

The ICC Appeals Chamber Decision on the Warrant of Arrest in Prosecutor v. Bashir

By [Saira Mohamed](#)

Introduction



On February 3, 2010, the Appeals Chamber of the International Criminal Court (ICC) ruled that the court's Pre-Trial Chamber had erred in refusing to issue an arrest warrant on charges of genocide for Omar Hassan Ahmad al-Bashir, the President of Sudan.^[1] The Pre-Trial Chamber had issued a warrant in March 2009 on charges of crimes

against humanity and war crimes, but it found that there was insufficient evidence to support the genocide charges that the Prosecutor had alleged.^[2] Although it did not reach a conclusion as to whether a warrant must be issued with respect to the genocide charges, the Appeals Chamber's decision both provides some clarification of the standards required under the Rome Statute for issuance of an arrest warrant and offers an opportunity for reflection on the Appeals Chamber's interpretation of the limits of its powers with respect to the bodies it reviews. This Insight provides background to this important and potentially charged decision and explores its potential impact on the judicial and prosecutorial organs of the Court.

Background to the Decision

The action against Bashir originated in the July 2008 request of the ICC Prosecutor for an arrest warrant on three counts of genocide, five counts of crimes against humanity, and two counts of war crimes, based on Bashir's alleged role as the "mastermind" behind atrocities committed against the people of Darfur, where hundreds of thousands have been killed and millions have been forced from their homes.^[3] The request for a warrant, which marked the first time a sitting head of state has been pursued by the ICC, was met with defiance by the Government of Sudan. Today, Bashir remains in power; he recently received the official nomination of his political party to make a bid for the presidency in nationwide elections to be held later this year.^[4]

The Pre-Trial Chamber unanimously granted the Prosecutor's request for a

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warrant, but with one dissent it issued the warrant only for charges of crimes against humanity and war crimes.^[5] Soon after, the Prosecutor filed an application for leave to appeal the Pre-Trial Chamber's decision.^[6] Under the Rome Statute, appeals are not available for all interim decisions. Instead, Article 82(1) enumerates four categories of decision that may be appealed, including three that are appealable as of right, and a fourth—a decision "that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings"^[7]—that requires permission of the chamber issuing the decision.^[8] The Pre-Trial Chamber granted the request for appeal, filed under this final provision of Article 82(1), in June 2009.^[9]

The "Reasonable Grounds" Standard

The central issue on appeal concerned the proper interpretation of Article 58(1)(a) of the Rome Statute, which holds that the Pre-Trial Chamber "shall, on the application of the Prosecutor, issue a warrant of arrest of a person" if "[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."^[10] In its decision to issue the arrest warrant only for charges of war crimes and crimes against humanity, the majority of the Pre-Trial Chamber held that because the existence of genocidal intent was "only one of several reasonable conclusions" that could have been drawn from the evidence, the Prosecution had failed to satisfy the evidentiary burden set forth in the Rome Statute to support the warrant on charges of genocide.^[11] In its appeal, the Prosecution challenged this interpretation of the "reasonable grounds" standard of Article 58(1)(a), arguing that it equated "reasonable grounds" with a "higher level of proof," an argument that was also made by Judge Usacka in dissent from the majority of the Pre-Trial Chamber.^[12] Instead of requiring that genocidal intent be the *only* reasonable inference available, the Prosecution argued, the Pre-Trial Chamber should have required simply that genocidal intent was *one* reasonable inference available.^[13]

The Appeals Chamber agreed. The Pre-Trial Chamber's standard, it held, was "higher and more demanding" than what is required under the Rome Statute.^[14] In rejecting the Pre-Trial Chamber's interpretation of Article 58, it distinguished the evidentiary threshold required for issuance of an arrest warrant—"reasonable grounds to believe"—both from the stricter standard required for the later stage of confirmation of charges—"substantial grounds to believe"^[15]—and from the even more rigorous standard ultimately required for conviction—"beyond reasonable doubt."^[16] According to the Appeals Chamber, the Pre-Trial Chamber's interpretation of "reasonable grounds" would impose on the Prosecutor a requirement of proof "beyond reasonable doubt."^[17]

Significance of the Decision

From the perspective of those eager to see some progress in the prosecution of Bashir, in the development of international criminal law, or in the work of the Court overall, the Appeals Chamber's decision may appear to have little import. The Appeals Chamber did not add genocide charges to the warrant

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for Bashir's arrest; it merely remanded to the Pre-Trial Chamber for a new determination under a proper reading of Article 58(1)(a).^[18] Indeed, the Pre-Trial Chamber could still find in its next round of review that the Prosecutor has not shown reasonable grounds to believe that Bashir is criminally responsible for genocide; or even if it does amend the warrant to add genocide charges, the same result could have been reached if the Prosecutor sought later to amend the charges to include genocide at the confirmation of charges stage, rather than appealing at the warrant stage.^[19] Nor did the Appeals Chamber provide a definition or test for a proper interpretation of "reasonable grounds to believe"; although the Appeals Chamber detailed the flaws in the decision it was reviewing, it left that power of interpretation to the Pre-Trial Chamber. The decision by the Appeals Chamber did not even appear to satisfy the Rome Statute's requirement that permission for appeal should be granted only where "an immediate resolution by the Appeals Chamber may materially advance the proceedings."^[20] Far from an "immediate" resolution, the Appeals Chamber issued its narrow ruling, finding error and remanding to the Pre-Trial Chamber for a new decision, more than seven months after the Pre-Trial Chamber had granted the Prosecutor leave to appeal in the first place.

