

1 International Criminal Court

2 The Appeals Chamber - Courtroom 1

3 Presiding Judge Erkki Kourula

4 Situation in Darfur, The Sudan - ICC-02/05-01/09

5 In the case of The Prosecutor v Omar Hassan Ahmad Al Bashir

6 Wednesday, 3 February 2010

7 (The hearing starts at 10.28 a.m.)

8 (Open session)

9 JUDGE KOURULA: Good morning. Court Officer, would you be so kind, please,
10 as to call the case, please.

11 THE COURT OFFICER: (Interpretation) Thank you, your Honour. Situation
12 in Darfur, Sudan. The Prosecutor v Omar Hassan Ahmad Al Bashir. ICC 02/05-01/09.

13 JUDGE KOURULA: Thank you very much. May I ask the Prosecutor to place
14 himself on the record and present the people around you.

15 MR MORENO-OCAMPO: Thank you, your Honour. The Office of the Prosecutor
16 is represented by Sara Criscitelli, Prosecutor Coordinator; Fabricio Guariglia,
17 head of the Appeals Section; Essa Faal, Senior Attorney; Jennifer Schense,
18 International Cooperation Adviser; Adebawale Omofade, a trial lawyer; Ben Batros
19 and Reinhold Gallmetzer.

20 JUDGE KOURULA: Thank you very much.

21 I should also like to mention that the legal representative of the victims
22 participating in the present appeal has indicated himself that he is unable to attend
23 today's hearing, but I see that there is a replacement, so would you be so kind
24 as to place yourself on record.

25 MS YAZJI: Yes. Good morning, your Honour. My name is Maria Victoria

1 Yazji. I am counsel at the Office of Public Council for Victims and, as you well
2 said, today we are standing in on behalf of Mr Nicolas Kaufman, who is the legal
3 representative for the victims in this case, as well as the B'Nai Darfur victims
4 who he represents in this case. Thank you.

5 JUDGE KOURULA: Thank you so much.

6 Today, the Appeals Chamber delivers its judgment on the Prosecutor's appeal
7 against the decision of the Pre-Trial Chamber I of 4 March 2009 entitled "Decision
8 on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad
9 Al Bashir."

10 The Appeals Chamber's unanimous decision on the appeal is as follows:

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

17 I should like now to summarise the reasons in the Appeals Chamber's decision.
18 Please note that the judgment itself, and not this summary, is authoritative.

19 At the outset, I would like to emphasise that the present appeal was not
20 concerned with the question of whether Mr Omar Al Bashir is, or is not, responsible
21 for the crime of genocide. Rather, the appeal addressed a question of procedural
22 law, namely, whether the Pre-Trial Chamber applied the correct standard of proof
23 when disposing of the Prosecutor's application for an arrest warrant. As a result
24 of the present appeal, it is for the Pre-Trial Chamber to determine anew whether
25 or not the arrest warrant for Mr Al Bashir should be extended to cover the crime

1 of genocide. The Appeals Chamber has not considered this question in the present
2 appeal, nor has it made a finding that there are reasonable grounds to believe that
3 Mr Al Bashir acted with genocidal intent.

4 Let me now turn briefly to the procedural history and the arguments of
5 the participants.

6 In July 2008, the Prosecutor applied to the Pre-Trial Chamber I for the
7 issuance of a warrant of arrest of Mr Al Bashir inter alia for the crime of genocide.
8 On 4 March 2009, the Pre-Trial Chamber rendered its decision on the Prosecutor's
9 application. The Pre-Trial Chamber decided to issue an arrest warrant for Mr Al
10 Bashir in respect of crimes against humanity and war crimes, but rejected the
11 Prosecutor's application in respect of the crime of genocide. The Pre-Trial Chamber
12 explained that the Prosecutor relied exclusively on proof by inference to establish
13 reasonable grounds to believe that Mr Al Bashir acted with genocidal intent. The
14 Pre-Trial Chamber stated that in such a situation the standard of proof "would be
15 met only if the materials provided by the Prosecution in support of the Prosecution's
16 application show that the only reasonable conclusion to be drawn therefrom is the
17 existence of reasonable grounds to believe in the existence of genocidal intent."

18 The Pre-Trial Chamber also explained that "if the existence of genocidal
19 intent is only one of several reasonable conclusions available to the materials
20 provided by the Prosecution, the Prosecution's application in relation to genocide
21 must be rejected as the evidentiary standard provided for in Article 58 of the Statute
22 of the ICC would not have been met."

23 On the basis of this understanding of the standard of proof, the Pre-Trial
24 Chamber assessed the Prosecutor's evidence in respect of the alleged genocidal intent.
25 The Chamber concluded that reasonable grounds to believe that Mr Al Bashir acted

1 with genocidal intent had not been established. Judge Usacka filed a dissenting
2 opinion on the Pre-Trial Chamber's decision.

