DRAFT. For the final version of this paper, see:
Journal of International Criminal Justice (2015) 13(3) 555-577

'REASONABLE GROUNDS TO BELIEVE': AN UNREASONABLY UNCLEAR EVIDENTIARY THRESHOLD IN THE ICC STATUTE

Michael Ramsden and Cecilia Chung

Abstract

The Pre-Trial Chamber of the International Criminal Court (ICC) ('the Court') is obliged to issue a warrant of arrest should the Prosecutor present information that meets, *inter alia*, the evidentiary threshold of 'reasonable grounds to believe' under Article 58(1) of the Rome Statute. Following critical assessment of the Court's interpretations of the threshold, this paper shows that elucidations at the ICC are a potential source of confusion rather than guidance as to what is required under the threshold. It is argued that the lack of clarity has lowered the standard, with detrimental effects on judicial oversight of the exercise of prosecutorial discretion and the defendant's right to liberty.

1. Introduction

Despite the extensiveness and complexity of the International Criminal Court's legal texts, they present a rather rudimentary framework of international criminal procedure. The lack of consistency and coherence is a result of the 'unique compromises' made between different legal traditions during the diplomatic

negotiations that took place to formulate the procedural law.[1] As a result of this lack of clarity there is a need to deploy 'dynamic and sometimes creative interpretations', with much dependency on the authority and quality of the judges.[2] Indeed the Court's mixed system relying on the technique of 'constructive ambiguity' leaves the shaping of ICC proceedings very much in the hands of the judges.[3]

This need to fine-tune and align judicial precedents is acute in the interpretation of the evidentiary threshold to issue an arrest warrant under Article 58(1)(a) of the Rome Statute. An 'arrest', though not explicitly defined in the Rome Statute or the Rules of Procedure and Evidence, refers to the act of taking a suspect or an accused into custody.[4] The newly established Pre-Trial Chamber of the ICC is responsible for providing judicial oversight over the issuance of an arrest warrant.[5] Although the phrase 'reasonable grounds to believe' in Article 58 seems reasonably clear at first glance, the wording has proved problematic in the Court's interpretation and application. The first part of this paper will discuss the difficulties in defining the applicable standard. It will be argued that clarifications of 'reasonable grounds to believe' in the *Al Bashir* case have led to an unjustified lowering of the prosecutor's burden to present information. Moreover, misconceived use of jurisprudence from the European Court of Human Rights has resulted in a lowering of the evidentiary threshold. Difficulties in evaluating 'reasonableness' will also be discussed, and it

---

[1] See generally, C. Kress, 'The Procedural Law of the ICC in Outline: Anatomy of a Unique Compromise', 1 *Journal of International Criminal Justice* (2003) 603-617.

[2] C. Safferling, *International Criminal Procedure* (Oxford University Press, 2012), 51.

[3] Kress, *supra* note 1.

[4] See e.g. Rule 2 ICTY RPE; Rule 2 ICTR RPE.

[5] At the ad hoc tribunals, a single judge of the Trial Chamber reviews and confirms the indictment before an order for arrest may be issued (Art. 19(1) ICTY St; Art.18(1) ICTR St).

will be argued that the Court does not have the tools required to embark on the necessary qualitative assessment of the evidence.

Having analysed the threshold in isolation, the second part of the paper looks to other standards contained in the Rome Statute for guidance on how high the threshold actually is. It is shown that equation of the 'reasonable basis to proceed' standard applicable at the stage of authorising *proprio motu* investigations with 'reasonable grounds to believe' may result in the lowering of the arrest warrant standard by association. At the outset, it is recognised that chambers of the ICC will be concerned to limit any theoretical elaboration of evidentiary standards and thus it may be difficult to draw conclusions from case law. However, the rather technical analysis of the evidentiary threshold adopted here is warranted due to the significance of this threshold at the arrest warrant stage.

The third part of this paper highlights the consequences of the standard being lowered. It is axiomatic that the threshold on which an arrest warrant is based forms an essential part of the safeguard against arbitrary deprivation of liberty. [6] The nature of the application for an arrest warrant made *ex parte* by the prosecutor strengthens the argument for a rigorous threshold. As prosecutions at the ICC are targeted at perpetrators who bear most responsibility for international crimes regardless of their official position, the effects of arbitrary arrest or summons ripple beyond the individual and into the political arena.

