

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 June 2009

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

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

Public Document

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"

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
Ms Fatou Bensouda

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Ms Silvana Arbia & Mr Didier Daniel
Preira

Defence Support Section

Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Mr Simo Vaatainen

Detention Section

Mr Anders Backman

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I (the “Chamber”) of the International Criminal Court (the “Court”);

NOTING the “Prosecutor’s Application under Article 58”¹, regarding a request for a warrant of arrest against Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”) filed on 14 July 2008, and the supporting and other information submitted by the Prosecutor thereafter;²

NOTING the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”³ (“the Decision”) issued by the Pre-Trial Chamber I (“the Chamber”) on 4 March 2009, in which:

- (i) the Chamber decided to “issue a warrant of Arrest for Omar Al Bashir for his alleged responsibility for crimes against humanity and war crimes under articles 25(3)(a) of the Statute”⁴; and
- (ii) the Majority of the Chamber (“the Majority”) decided not to include any genocide count in such a warrant of arrest;

NOTING 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’”⁵ (“the Prosecutor’s Application”) filed by the Office of the Prosecutor on 10 March 2009, pursuant to paragraph (d) of article 82 (1) of the Statute of the Court (“the Statute”);

¹ ICC-02/05-151-US-Exp and ICC-02/05-151-US-Exp-Anxs1-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxs1 & 2.

² ICC-02/05-160 and ICC-02/05-160-Conf-Exp-AnxI, ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J.

³ ICC-02/05-01/09-3.

⁴ ICC-02/05-01/09-3, p. 92.

⁵ ICC-02/05-01/09-12.

NOTING article 82(1)(d) of the Statute, rule 155 of the Rules of Procedure and Evidence (“the Rules”) and regulations 24(5), 65 and 77 of the Regulations of the Court (“the Regulations);

CONSIDERING that, according to the Chamber’s consistent case law,⁶ for the Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issue identified by the appellant must: (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING further that, according to the Appeals Chamber:

- (i) “[o]nly an issue may form the subject-matter of an appealable decision”;⁷
- (ii) “an issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion;”⁸

⁶ See, *inter alia*, “Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal”, issued by Pre-Trial Chamber I on 23 June 2006 (ICC-01/04-01/06-166); “Decision on Defence Motion for Leave to Appeal”, issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338); “Decision on Second Defence Motion for Leave to Appeal”, issued by Pre-Trial Chamber I on 28 September 2006 (ICC-01/04-01/06-489); and “Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions”, issued by Pre-Trial Chamber I on 14 December 2007 (ICC-01/04-01/07-108). See also “Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58”, issued by Pre-Trial Chamber II on 19 August 2005 (ICC-02/04-01/05-20).

⁷ “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, issued by the Appeals Chamber on 13 July 2006, ICC-01/04-168, para. 9.

⁸ *Ibid.*, para. 9.

- (iii) “[a]n issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”;⁹
- (iv) “[n]ot every issue may constitute the subject of an appeal”,¹⁰ but “it must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”;¹¹ and
- (v) “[i]dentification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal” insofar as “the issue must be one ‘for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings’”;¹²

CONSIDERING that, in the Prosecutor’s Application, the Prosecutor seeks leave to appeal in relation to the following three issues:

- (i) “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” (“the First Issue”);¹³
- (ii) “Whether the Majority considered specific extraneous factors in assessing the existence of reasonable grounds to establish genocidal intent” (“the Second Issue”);¹⁴

⁸ *Ibid.*, para. 9.

⁹ *Ibid.*, para. 9.

¹⁰ *Ibid.*, para. 10.

¹¹ *Idem.*

¹² *Ibid.*, para. 14.

¹³ Prosecution’s Application, para. 13

¹⁴ *Idem.*

- (iii) “Whether the Majority failed to consider both separately and collectively specific critical factors in assessing the existence of reasonable grounds to establish genocidal intent” (“the Third Issue”);¹⁵

CONSIDERING that, in relation to the First Issue, the Majority explained in the Decision that, in the present case, the Prosecutor:

- a. did not have any direct evidence of genocidal intent;
- b. requested that the Chamber draw the conclusion that there are reasonable grounds to believe that genocidal intent existed from a joint analysis of those facts for which sufficient evidence to meet article 58 evidentiary standard was available (“the facts proven by the Prosecutor”);¹⁶

CONSIDERING further that the Majority explained in the Decision that, under these circumstances, the law on proof by inference became applicable; and that according to this law, an inference can only be drawn if it is the only reasonable conclusion from the joint analysis of the facts proven by the Prosecutor;¹⁷

CONSIDERING that the Majority did not suggest that, in order to establish the existence of reasonable grounds in relation to genocidal intent, the Prosecutor must show that the only reasonable conclusion from the facts proven by the Prosecutor is the existence of genocidal intent beyond reasonable doubt (article 66 of the Statute evidentiary standard);

¹⁵ *Idem.*

¹⁶ ICC-02/05-01/09-3, paras. 147-161.

