UNREASONABLE REASONABLENESS: STANDARDIZING PROCEDURAL NORMS OF THE ICC THROUGH AL BASHIR

Abstract: On March 4, 2009, the International Criminal Court issued its first ever arrest warrant against a sitting head of state, Omar Hassan Ahmad Al Bashir. The warrant, issued in relation to the situation in the Darfur region of Sudan, was notable both for its inclusion of charges of war crimes and crimes against humanity, and for its exclusion of charges of genocide. On appeal, the decision not to include the genocide charges in the warrant was unanimously overruled for an error in law regarding the standard of proof utilized to determine the sufficiency of mens rea. The International Criminal Court is the only permanent international adjudicatory body tasked with the criminal adjudication of individuals accused of the most serious crimes of international concern. In overruling this decision, therefore, the International Criminal Court not only standardized the evidentiary thresholds for the prosecution of genocide charges in its Chambers, but at the same time distinguished itself among the growing field of international adjudicatory bodies.

INTRODUCTION

On March 4, 2009, the International Criminal Court (ICC) issued an arrest warrant against the sitting president of the Republic of Sudan, Omar Hassan Ahmad Al Bashir (Al Bashir). The warrant, the first ever issued by the ICC against a sitting head of state, listed five counts of crimes against humanity and two counts of war crimes relating to the armed conflict in the Darfur region of Sudan. The warrant did not, however, list the three counts of genocide alleged by the Office of the

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Prosecutor of the ICC. On February 3, 2010, the Appeals Chamber of the ICC reversed this decision with respect to the genocide charges, citing the Pre-Trial Chamber’s use of an erroneous standard of proof regarding the sufficiency of *mens rea* evidence for allegations of genocide. As a relatively new international criminal adjudicatory body, the ICC is struggling to assert itself within the increasingly expanding area of international law. By handing down this decision, the Appeals Chamber simultaneously established itself within the boundaries of international criminal adjudication, while at the same time standardizing an independent evidentiary procedure by which future genocide allegations will be adjudicated before the ICC.

Part I of this Comment provides a background on *Prosecutor v. Omar Hassan Ahmad Al Bashir* and the evidentiary standard utilized by the Pre-Trial Chamber I regarding the three counts of genocide. This section also discusses the decision of the Appeals Chamber to reverse the Pre-Trial Chamber I. Part II focuses on the statutorily prescribed evidentiary thresholds of the ICC and the evidentiary thresholds utilized by other similarly-structured international criminal tribunals. Part III analyzes in more detail the decision of the Appeals Chamber. In particular, Part III analyzes the role of the Appeals Chamber decision both in standardizing the evidentiary thresholds for genocide proceedings before the ICC and in asserting the ICC’s significance among the growing field of international adjudicatory bodies.

I. Background

A. Prosecutor v. Omar Hassan Ahmad Al Bashir: Pre-Trial Chamber I Rejects Genocide Charges Against Al Bashir

On March 31, 2005, following a report of the International Commission of Inquiry concerning violations of international humanitarian law and human rights law in the Darfur region of Sudan, the United

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3 See *Al Bashir I*, Case No. ICC-02/05–01/09, at 7–8; see also *Prosecutor v. Omar Hassan Ahmad Al Bashir (Al Bashir II)*, Case No. ICC-02/05–01/09, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 110 (Mar. 4, 2009), http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf.


6 See id.
Nations Security Council adopted Resolution 1593, which referred the matter to the Office of the Prosecutor (Prosecutor) of the ICC. On July 14, 2008, the Prosecutor filed an application under Article 58 of the Rome Statute of the ICC (Rome Statute), requesting the issuance of an arrest warrant against Al Bashir for his alleged criminal responsibility in the commission of war crimes, crimes against humanity, and genocide against members of the Fur, Masalit, and Zaghawa groups in Darfur. According to Article 58(1)(a) of the Rome Statute, a warrant for arrest shall be issued if a Pre-Trial Chamber is satisfied that there are “reasonable grounds to believe” that the person committed the crime. Each of the three judges of the Pre-Trial Chamber I (Pre-Trial Chamber) was satisfied that there existed reasonable grounds to believe that Al Bashir committed war crimes and crimes against humanity.