Despite its apparent emptiness, however, the Appeals Chamber decision concerning the Bashir warrant represents a valuable resource to study the development of international criminal law and the Court. As a preliminary matter, the fact that genocide charges could have been added at the confirmation of charges stage, without months of a drawn-out appeals process, does not vitiate the interest in correcting the Pre-Trial Chamber's incorrect interpretation of the Article 58(1)(a) standard. Had the Prosecutor chosen not to appeal, the Pre-Trial Chamber's unduly rigorous threshold for establishing "reasonable grounds to believe" sufficient to support an arrest warrant surely would have affected future cases—involving not only genocide, but also charges of other crimes. From this perspective, the Appeals Chamber decision was not a seven-month exercise in futility; it was a necessary and significant step in interpretation and application of the Rome Statute.

Beyond its importance for development of international criminal law, the decision also provides some insight into the Appeals Chamber's understanding of its role in reviewing interim decisions. The Prosecution requested that the Appeals Chamber either direct the Pre-Trial Chamber to issue an arrest warrant on the genocide counts, or, in the alternative, to remand the matter to the Pre-Trial Chamber to determine whether it must issue an arrest warrant for genocide.^[21] The Appeals Chamber indeed has either power: In contrast to the rules governing an appeal of a final judgment, which are set forth in detail in Article 83, the Rome Statute provides little guidance on the procedures or impact of an appeal of an interim decision, and the Rules of Procedure, which provide that the Appeals Chamber "may confirm, reverse, or amend the decision appealed," grant great discretion to the Appeals Chamber.^[22]

By finding error in the decision not to grant the warrant for genocide charges but choosing to remand to the Pre-Trial Chamber for the ultimate determination, the Appeals Chamber showed great restraint in its approach to its position relative to other institutions of the Court. It protected the

Pre-Trial Chamber's responsibility for monitoring the investigatory work of the Office of the Prosecutor, leaving to the Pre-Trial Chamber the task of striking a balance between holding the Prosecutor in check through the requirement of adequate evidence to support an arrest warrant and granting the Prosecutor sufficient latitude consistent with the Rome Statute to support charges where appropriate. Like its 2008 decision on the definition of gravity required for admissibility, in which the Appeals Chamber held that the Pre-Trial Chamber had erred in its interpretation of gravity but refused the request of the Prosecutor that the Appeals Chamber identify the correct interpretation on its own,^[23] the Appeals Chamber has set out for itself a limited role in interlocutory appeals—but a role that bears great power despite its limits. By ensuring that the Pre-Trial Chamber—not the Appeals Chamber—remains the gatekeeper to the issuance of arrest warrants and confirmations of charges,^[24] the Appeals Chamber has maintained through the Bashir decision a balance on the relative powers of the Office of the Prosecutor, Pre-Trial Chamber, and Appeals Chamber, and has preserved the vitality and relevance of each body relative to the other.

At the same time, the decision could alter the dynamic between the Office of the Prosecutor and the Pre-Trial Chamber, which may interpret the Appeals Chamber's opinion as a call for greater deference by the Pre-Trial Chamber when reviewing charging documents submitted by the Prosecutor. The potential for fewer checks on the Office of the Prosecutor, especially in light of the controversy already surrounding the decision to pursue Bashir,^[25] could lead to heightened allegations concerning the absence of checks on the power of the Prosecutor.

Conclusion

The ICC's pursuit of Bashir will likely run a long course. More than eighteen months after the Prosecutor announced that he was seeking an arrest warrant for the Sudanese president, Bashir remains the leader of the Government of Sudan. Based on the progress made so far, it seems likely that the arrest warrant for Bashir may never be executed; pouring the ICC's resources into determining which charges may form the basis of this warrant suggests that, for better or worse, the work of the Court is divorced from realities on the ground. Although the Appeals Chamber's decision on the warrant may have questionable impact on Bashir himself, this Insight has shown that the decision protects an important standard in the ICC's pre-trial powers, preserves the separation between the different branches of the Court, and suggests an awareness on the part of the Appeals Chamber of its crucial role in maintaining a balance among these institutions' powers and responsibilities.