It is shown that the threshold plays a further role in shielding the Court from frivolous or politically motivated charges. The gravity of the crimes to be prosecuted at this Court referenced in Article 1 of the Rome Statute warrants an evidentiary

[6] A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2 (Oxford University Press, 2002), 1232.

threshold that prevents the undue proliferation of arrest warrants.[7] An unclear evidentiary threshold does not aid the prosecutor in his consideration of how much investigatory work is required and how much evidence is to be submitted in his application. Thorough and objective fact-finding is a cornerstone to achieving justice, and jurisprudence suggesting that the threshold is lower may have an effect on the prosecutor's approach, at least in the early stages of investigation and prosecution. The ICC has the responsibility to ensure that the highest standards of criminal procedure are met.

2. Difficulties defining 'reasonable grounds to believe'

The standard of proof required for the issuance of an arrest warrant or a summons is contained in Article 58(1)(a). Article 58(1) sets out the two limbs required to issue a warrant of arrest, namely that there exist 'reasonable grounds to believe' that a person has committed a crime within the jurisdiction of the Court, and that an arrest is 'necessary'. A summons will be issued in place of an arrest warrant should the second limb fail.[8] The Pre-Trial Chamber in *Lubanga*, followed in subsequent decisions such as *Katanga,* further divided up the first limb into two questions: 1) Are there reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed, and 2) Are there reasonable grounds to believe that [the alleged perpetrator] has incurred criminal liability for such crimes under any of the modes of liability provided for in the Statute?[9] Therefore the evidentiary threshold of

[7] Art. 1 ICCSt. provides that '[ICC] shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.'

[8] Art. 58(7), ICCSt.

[9] Decision on the Prosecutor's Application for Warrants of Arrest, *Thomas Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial Chamber I, 10 February 2006, § 79; Decision on the evidence and information

'reasonable grounds to believe' applies in considering firstly whether a crime has been committed, and secondly whether the defendant is criminally liable.

The prosecutor bears the burden of satisfying the requisite threshold, as he is the party asserting the existence of such information justifying the arrest of the defendant.[10] The Pre-Trial Chamber is required to analyse the prosecutor's application, evidence and other information submitted, in order to be satisfied that the threshold has been met. This requirement was stipulated for instance in the arrest warrant decisions of *Lubanga*, *Gbagbo* and *Blé Goudé*.[11] However, there are no specific prerequisites in the Statute, rules, or case law, as to what type of evidence may be submitted. In principle, it is at the prosecutor's discretion as to what type and how much evidence he deems appropriate and necessary to convince the Pre-Trial Chamber that a warrant or summons be issued. What is significant is that provided the 'necessity' requirement in Article 58(1)(b) is met, the issuance of an arrest warrant or summons is mandatory if the prosecutor produces materials to reach the evidentiary threshold. The Pre-Trial Chamber is obliged to fulfill the prosecutor's request, and cannot refuse it for political or other extraneous reasons. It can thus be seen that the only hurdle for the prosecutor to overcome under the first limb of Article 58 is an evidentiary one.

---

provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, *Germain Katanga* (ICC-01/04-01/07), Pre-Trial Chamber I, 6 July 2007, § 24.

[10] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn., Beck, 2009), 1137.

[11] *Lubanga, supra* note 9, § 10; Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Laurent, Koudou Gbagbo, *Gbagbo* (ICC-02/11-01/11), Pre-Trial Chamber III, 30 November 2011, § 26; Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Charles Blé Goudé, *Charles Blé Goudé* (ICC-02/11-02/11), Pre-Trial Chamber III, 6 January 2012, § 14.

On the precise meaning of the phrase 'reasonable grounds to believe', the Courts have generally 'eschewed from any attempt to specify of what 'reasonable grounds' may consist.'[12] Even at the drafting stage, there was much ambivalence as to what the standard should be. The provisions on indictment in the 1993 draft of the International Law Commission (ILC) were aligned closely with the provisions from the ad hoc tribunals, dealing with the commencement of prosecution and issuance of an indictment based upon the existence of a 'prima facie case'.[13] A distinct article on arrest was developed in the 1994 ILC draft, which provided that the Presidency of the Court may issue a warrant of arrest upon the prosecutor's request if there is 'probable cause to believe' that the suspect may have committed a crime within the jurisdiction of the Court.[14] During the Preparatory Committee drafting stage, the powers of the Presidency were transferred to the Pre-Trial Chamber, but there were still many unresolved issues including the standard of proof to be applied. The wording 'reasonable grounds' appears in Article 59 of the Report of the Preparatory Committee in April 1998.[15] However, a footnote to the words 'reasonable grounds' explains that '[s]ome delegations preferred other terms such as "serious reasons".'[16] The current form of Article 58 was largely settled by an informal working group prior to the Zutphen Draft, which was introduced as a 'further option' in the report of the

[12] W.Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), at 706.