With respect to the genocide allegations, however, the question of the sufficiency of the evidence necessary to fulfill the intent requirement of the Rome Statute divided the judges of the Pre-Trial Chamber. The two-judge majority (Majority) determined that the crime of genocide is comprised of two subjective elements: a general subjective element provided for in the Rome Statute and a dolus specialis (“specific intent”), which refers to the specific intent to destroy in whole, or in

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8 Prosecutor v. Omar Hassan Ahmad Al Bashir (Al Bashir II), Case No. ICC-02/05–01/09, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 4 (Mar. 4, 2009), http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf; see Rome Statute of the International Criminal Court, art. 58(1), July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002). The Prosecutor alleged five counts of crimes against humanity (murder, extermination, forcible transfer, torture, and rape), two counts of war crimes (pillaging and intentionally directing attacks against a civilian population as such or against individual civilians not taking part in the hostilities), and three counts of genocide (genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction). See Al Bashir II, Case No. ICC-02/05–01/09, ¶¶ 78, 109, 110.

9 Rome Statute of the International Criminal Court, supra note 8, art. 58(1)(a).

10 Al Bashir II, Case No. ICC-02/05–01/09, ¶ 78.

11 Id. ¶ 109.

part, the targeted group.\textsuperscript{13} Recognizing that the Prosecutor relied exclusively on proof by inference regarding Al Bashir’s alleged genocidal intent, the Majority, citing cases tried before the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the European Court of Human Rights (ECHR), held that for such an inference to be drawn regarding Al Bashir’s \textit{dolus specialis}, it must be the “only reasonable inference available on the evidence.”\textsuperscript{14} Ultimately, after reviewing the materials offered by the Prosecutor, the Majority found that reasonable grounds to believe that Al Bashir possessed the requisite genocidal intent was not the only reasonable conclusion to be drawn from the material presented.\textsuperscript{15} Accordingly, the Majority refused to issue an arrest warrant for the three counts of genocide alleged against Al Bashir.\textsuperscript{16}

Judge Anita Ušacka, in her dissent, was satisfied that there were reasonable grounds to believe that Al Bashir possessed the requisite genocidal intent.\textsuperscript{17} To support her position, Judge Ušacka pointed to the necessity of distinguishing between the progressively higher evidentiary thresholds statutorily required for the three different stages of the ICC proceedings: the arrest warrant/summons, the confirmation of charges, and the conviction.\textsuperscript{18} In distinguishing between such thresholds, Judge Ušacka emphasized that references to other international bodies, while instructive, were not entirely apt.\textsuperscript{19} Further, recognizing the Majority’s understanding of the particularly difficult nature of determining \textit{dolus specialis}, and concerned that well-disguised intent not be used as a barrier to prosecution, Judge Ušacka argued that the Majority’s standard essentially required the Prosecutor to prove genocidal intent beyond reasonable doubt at the pre-trial stage of the proceedings.\textsuperscript{20} Under the “reasonable grounds to believe” standard for the issu-

\textsuperscript{13} \textit{Al Bashir II}, Case No. ICC-02/05–01/09, ¶ 139.
\textsuperscript{14} See id. ¶¶ 147–155, 160.
\textsuperscript{15} \textit{Id.} ¶ 205 (“[T]he Majority cannot but conclude that the existence of reasonable grounds to believe that the [Government of Sudan] acted with a \textit{dolus specialis}/specific 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.”).
\textsuperscript{16} \textit{Id.} ¶ 206.
\textsuperscript{17} \textit{Al Bashir III}, Case No. ICC-02/05–01/09, ¶ 1.
\textsuperscript{18} See id. ¶ 8.
\textsuperscript{19} See id. ¶ 6 (“In contrast, the factual characterisations or legal conclusions of such bodies are drawn from their different mandates, and therefore may be relevant only by analogy.”).
\textsuperscript{20} See id. ¶ 31 (“R}equiring the Prosecution to establish that genocidal intent is the only reasonable inference available on the evidence is tantamount to requiring the Prose-
of an arrest warrant, Judge Ušacka argued that the Pre-Trial Chamber need only determine whether genocide is a reasonable inference available on the evidence presented, not the only reasonable inference available.