¹⁷ *Idem.*

CONSIDERING that, quite the contrary, the Majority only required the Prosecutor to demonstrate that the only reasonable conclusion from the facts proven by the Prosecutor is that there are “reasonable grounds to believe” in the existence of genocidal intent (article 58 of the Statute evidentiary standard);¹⁸

CONSIDERING that, nevertheless, the First Issue constitutes an issue arising out of the decision if interpreted in the sense that the Majority - in applying the law on proof by inference due to the Prosecutor’s exclusive reliance thereon - erred in requiring that the only reasonable conclusion from the facts proven by the Prosecutor be that there are “reasonable grounds to believe” in the existence of genocidal intent;

CONSIDERING that, in the Chamber’s view, this issue affects the fairness of the proceedings insofar as, had the Majority erred in its determination, it “would have a direct and detrimental impact on the Chamber’s ability to correctly assess the evidence;”¹⁹

CONSIDERING, further, that, in the Decision, the Majority concluded that:

- (i) “[...] 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”;²⁰ and
- (ii) “[...] 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

¹⁸ *Idem.*

¹⁹ ICC-02/05-01/09-12, para. 37.

²⁰ ICC-02/05-01/09-3, para. 206.

to the arrest warrant for Omar Al Bashir so as to include the crime of genocide;"²¹

CONSIDERING, that, in the view of the Chamber, such amendment or production of further evidence in order to meet the standard espoused by the Majority would affect the expeditiousness of the proceedings, and, therefore, the determination of the First Issue, as defined by the Chamber in the present decision, affects the expeditiousness of the proceedings;

CONSIDERING that the Chamber is also of the view that an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings by providing clarity on the law on proof by inference, particularly at the arrest warrant stage;

CONSIDERING that , as a result, the two cumulative criteria provided for in article 82 (1)(d) of the Statute are met;

CONSIDERING that the Second and Third Issues consist of a mere disagreement with the Majority's assessment of the evidence submitted by the Prosecutor to support his genocide-related allegations and, therefore, neither constitutes an "issue" as defined by the Appeals Chamber;

CONSIDERING that, in relation to parties' disagreements with the Chamber's evidentiary assessment of the evidence, the Chamber has consistently held that:

"[...] the first and foremost requirement for a request for leave to appeal to be granted is that the relevant party identifies an issue within the meaning of article 82(1)(d) of the Statute; and that, as this Chamber has already stated and based on the Appeals Chamber Judgment of 13 July 2006, this is not the case

²¹ *Ibid*, para. 207.

when the matter raised by the Defence consists of "nothing more than a disagreement" with a finding of the Chamber;"²²

CONSIDERING, therefore, that the Second and Third Issues do not fulfill the requirements set out in article 82 (1)(d) of the Statute;

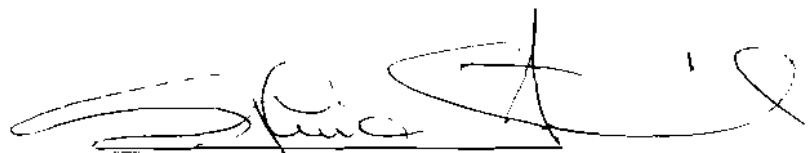
FOR THESE REASONS,

²² *Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges*, ICC-01/04-01/07-727, issued by Pre-Trial Chamber I on 24 October 2008, p. 16. See also, *Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges*, ICC-01/04-01/06-915, issued by the Pre-Trial Chamber I on 24 May 2007, para. 71. See also, *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, issued by the Appeals Chamber on 13 May 2006, ICC-01/04-168, para. 9.

GRANTS the Prosecutor's Application in relation to the First Issue raised by the Prosecutor therein;

REJECTS the Prosecutor's Application in relation to the other issues raised therein.

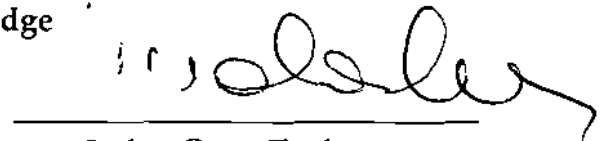
Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner
Presiding Judge



Judge Sanji Mmasenono Monageng



Judge Cuno Tarfusser

Dated this Wednesday 24 June 2009

At The Hague, The Netherlands