[13] *Report of the International Law Commission on the work of its forty-fifth session*, UN Doc A/48/10, 3 May–23 July 1993.

[14] *Report of the International Law Commission on the work of its forty-sixth session*, UN Doc A/49/10, 2 May–22 July 1994, Art 28(1)(a).

[15] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/2, 14 April 1998.

[16] *Ibid.*, at footnote 152.

Preparatory Committee.[17] During the final drafts of the Preparatory Committee, which remained largely unchanged at the Rome Conference, the distinction between pre and post indictment arrest was removed, the standard of proof remained that of 'reasonable grounds to believe', and it was decided that no rules were required to implement Article 58.

As the different options for the threshold ('probable cause', 'serious reasons', 'reasonable grounds') indicate, drafting of the threshold within the wider framework of restructuring the arrest procedure at the newly established Pre-Trial Chamber, was not a straightforward exercise.

A. Clarifications from the Al Bashir Case

The first case at the ICC to directly address the 'reasonable grounds to believe' evidentiary threshold was the case against Sudanese President, Hassan Ahmad Al Bashir. In March 2009, the Pre-Trial Chamber I found that there were reasonable grounds to believe that Mr. Al Bashir was criminally responsible for war crimes of intentionally directing attacks against a civilian population or against civilians not directly taking part in hostilities, and crimes against humanity of pillage, murder, extermination, forcible transfer, torture and rape throughout the Darfur region.[18] The majority did not find reasonable grounds to believe that the specific intent of genocide could be proved by inference from the evidence available, thus the charge of genocide was not included in the first arrest warrant.[19] One piece of evidence relied upon was a

[17] C. Hall, 'Article 58', in Triffterer *supra* note 10, at 1135.

[18] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *v Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, § § 78, 109.

[19] Ibid., § 206.

report by the International Commission of Inquiry on Darfur, which concluded that there was intention to drive victims from their homes primarily for purposes of counter-insurgency warfare, rather than specific intention to annihilate a group based on racial, ethnic, national or religious grounds.[20] The majority reasoned that if the existence of genocidal intent is only one of the several reasonable conclusions, the prosecution's application must be rejected in respect of that charge.[21]

The issue to be decided at appeal concerned whether the standard in Article 58 requires that the 'only 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'. [22] The decision of the Appeals Chamber in February 2010 reversed the Pre-Trial Chamber's decision not to issue an arrest warrant for genocide, holding that '[a] Pre-Trial Chamber acts erroneously if it denies to issue a warrant of arrest under article 58(1) of the Statute on the basis that "the existence of […] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution".'[23] The Appeals Chamber adopted Pre-Trial Chamber Judge Ušacka's reasoning in her separate and partly dissenting opinion that requiring the existence of genocidal intent to be the 'only reasonable conclusion' would be the tantamount to requiring the prosecution to establish the higher standard of 'beyond reasonable doubt' only required at the trial stage. [24] Based upon the

---

[20] *International Commission of Inquiry on Darfur 'Report to the United Nations Secretary-General'* UN Doc S/2005/60, 25 January 2005, § 518.

[21] *Al Bashir*, *supra* note 18, § 205.

[22] 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, *Al Bashir* (ICC-02/05-01/09-73), Appeals Chamber, 3 February 2010, § 5.

[23] *Ibid.,* § 1.

[24] *Ibid.,* §§ 25, 30-33, 34; Separate and partly dissenting opinion of Judge Anita Ušacka, *Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, § 31.

Appeal Chamber's elucidation of the threshold to require that the conclusion only be one of the possible reasonable conclusions and not the only reasonable conclusion, the Pre-Trial Chamber I unanimously amended the arrest warrant to include genocide charges. [25]

This correction by the Appeals Chamber is widely seen as appropriate, as it removes the overbearing duty for the prosecution to prove guilt essentially beyond reasonable doubt at an initial stage of the court proceedings. Yet the caution exercised by the judges at the Pre-Trial Chamber in relation to dealing with allegations of genocide is not unfounded, because of the grave consequences of such claims on both the individual and the State.[26] This not only applies to charges of genocide, but also to all charges of this level of gravity. Therefore, reluctance to find 'reasonable grounds' resting solely upon inferences made from indirect evidence seems to be a sensible approach by the Pre-Trial Chamber judges. The standard of proof required must be high enough to prevent the court from dealing with wholly unfounded allegations that do not merit any further consideration.[27] From this perspective, the equating of 'reasonable grounds to believe' with 'one of the reasonable conclusions' presents its own set of problems.