B. Prosecutor v. Omar Hassan Ahmad Al Bashir: Appeals Chamber Reverses Decision Citing an Erroneous Standard of Proof

On appeal, the Prosecutor argued that the Majority utilized an incorrect standard of proof to determine the sufficiency of the mens rea component of the genocide charges. Specifically, the Prosecutor emphasized the failure of the Pre-Trial Chamber to adhere to the three distinct standards of proof outlined by the Rome Statute and the inconsistency of the decision when compared to previous decisions of the Pre-Trial Chamber and the ad hoc international criminal tribunals. On February 3, 2010, the Appeals Chamber unanimously reversed the decision of the Pre-Trial Chamber with respect to the three counts of genocide, citing an error of law. The Appeals Chamber recognized the distinction between the three statutorily prescribed standards of proof and further noted that “proof beyond a reasonable doubt” (the standard essentially put forth by the Pre-Trial Chamber’s “only reasonable conclusion” analysis) clearly requires more than what is required by “reasonable grounds to believe” (the standard prescribed in the Rome Statute). The Appeals Chamber recognized that the “only reasonable cution to present sufficient evidence to allow the Chamber to be convinced of genocidal intent beyond a reasonable doubt.”).

See id. ¶ 86.


See Leave to Appeal, supra note 22, ¶¶ 36–39.

See Support for Appeal, supra note 22, ¶¶ 44–49 (“This same Court has issued arrest warrants based on inferences that the person acted with the relevant mens rea and without any requirement that they be the only reasonable inference.”).


See id. ¶ 33 (“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
conclusion” standard put forth by the Pre-Trial Chamber “amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt.” Finding such a standard to be more stringent than what is statutorily required, the Appeals Chamber reversed the Pre-Trial Chamber to the extent that it applied such a standard to the genocide allegations.

The Appeals Chamber, however, declined the Prosecution’s invitation to order the Pre-Trial Chamber to issue an arrest warrant for the genocide charges, choosing instead to remand the case to the Pre-Trial Chamber for redetermination under the correct standard of proof. On July 12, 2010, the Pre-Trial Chamber issued a second arrest warrant against Al Bashir for three counts of genocide. This is the first time the ICC issued an arrest warrant for charges of genocide. The decision was greeted with both praise and condemnation, and Al Bashir continues to defy the arrest warrants today.

II. Discussion

A. Genocide and International Criminal Tribunals

The United Nations General Assembly originally defined genocide in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The definition provided by the General Assembly

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27 See id.
28 See id. ¶ 41.
29 Id. ¶ 42.
32 See Mackenzie et al., supra note 7, at 182; Sudan’s President Omar Al-Bashir Charged with Three Counts of Genocide in Darfur, supra note 31; Rice, supra note 2.
33 Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. Doc. A/Res/260(III) (Dec. 9, 1948) (“[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethничal, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.”).
has been adopted verbatim in the statutes governing the ICTY, the ICTR, and the ICC. Although the term colloquially refers to large-scale killings, the legal concept of genocide is reserved for a narrow subset of atrocities, which are characterized by an intent to destroy groups. Despite the fact that the definition of genocide has been accepted by the United Nations General Assembly, adopted by the Rome Statute, and adjudicated before ad hoc international criminal tribunals, the application and interpretation of the definition continues to raise difficulties for adjudication.

B. The Evidentiary Standards of the Ad Hoc Tribunals and the European Court of Human Rights

The statutorily prescribed standards of proof for the ICTY and ICTR are nearly identical. In order to confirm an indictment forwarded by the prosecutor during the pre-trial stage in both the ICTY and ICTR, the judge must be “satisfied that a prima facie case has been established by the Prosecutor.” At the trial stage in both the ICTY and the ICTR, the majority of judges must be “satisfied that guilt has been proven beyond reasonable doubt” in order to find the accused guilty. With respect to proof of genocidal intent at the trial stage, the ICTY ruled that such intent may be inferred from the factual circumstances of the crime, but that when such an inference is drawn, “it has to be the only reasonable inference available on the evidence.”