3 The Prosecutor sought leave to appeal the decision of the Pre-Trial Chamber.
4 This was granted on 24 June 2009. The issue in respect of which the Pre-Trial Chamber
5 granted leave was whether the correct standard of proof, in the context of Article
6 58, requires that the only reasonable conclusion to be drawn from the evidence is
7 the existence of reasonable grounds to believe that a person has committed a crime
8 within the jurisdiction of the Court.

9 On 6 July 2009, the Prosecutor filed his document in support of appeal.
10 On appeal the Prosecutor argues that the Pre-Trial Chamber applied a standard of
11 proof that was too demanding. In his submission, the Pre-Trial Chamber required
12 him to establish Mr Al Bashir's genocidal intent beyond reasonable doubt even though
13 at the arrest warrant stage the standard of proof is "reasonable grounds to believe."

14 In the course of the proceedings, the Appeals Chamber granted the Sudan
15 Workers Trade Unions Federation and the Sudan International Defence Group leave
16 to make submissions under Rule 103 of the Rules of Procedure and Evidence. The
17 two organisations submit that the Pre-Trial Chamber did not apply an incorrect standard
18 of proof. Rather, the Pre-Trial Chamber emphasised that the "only reasonable
19 conclusion" must be that there are reasonable grounds to believe in the existence
20 of genocidal intent. In their view, therefore, the Pre-Trial Chamber's decision
21 not to issue a warrant of arrest in respect of the crime of genocide was not erroneous
22 and should be confirmed.

23 The Appeals Chamber also permitted the (indiscernible) eight victims to
24 make submissions on the appeal. These victims agree with the arguments of the
25 Prosecutor and submit that the Pre-Trial Chamber's decision should be reversed.

1 Turning now to the determination of the issue of appeal.

2 The Appeals Chamber was of the view that the evidentiary threshold of
3 "reasonable grounds to believe," which is the standard of the issuance of an arrest
4 warrant under Article 58(1) of the Rome Statute, must be distinguished from the
5 threshold required for the confirmation of charges, ("substantial grounds to
6 believe," as provided in Article 61(7) of the Statute) as well as threshold for
7 a conviction, that is, beyond reasonable doubt, as provided in Article 66(3) of
8 the Statute. It's evident from the wording in these provisions that the standards
9 "substantial grounds to believe" and "beyond reasonable doubt," are higher standards
10 of proof than "reasonable grounds to believe." Accordingly, when disposing of an
11 application for an arrest warrant under Article 58(1) of the Statute, a Pre-Trial
12 Chamber should not apply a level of proof that would be required for the confirmation
13 of charges or for conviction.

14 In the impugned decision, the Pre-Trial Chamber developed a specific test
15 to determine whether "reasonable grounds to believe" have been established by way
16 of "proof by inference." Notably, the Pre-Trial Chamber required that the existence
17 of genocidal intent must be the only reasonable conclusion drawn from the evidence.
18 In the view of the Appeals Chamber, demanding that the existence of genocidal intent
19 must be the only reasonable conclusion amounts to requiring the Prosecutor to disprove
20 any other reasonable conclusions and to eliminate any reasonable doubt. If the
21 only reasonable conclusion based on the evidence is the existence of genocidal intent
22 then it can't be said that such a finding establishes merely "reasonable grounds
23 to believe."

24 The Appeals Chamber notes that the Pre-Trial Chamber assessed the evidence
25 presented by the Prosecutor against this erroneous standard of proof and consequently

1 the Pre-Trial Chamber decided to reject the Prosecutor's application for an arrest
2 warrant in respect of the crime of genocide. The Appeals Chamber therefore finds
3 that the standard of proof developed and applied by the Pre-Trial Chamber in relation
4 to "proof by inference" was higher and more demanding than what is required under
5 Article 58 of the Statute. This amounted to an error of law.

6 In sum, the decision by the Pre-Trial Chamber not to issue a warrant of
7 arrest in respect of the crime of genocide was materially affected by an error of
8 law, and it is for this reason that the Appeals Chamber has decided to reverse the
9 impugned decision to that extent. The matter is remanded to the Pre-Trial Chamber
10 for a new decision using the correct standard of proof.

11 The Appeals Chamber will not, however, grant the Prosecutor's request
12 to make a finding that there are reasonable grounds to believe that Mr Al Bashir
13 is criminally responsible for the crime of genocide as this is a matter to be dealt
14 with by the Pre-Trial Chamber. As was pointed out earlier, the Appeals Chamber
15 itself has not addressed in the present appeal whether or not there are reasonable
16 grounds to believe that Mr Al Bashir acted with genocidal intent.

17 Thank you very much. The hearing is closed.

18 THE COURT USHER: All rise.

19 (The hearing ends at 10.45 a.m.)