The first difficulty with the Appeal Chamber's elucidation is that it does not really clarify the threshold. From the judgment it is clear that 'reasonable grounds to believe' does not require that the only reasonable conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that a crime has been

---

[25] Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09-95), Pre-Trial Chamber I, 12 July 2010.

[26] W. Schabas, *Genocide in International Law: the Crime of Crimes* (2nd edn, Cambridge University Press, 2009) 14-15, 491.

[27] E. Rojo, 'Standard of Proof Required to Issue an Arrest Warrant for Genocide' 27 *Merkourios Utrecht Journal of International and European Law* [2010] 61-64, at 64.

committed. One possible way to rephrase the explanation would be that 'reasonable grounds to believe' allows one reasonable conclusion to be that a crime has been committed, but also allows another reasonable conclusion to be that a crime has not been committed. That then begs the question: to what degree of probability does the threshold actually require? In the case of *Al Bashir*, it would mean that one reasonable conclusion could be that Mr. Al Bashir acted with *dolus specialis* to destroy in part the Fur, Masalit and Zaghawa ethnic groups and another reasonable conclusion could be that Mr. Al Bashir did not act with such *dolus specialis*. How do we reconcile the elucidation of the Appeals Chamber with the intuition that the reasonable conclusion of commission of the crime must trump the other reasonable conclusions for the threshold to be met?

Although the statement of 'only reasonable conclusion' by the Pre-Trial Chamber in *Al Bashir* may have been an error of law, there does not seem to be a problem with the Pre-Trial Chamber's application of the 'reasonable grounds to believe' threshold. It is clear from the lengthy analysis of the Pre-Trial Chamber's first decision that a reasonable conclusion was that Mr. Al Bashir did not possess genocidal intent. In fact, the findings made: that there was a lack of specific information, contradicting materials concerning conditions of life in IDP Camps, and only a handful of documents to show persecutory intent but not genocidal intent, show persuasively that the Government of Sudan did not act with genocidal intent. The alternative conclusion that the perpetrators only intended to drive the victims from their homes for counter-insurgency warfare was considered a reasonable one. [28] Surely the existence of this alternative conclusion, no longer simply a mere hypothesis, requires the Court to weigh it against the reasonableness of other

[28] *Al Bashir, supra* note 18, §§ 204-206.

conclusions. Simply to say that it suffices for evidence to point to one reasonable conclusion suggests that the standard is too low. Does the absence of a balancing exercise not undercut the level of proof as originally envisaged? Note again that the words 'serious reasons' or 'probable cause' were contenders in the drafting history, and we can glean from those words a sense that the threshold is intended to be higher than simply 'one of the reasonable conclusions'.

A second difficulty concerns the approach to inferences provided by Judge Ušacka in her separate and partly dissenting opinion.[29] Judge Ušacka put forward the approach that 'once sufficient evidence is presented to render an inference of genocidal intent reasonable, one can be satisfied that there are reasonable grounds to believe that genocidal intent exists, unless evidence is also presented which would render an inference of genocidal intent unreasonable'.[30] Accordingly, it would mean that provided there is sufficient evidence concerning the existence of intent, there is a prima facie presumption that reasonable grounds exist. To rebut that presumption, the prosecutor would need to adduce evidence to disprove the reasonableness. Yet, why would the prosecution present evidence that renders an inference reasonable but simultaneously renders it unreasonable? Proceedings at the arrest warrant stage are conducted *ex parte*, such that the prosecutor is the only party submitting evidence to the Court. It is unforeseeable that the prosecutor would commence a prosecution and submit an application for an arrest if he only holds such contradictory evidence. If that is so, then what are the chances of rebutting the presumption that genocidal intent exists?

It is acknowledged that the Rome Statute does provide for the prosecutor to investigate both incriminating and exonerating circumstances equally, which extends

[29] Separate and Partly Dissenting Opinion of Judge Ušacka, *supra* note 24.

[30] *Ibid*., § 34.

from the overarching duty to 'establish the truth' pursuant to Article 54(1)(a). In principle, this duty 'obligates the Prosecution to be as comprehensive as necessary in his or her investigation to establish whether criminal responsibility exists', and 'provides the matrix against which the Prosecutor should mobilise his or her investigative resources.'[31] However, due to the broadly defined scope of this duty, '[i]t remains unclear whether this prosecutorial duty to investigate exculpatory evidence has any practical substantive effect.' [32] As Damaška noted, it is difficult for the prosecution to refrain from using their evidence selectively and they are more likely to focus on information favourable to their allegations.[33] Moreover, the reality is that the prosecutor will not press on with investigation should he find such overwhelming exculpatory evidence that would undermine the prospects of a successful prosecution. There is indeed a need for realism in respect of the prosecutor's perceived impartial role in this regard, particularly in an adversarial system.