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35 See id. at 205.
36 See id. at 204 (“Almost every word of this definition has raised difficulties of interpretation.”).
38 S.C. Res. 955, supra note 37, Annex, art. 18(1); S.C. Res. 827, supra note 37, Annex, art. 19(1).
At the pre-trial stage before the ECHR, a person can be lawfully arrested or detained “for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.”\textsuperscript{41} The ECHR has interpreted the “reasonable suspicion” standard by explaining that “facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation.”\textsuperscript{42} The Appeals Chamber of the ICC specifically referenced the ECHR for this distinction between progressively higher evidentiary standards at distinct stages in proceedings before the court.\textsuperscript{43}

C. Evidentiary Standards in the Rome Statute

From the issuance of an arrest warrant to the conviction of the accused, the Rome Statute establishes three separate standards of proof for proceedings before the ICC.\textsuperscript{44} To issue an arrest warrant, the Pre-Trial Chamber must be satisfied that “[t]here are reasonable grounds to believe that the person has committed a crime.”\textsuperscript{45} At this point in the proceedings, the accused has neither submitted a defense nor appeared before the ICC in any manner.\textsuperscript{46} After the surrender or voluntary appearance of the person charged, the Pre-Trial Chamber holds a hearing on the confirmation of charges in which the judges will determine whether there is “sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”\textsuperscript{47} During the confirmation hearing, which is held in the presence of the accused and his or her counsel, the accused may “[o]bject to the charges”

\textsuperscript{43} Prosecutor v. Omar Hassan Ahmad Al Bashir (Al Bashir Appeal), Case No. ICC-02/05-01/09, 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,” ¶ 31 (Feb. 3, 2010), http://www.icc-cpi.int/iccdocs/doc/doc817795.pdf (“Thus, at this preliminary stage, it does not have to be certain that the person committed the alleged offence. Certainty as to the commission of the crime is required only at the trial stage . . . when the Prosecutor has had a chance to submit more evidence.”).
\textsuperscript{44} See Rome Statute of the International Criminal Court, supra note 8, arts. 58, 61, 66.
\textsuperscript{45} Id. art. 58(a)(1).
\textsuperscript{46} See id. arts. 54, 61. During the pre-trial investigation into potential violations of the Rome Statute, the Prosecutor can only request to speak with the accused; it is not until the accused has been arrested or voluntarily appeared before the ICC that he or she is able to formally object to the charges. Id.
\textsuperscript{47} Id. art. 61(7).
By citing to evidentiary standards of the ICTR, the ICTY, and the ECHR, among others, the Pre-Trial Chamber established itself well within the boundaries of international legal precedent. It was, however, an imperfect fit, as evidenced by the Pre-Trial Chamber’s failure to distinguish its decision on two important levels: procedural and substantive. Procedurally, as Judge Ušacka pointed out, most of the existing public jurisprudence of the ICTY and ICTR is drawn from the appellate and trial stages, not the pre-trial stage. The Majority was thus correct in understanding the “only reasonable conclusion” argument as the argument emanating from the ad hoc tribunals, but incorrect in conflating the final decisions of the tribunals with a pre-trial decision in the ICC. At this stage in the proceedings, the Pre-Trial Chamber should be concerned only with the question of “reasonable grounds to believe” that the accused committed the crime. To understand the standard of proof necessary for the issuance of an arrest warrant, the Appeals Chamber drew an apt analogy to a similar debate in the ECHR wherein the ECHR recognized that a standard of reasonable suspicion “presupposes the existence of facts or information which would satisfy an objec-

48 Id. art. 61(6).
49 Id. art. 66(3).
52 See Al Bashir III, Case No. ICC-02/05–01/09, ¶¶ 6, 10 (“[J]urisprudence of the ICTY and ICTR . . . is not directly applicable before this Court without ‘detailed analysis’, because of significant differences between the procedural frameworks of this Court and the ad hoc tribunals.”).
53 See id. ¶¶ 28–29.
54 See Rome Statute of the International Criminal Court, supra note 8, art. 58(1) (a).
tive observer that the person concerned may have committed the offence."

