



The ICC Pre-Trial Chamber's Decision: Why Was Genocide Not Included?

New York, NY (03.04.09) - The International Criminal Court's Pre-Trial Chamber I today issued an arrest warrant against General Omar al-Bashir, President of Sudan, on seven counts of war crimes and crimes against humanity. In declining to confirm the three charges of genocide brought by the Prosecutor in July 2008, the Pre-Trial Chamber made no comment on whether genocide has been committed in Darfur.

The Pre-Trial Chamber was charged only with deciding whether the evidence submitted by the Prosecutor in July 2008 constituted "reasonable grounds to believe" that Bashir committed genocide. Today, the Pre-Trial Chamber found only that the submitted evidence did not reach that standard. However, the Rome Statute of 1998, which established the ICC, authorizes the Prosecutor to ask the Pre-Trial Chamber to reconsider the genocide charges later if new evidence becomes available. However, even if the Prosecutor were to make such a request and the Pre-Trial Chamber were then to confirm an arrest warrant on those charges, the question of whether genocide was committed would remain unanswered by the ICC. Within the ICC, only the Trial Chamber may judge whether genocide has taken place in Darfur.

Establishing in a court of law that genocide has occurred is an extremely difficult task because it requires proof not only of an underlying criminal act, but also of genocidal intent. That is, genocide is committed when a proscribed act, including killing, raping, and causing serious bodily or mental harm, is carried out against members of a group with the intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." If one of those underlying crimes is committed without that "genocidal intent," it does not constitute genocide under the law, no matter its scale or moral repugnance.

The difficulty in establishing the existence of genocide lies in proving a state of mind—genocidal intent—which is a matter much more difficult to prove than the criminal act. International courts and tribunals have been strict in assessing the existence of genocidal intent, often requiring direct evidence, such as written documents (such as detention records or military plans) or oral statements (either recorded or witnessed). Perpetrators might not create such evidence even if they harbour the requisite intent, specifically to hide their motivations; those who do create such evidence often destroy it as their reign ends. Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Court of Justice, for instance, were able to find proof of genocidal intent only for the massacres of Srebrenica despite extensive evidence of mass murders and rapes committed against non-Serbs in the rest of the region. The ICTY found that the atrocities perpetrated in other parts of Bosnia and Herzegovina and in Croatia constituted war crimes and crimes against humanity, but it did not conclude that they were committed with genocidal intent.

Whether or not he finally faces charges of genocide, Bashir will have to appear in front of the Internationally Criminal Court to answer accusations that he committed some of the gravest crimes

the world knows—crimes against humanity and war crimes in Darfur. The day Bashir steps into the Court to face these charges, a giant step will have been made toward justice for Darfuris.