ICC, Rome Statute, Article 58, Genocide, Standard of Proof, Inference.

Abstract

At the time of writing this case note, the case against Omar Al Bashir is the only genocide case before the International Criminal Court. So far, the main legal question concerns whether the existence of reasonable grounds to believe that a person has committed a crime of genocide within the jurisdiction of the Court must be the only reasonable conclusion to be drawn from the evidence presented by the Prosecutor for an arrest warrant to be issued against the suspect of such crime.

Author affiliations

Ph.D. candidate, Willem Pompe Institute, Utrecht University, The Netherlands; LL.M., Leiden University; Associate Legal Adviser, Office of the Prosecutor of the International Criminal Court (2004-2009). The views expressed herein are those of the author in his personal capacity and do not necessarily represent those of the ICC.

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I. Introduction

In 2009, Pre-Trial Chamber I of the International Criminal Court (ICC) issued a warrant of arrest against the President of Sudan, Omar Al Bashir. This warrant of arrest related to his alleged responsibility for crimes against humanity and war crimes allegedly committed in Darfur against members of the Fur, Masalit and Zaghawa groups from March 2003 to the date of the filing of the Prosecution application on 14 July 2008.¹ The Prosecutor of the Court had also laid genocide charges,² but the majority of the Pre-Trial Chamber did not initially find reasonable grounds to believe that a crime of genocide had been committed. This case is important not only because it concerns an acting Head of State but also because, so far, it is the only case of genocide charges being brought before the ICC.

II. Background and Main Legal Question

On the basis of the material provided by the Prosecutor, Pre-Trial Chamber I found in March 2009 that there were reasonable grounds to believe that in the context of and in association with the protracted armed conflict not of an international character that existed in Darfur between the Government of Sudan and several organised armed groups,³ forces of the Government of Sudan (i) systematically committed acts of pillaging after the seizure of the towns and villages that were subject to their attacks,⁴ (ii) unlawfully attacked that part of the civilian population of Darfur perceived by the Government of Sudan as being close to the armed groups opposing it in the ongoing armed conflict,⁵ and (iii) subjected, as part of such unlawful attack, thousands of civilians to acts of murder,⁶ extermination,⁷ forcible transfer,⁸ torture⁹ and rape.¹⁰ Accordingly, the Pre-Trial Chamber found reasonable grounds to believe that forces of the Government of Sudan had committed war crimes of intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities and pillage, and crimes against humanity of murder, extermination, forcible transfer, torture and rape throughout the Darfur region.¹¹ Moreover, the Pre-Trial Chamber found reasonable grounds to believe that Mr Al Bashir was criminally responsible for these crimes as an indirect perpetrator or as an indirect co-perpetrator. The Pre-Trial Chamber considered the essential role he would have played in coordinating the design and implementation of the counter-insurgency campaign agreed upon with other high-ranking Sudanese political and military leaders.¹² The Chamber held, in the alternative, that Mr Al Bashir would have been in full control of all branches of the ‘apparatus’ of the State of Sudan and that he would have used such control to secure the implementation of the common plan.¹³

Contrary to the Prosecutor’s allegations, however, the majority of the Chamber did not find reasonable grounds to believe that a crime of genocide had been committed. The majority considered that the 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) could be proved by inference from the evidence if this were the only reasonable inference available on the evidence.¹⁴ Eventually, the majority of the Chamber found that the genocidal intent of the Government of Sudan was only one of a number of other possible reasonable conclusions available from the evidence.¹⁵

In June 2009, Pre-Trial Chamber I granted the Prosecutor leave to appeal its analysis of the genocide allegations. More specifically, the Chamber allowed an interlocutory appeal on the issue of ‘whether the correct standard of proof in the context of Article 58 [of the Rome Statute of the International Criminal Court (the Statute)] 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’.¹⁶

1 *The Prosecutor v Omar Hassan Ahmad Al Bashir* (hereinafter *Al Bashir*), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09-1 (4 March 2009).

2 *Situation in Darfur, The Sudan*, Public Redacted Version of Prosecution’s Application under Article 58 filed on 14 July 2008, Office of the Prosecutor, ICC-02/05-157 (12 September 2008) Annex A, 76-209 and 374-400.

3 *Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09-3 (4 March 2009) 62-67.

4 *ibid* 77.

5 *ibid* 76.

6 *ibid* 94.

7 *ibid* 97.

8 *ibid* 100-101.

9 *ibid* 104.

10 *ibid* 108.

11 *ibid* 78 and 109.

12 *ibid* 214 and 221.

13 *ibid* 222-223.

14 *ibid* 158.

15 *ibid* 165, 172, 179, 181, 201 and 204-206.

16 *Al Bashir*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar

III. The Judgement

In February 2010, the Appeals Chamber reversed the decision of Pre-Trial Chamber I not to issue a warrant of arrest for genocide against Mr Al Bashir. The Appeals Chamber held that the Pre-Trial Chamber assessed the evidence presented by the Prosecutor on the basis of an erroneous standard of proof and directed the Pre-Trial Chamber to decide anew, on the basis of the correct standard of proof, whether a warrant of arrest for genocide should be issued.¹⁷ After recalling that the standard of proof, articulated by the European Court of Human Rights as a prerequisite for lawful arrest or detention, requires merely a ‘reasonable suspicion’, *i.e.* that the person ‘may’ have committed the offense, and upon finding that certainty as to the commission of the crime is required only at the trial stage of the proceedings pursuant to Article 66(3) of the Statute, the Appeals Chamber concluded that the Pre-Trial Chamber had developed and applied an erroneous standard regarding ‘proof by inference’. This was so because the Pre-Trial Chamber required that the existence of genocidal intent must be the only reasonable conclusion from the evidence.¹⁸ The Appeals Chamber found that to do so amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt instead of requiring him to establish merely ‘reasonable grounds to believe’ that the person has committed a crime within the jurisdiction of the Court, as required for the issuance of an arrest warrant pursuant to Article 58(1)(a) of the Statute.¹⁹