The main problem regarding the failure of the ICC Pre-Trial Chamber to distinguish its decision procedurally from those of other international bodies is that the decision forecloses the opportunity for a trial on the merits, whatever the eventual judgment may be. Although at first blush a high threshold at the pre-trial stage may appear to favor the defense, the standard set by the Pre-Trial Chamber actually disadvantages the defense since arrest warrants are issued only on the information provided by the Prosecutor; a defense is not even presented until the hearing on the confirmation of charges. Similarly, the procedure set forth by the Pre-Trial Chamber requires the Prosecutor to prove mens rea without having the opportunity to confront the accused at trial. This is of particular concern for genocide allegations in which intent is a critical, yet difficult to prove, component of the charge. Accordingly, as the Appeals Chamber emphasized, the standard of proof outlined by the Pre-Trial Chamber is actually more akin to the “beyond reasonable doubt” standard required for conviction. If the Prosecutor meets this standard, the defense would have to overcome a decision of beyond reasonable doubt, thus essentially rendering moot the confirmation of charges stage because “beyond a reasonable doubt” is a higher threshold than “substantial grounds to believe.” Therefore, while a high threshold arguably weeds out unsupported charges by front-loading the evidentiary requirements, it then bypasses the statutorily prescribed sec-

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56 See Al Bashir Appeal, Case No. ICC-02/05–01/09, ¶¶ 30–31.
57 See Rome Statute of the International Criminal Court, supra note 8, art. 58(1)(a) (“[T]he Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest.”) (emphasis added); see also id. art. 61(1) (“[W]ithin a reasonable time after the person’s surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges. . . . The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.”) (emphasis added).
58 See id. arts. 58(1)(a), 61(1).
59 See Al Bashir Appeal, Case No. ICC-02/05–01/09, ¶ 17; Al Bashir III, Case No. ICC-02/05–01/09, ¶ 27; Support for Appeal, supra note 22, ¶ 41; see also Rutaganda v. Prosecutor, Case No. ICTR-96–3-A, Judgment, ¶ 525 (May 26, 2003), http://www.unictr.org/Portals/0/Case/English/Rutaganda/decisions/030526.pdf (“In the absence of explicit, direct proof, the dolus specialis may therefore be inferred from relevant facts and circumstances. Such an approach prevents perpetrators from escaping convictions simply because such manifestations are absent.”) (footnotes omitted).
60 See Al Bashir Appeal, Case No. ICC-02/05–01/09, ¶ 33.
61 See id. ¶¶ 30–33.
ond stage and requires all parties to operate on the assumption that the case has already been proven beyond reasonable doubt.\footnote{See id.; Leave to Appeal, supra note 22, ¶ 39.} The failure of distinction procedurally between the ICC and other international bodies thus confuses the three statutorily designated stages of proceedings before the ICC and paradoxically requires the highest standard of proof at the earliest stage of the proceedings, disadvantaging both the prosecution and the defense.\footnote{See Leave to Appeal, supra note 22, ¶¶ 38–39.}

Beyond simply procedural matters, the Pre-Trial Chamber failed to distinguish itself substantively as the permanent international criminal tribunal.\footnote{See Al Bashir III, Case No. ICC-02/05–01/09, ¶¶ 4–10.} While references to the \textit{ad hoc} and other international bodies are persuasive, they should not be predictive of outcomes before the ICC for two reasons: jurisdiction and permanence.\footnote{See Mackenzie et al., supra note 7, at 158–59.} First, apart from the ICTY and ICTR which are limited geographically to the former Yugoslavia and Rwanda, respectively, the ICC is the only permanent international criminal court having jurisdiction over \textit{individuals} accused of genocide, war crimes, and/or crimes against humanity.\footnote{See id. at 157–59, 185.} Second, the ICC is the first, and only, permanent, independent international criminal adjudicatory body.\footnote{See id. at 157–59.} In this regard, the Appeals Chamber decision is striking not simply because it reversed the Pre-Trial Chamber for an erroneous standard of proof, but also, more subtly, because it signaled the necessity for distinction between the ICC and other international bodies, particularly in regard to the standard of proof required to satisfy the \textit{mens rea} component of genocide.\footnote{See Al Bashir Appeal, Case No. ICC-02/05–01/09, ¶¶ 30–33.}