About the Author

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Endnotes

^[1] See Prosecutor v. Bashir, No. ICC-02/05-01/09-OA, Judgment on the Appeal of the Prosecutor Against the "Decision of the Prosecution's

Application for a Warrant Against Omar Hassan Al Bashir," ¶ 1 (Feb. 3, 2010) [hereinafter Appeals Chamber Warrant Judgment].

[2] See Prosecutor v. Bashir, No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, at 92 (Mar. 4, 2009) [hereinafter Pre-Trial Chamber Warrant Decision].

[3] International Criminal Court, Office of the Prosecutor, Situation in Darfur, The Sudan, Summary of the Case: Prosecutor's Application for Warrant of Arrest Under Article 58 Against Omar Hassan Ahmad Al Bashir, at 1, available at <http://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>.

[4] See *Beshir Nominated by His Party for Sudan Re-Election*, AGENCE FRANCE PRESS, Jan. 12, 2010.

[5] See Pre-Trial Chamber Warrant Decision, *supra* note 2, at 92.

[6] See Prosecutor v. Bashir, No. ICC-02/05-01/09, 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," at 3 (Mar. 10, 2009).

[7] Rome Statute of the International Criminal Court art. 82(1)(d), July 17, 1998, 2187 U.N.T.S. 90, 137 [hereinafter Rome Statute]. The three categories that are appealable as of right are (1) decisions jurisdiction or admissibility; (2) decisions granting or denying release of the person being investigated or prosecuted; and (3) decisions of the Pre-Trial Chamber made pursuant to Article 56(3) of the Statute. See *id.* art. 82(1)(a)–(c); see also Robert Roth & Marc Henzelin, *The Appeal Procedure of the ICC*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1535, 1548–50 (Antonio Cassese et al. eds., 2002).

[8] See WAR CRIMES RESEARCH OFFICE, INTERLOCUTORY APPELLATE REVIEW OF EARLY DECISIONS OF THE INTERNATIONAL CRIMINAL COURT, at 12–13 (Jan. 2008), available at <http://www.wcl.american.edu/warcrimes/documents/01-2008InterlocutoryAppeals.pdf>.

[9] See Prosecutor v. Bashir, No. ICC-02/05-01/09, 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," at 10 (June 24, 2009).

[10] Rome Statute, *supra* note 7, art. 58(1)(a).

[11] See Pre-Trial Chamber Arrest Warrant Decision, *supra* note 2, ¶ 159.

[12] See Prosecutor v. Bashir, No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Uacka, at 5–7 (Mar. 4, 2009).

[13] See Prosecutor v. Bashir, No. ICC-02/05-01/09 OA, 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," ¶¶ 3, 37–43 (July 6, 2009) [hereinafter Prosecution's Appeal of Warrant Decision].

[14] Appeals Chamber Warrant Judgment, *supra* note 1, ¶ 39.

[15] Rome Statute, *supra* note 7, art. 61(7).

[16] *Id.* art. 66(3).

[17] See Appeals Chamber Warrant Judgment, *supra* note 1, ¶ 33 (Feb. 3, 2010) ("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.'").

[18] See *id.* ¶ 42.

[19] See Rome Statute, *supra* note 7, art. 61(7)(c)(ii) (providing that the Pre-Trial Chamber may request the Prosecutor to consider amending charges "because the evidence submitted appears to establish a different crime within the jurisdiction of the Court"); see also *id.* art. 61(9) ("After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges."). Notably, in December 2009 the Appeals Chamber reversed a decision of Trial Chamber I that had allowed for a legal "recharacterization" of the facts in *Lubanga*. The Appeals Chamber held that the Trial Chamber could not change the legal characterization of the facts to support charges that were not originally confirmed by the Pre-Trial Chamber because the "facts and circumstances" in the confirmation of charges did not support the new charges, a violation of Article 74(2) of the Rome Statute. See Prosecutor v. Lubanga, No. ICC-01/04-01/06, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court," ¶ 112 (Dec. 8, 2009).

[20] Rome Statute, *supra* note 7, art. 82(1)(d).

[21] See Prosecution's Appeal of Warrant Decision, *supra* note 13, ¶ 65.

[22] INT'L CRIM. CT. R. P. & EVID. 158(1).

[23] See Situation in the Democratic Republic of Congo, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," ¶¶ 88–89; see also Beth Van Schaack, *Atrocity Crimes Litigation: 2008*

Year-In-Review, 7 NW. J. INT'L HUM. RTS. 170, 176–83 (2009).

[24] See David Scheffer, *A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence*, 21 LEIDEN J. INT'L L. 151, 153 (2008).

[25] See Colum Lynch, *Africans Defend Sudan's Indicted Leader as International Court Under Fire*, WASH. POST, June 30, 2009, 2009 WLNR 12462101 (describing questions surrounding motivations and prosecutorial strategy of the ICC Prosecutor).