On the basis of this judgement, in July 2010 Pre-Trial Chamber I unanimously amended the arrest warrant previously issued against Mr Al Bashir and included the previously dismissed genocide charges.²⁰ More specifically, the Pre-Trial Chamber was satisfied, on the basis of the standard of proof as identified by the Appeals Chamber, that there were reasonable grounds to believe that Mr Al Bashir acted with *dolus specialis* (specific intent) to destroy in part the Fur, Masalit and Zaghawa ethnic groups.²¹

Relying on its previous findings with respect to the material elements of crimes against humanity, the Pre-Trial Chamber found that the material elements of each of the alleged counts of genocide, common and specific, were fulfilled. Regarding the common elements, the Pre-Trial Chamber found that there were reasonable grounds to believe that (i) the victims of the alleged acts belonged to the targeted groups,²² and that (ii) the attacks and acts of violence committed by the Government of Sudan forces against a part of the Fur, Masalit and Zaghawa groups were large in scale, systematic and followed a similar pattern.²³ Regarding the specific material elements of each genocide charge, the Pre-Trial Chamber found reasonable grounds to believe that killings, acts of rape, torture and forcible transfer were committed against members of the targeted ethnic groups.²⁴ The Pre-Trial Chamber also considered that one of the reasonable conclusions that could be drawn was that the acts of contamination of water pumps and forcible transfer coupled by resettlement by member of other tribes were committed in furtherance of the genocidal policy and that the conditions of life inflicted on the Fur, Masalit and Zaghawa groups were calculated to bring about the physical destruction of a part of those ethnic groups.²⁵

Accordingly, charges of genocide by killing (Article 6(a) of the Statute), genocide by causing serious bodily or mental harm (Article 6(b) of the Statute), and genocide by deliberately inflicting conditions of life calculated to bring about physical destruction (Article 6(c) of the Statute) were included in the arrest warrant.²⁶

IV. Comment

The exact delimitation of the standard of proof required by Article 58 of the Statute to issue a warrant of arrest or a summons to appear for an alleged crime of genocide is a particularly sensitive issue. On the one hand, based on the different wording of the relevant provisions, the standard (‘reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court’)²⁷ must be lower than the standards consecutively required for starting a trial on genocide allegations (‘substantial grounds to believe that the person committed each of the crimes charged’)²⁸ and for convicting a person accused

Hassan Ahmad Al Bashir”, Pre-Trial Chamber I, ICC-02/05-01/09-12 (10 March 2009) 5.

17 *Al Bashir*, Judgement 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”, The Appeals Chamber, ICC-02/05-01/09-73 (3 February 2010).

18 *ibid* 30-31 and 34.

19 *ibid* 33.

20 *Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09-95 (12 July 2010).

21 *Al Bashir*, Second Decision on the Prosecution’s Application for a Warrant of Arrest, Pre-Trial Chamber I, ICC-02/05-01/09-94 (12 July 2010) 4-5.

22 *ibid* 11-12.

23 *ibid* 16-17.

24 *ibid* 23-24 and 30-31.

25 *ibid* 38-40.

26 *Al Bashir* (n 20).

27 *Rome Statute of the International Criminal Court*, open for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 58(1)(a).

28 *ibid* art 61(7).

of genocide ('the Court must be convinced of the guilt of the accused beyond reasonable doubt').²⁹ From this point of view, I agree with the Appeals Chamber that the existence of genocidal intent cannot be required to be the only reasonable conclusion from the evidence tendered for issuing a warrant or a summons under Article 58 of the Statute. Such a requirement amounts to calling on the Prosecutor to eliminate any reasonable doubt of the crime before the trial even takes place. Moreover, it can be argued that the standard of proof to issue a warrant of arrest or a summons to appear must be lower than the one required by the Pre-Trial Chamber in its first decision for the standard to be consistent with the right to a fair trial.³⁰ This evidentiary threshold is very high but is required at a time when the suspect cannot present his or her views to the judges.

On the other hand, the standard of proof required by Article 58 of the Statute to issue a warrant of arrest or a summons to appear for an alleged crime must be high enough to prevent the ICC from dealing with wholly unfounded allegations that do not merit any further consideration. From this angle, it is understandable that judges are cautious when dealing with genocide allegations, especially because this crime is considered very grave and claims about its commission may have drastic consequences not only on those directly affected by them but also on their States.³¹ The situation is even more delicate in scenarios similar to the one in this case, where the allegations did not appear to be supported by direct evidence but seemingly rested only on inferences. This circumstance may explain the reluctance of the Pre-Trial Chamber to rely on reasonable inferences only to issue a warrant for genocide in its first decision.

These two conflicting views are likely to appear again in future cases in which requests for arrest warrants or summons to appear concerning genocide allegedly committed by high level suspects are founded only on inferences or other types of indirect evidence. In these instances, the Appeals Chamber of the Court appears to have endorsed the view of the minority of the Pre-Trial Chamber, who stated in the context of the case against Mr Al Bashir that 'once sufficient evidence is presented to render an inference of genocidal intent reasonable, one can be satisfied that there are reasonable grounds to believe that genocidal intent exists, unless evidence is also presented which would render an inference of genocidal intent unreasonable'.³² ■

29 *ibid* art 66(3).

30 *ibid* art 67(1).

31 WA Schabas, *Genocide in International Law: the Crime of Crimes* (2nd edn, Cambridge University Press 2009) 14-15 and 491.

32 *Al Bashir* (n 3) Separate and Partly Dissenting Opinion of Judge Anita Ušacka 34.