It is of note, in this respect, that the Appeals Chamber itself refused to direct the Pre-Trial Chamber to issue a second arrest warrant for the crimes of genocide, noting that the substance of the matter should be decided by the Pre-Trial Chamber.\footnote{See id. ¶ 42. In so doing, the Appeals.
Chamber underscored the necessity of establishing detailed precedent for the Pre-Trial Chamber based not on the application of an evidentiary standard similar to other legal bodies, but instead based on the application of the evidentiary standard of the Rome Statute.\(^\text{70}\) As the standard of analysis will likely serve as the basis for future genocide allegations before the ICC, a detailed opinion from the Pre-Trial Chamber, rather than an order from the Appeals Chamber, better serves to establish legal norms for the ICC.\(^\text{71}\)

As a relatively new international criminal adjudicatory body, the ICC will continue to face questions concerning both legitimacy and effectiveness.\(^\text{72}\) The decision of the Appeals Chamber bolsters the latter.\(^\text{73}\) While the decision of the Appeals Chamber has neither curbed Al Bashir’s continuing defiance to submit to the arrest warrants issued against him, nor answered jurisdictional critics, the decision has standardized procedural norms for future genocide allegations brought before the ICC.\(^\text{74}\) Further, the Appeals Chamber decision, followed by the issuance of a second arrest warrant, bolstered the effectiveness of the ICC by asserting its independence in the face of international pressure.\(^\text{75}\) By reversing the Pre-Trial Chamber, the Appeals Chamber established the procedural norms for the adjudication of genocide charges utilizing the statutorily defined, progressively stringent evidentiary thresholds of the Rome Statute.\(^\text{76}\) Such standardization provides both the Prosecutor and the accused not only a stable procedural structure for the adjudication of genocide allegations, but also an effective framework in which to present, and rebut, evidence before a neutral trier of fact.\(^\text{77}\) The progressively higher stages of the proceedings thus ensure equity as the ICC seeks to “exercise its jurisdiction over persons for the most serious crimes of international concern.”\(^\text{78}\)

\(^{70}\) See id.

\(^{71}\) See id.; Leave to Appeal, supra note 22, ¶ 37.

\(^{72}\) See Mackenzie et al., supra note 7, at 181.

\(^{73}\) See Al Bashir Appeal, Case No. ICC-02/05-01/09, ¶¶ 38–39.

\(^{74}\) See id. ¶¶ 41–42.

\(^{75}\) See Mackenzie et al., supra note 7, at 182.

\(^{76}\) See id. at 209 (“Both the ICTY and the ICTR further refined over the years their procedures, in a learning-by-doing process that provided the foundation for subsequent generations of international criminal bodies.”).

\(^{77}\) See Leave to Appeal, supra note 22, ¶¶ 36–39.

\(^{78}\) Rome Statute of the International Criminal Court, supra note 8, art. 1.
CONCLUSION

While the outcome of a trial against Al Bashir for genocide, war crimes, and crimes against humanity remains uncertain, particularly in light of Al Bashir’s refusal to submit to the arrest warrants, what has emerged from the decision of the Appeals Chamber is a clear standard by which he, and future persons accused of such crimes, will be judged. The decision by the Appeals Chamber accomplished this goal by stabilizing the procedural norms of the Pre-Trial Chamber, particularly when determining the *mens rea* element of genocide allegations. In addition, the decision asserts the ICC’s significance not only as an independent body within its own right, but as the only permanent body charged with criminal adjudication of individuals accused of the most serious crimes of international concern. By reversing the judgment of the Pre-Trial Chamber, the Appeals Chamber bolstered the effectiveness of the relatively new international adjudicatory body by placing it within international legal norms, but independent of any other international legal body.