It would seem that the threshold elucidated by the Appeals Chamber lowers the standard of proof, as it requires that the prosecutor can merely put forward one of a myriad of reasonable possibilities, and the Court would have no power to refuse the issuance of an arrest warrant. The explanation given by the Appeals Chamber still does not help us answer the question: what level of probability is required? What is the standard of proof? Furthermore, does the presumption as implied by Judge Ušacka not derogate from the presumption of innocence provided by Article 66 of the Rome Statute?

---

[31] Triffterer, *supra* note 10, at 1079

[32] G. Boas et al., *International Criminal Procedure*, Vol III (Cambridge University Press, 2011), at 106.

[33] M. Damaška, 'Problematic Features of International Criminal Procedure' in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), at 1770.

The situation in *Al Bashir*, where the prosecutor proceeds with a request for arrest or summons based only on inferences or other types of indirect evidence is likely to be a recurring one. This is especially true with regards to the mental element and modes of criminal liability. Dicta from Appeal Chamber's decision in *Al Bashir* has been relied upon by the Court in subsequent cases such as the Pre-Trial Chamber II in *Muducumura*, so it is seen that *Al Bashir* has and will continue to have wide repercussions.[34] Instead of providing clarity, the *Al Bashir* decision has whittled down the evidentiary threshold, subsequently imposing a lower burden on the prosecutor. Presumptions have arguably been slipped through the backdoor that potentially erode an individual's presumption of innocence.

B. Equation of 'reasonable grounds to believe' with 'reasonable suspicion'

In interpreting 'reasonable grounds to believe', the Pre-Trial Chamber has consistently referred to the 'reasonable suspicion' standard provided for in Article 5(1)(c) of the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR).[35] Article 5(1)(c) sets out the requirement that the lawful arrest or detention of a person for the purpose of bringing them before a competent judicial authority must be based on 'reasonable suspicion' that an offence was committed. Thus, an important purpose of Article 5(1)(c) is to ensure that any

[34] Decision on the Prosecutor's Application under Article 58, *Mudacumura* (ICC-01/04-01/12-1-Red), Pre-Trial Chamber II, 13 July 2012, § 19.

[35] Art. 5(1)(c), EHCR reads: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:… (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on *reasonable suspicion* of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.' (emphasis added). See also Article 7 of the American Convention on Human Rights, which has also been referred to in ICC jurisprudence.

arrest or detention for the purpose of initiating criminal proceedings has a sufficient evidentiary basis to justify a deprivation of liberty. In *Bemba*, the Pre-Trial Chamber III was 'specifically guided' by the ECHR standard.[36] The Pre-Trial Chamber I In *Al Bashir* and *Lubanga* adopted the 'reasonable suspicion' standard, relying on footnotes to highlight relevant decisions without any further elaboration.[37] The Appeals Chamber in *Al Bashir* found the interpretation of 'reasonable suspicion' by the ECtHR 'instructive', and in *Gbagbo* and *Ntaganda*, the Court was required to take into account the reasonable suspicion standard.[38]

However, reliance on this threshold at the ICC in applying Article 58(1)(a) is excessive and misguided.[39] At first sight, equating 'reasonable suspicion' with 'reasonable grounds to believe' may seem reasonable, especially because of the requirement under Article 21(3) of the Rome Statute to interpret provisions in accordance with internationally recognised human rights. 'Reasonable suspicion' is a prerequisite for lawful arrest or detention under Article 5(1)(c) of the ECHR. 'Reasonable suspicion' has been defined by the ECtHR as 'presupposing the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence' and 'sufficient facts or

[36] Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, *Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), Pre-Trial Chamber III, 10 June 2008, § 24.

[37] *Al Bashir, supra* note 18, § 160; *Lubanga, supra* note 9, § 12.

[38] *Al Bashir*, *supra* note 22, § 31; *Gbagbo, supra* note 11, § 27; Decision on the Prosecutor's Application under Article 58, *Bosco Ntaganda* (ICC-01/04-02/06), Pre-Trial Chamber II, 13 July 2012, § 16.

[39] N. Croquet, 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?' 11 *Human Rights Law Review* (2011) 91-131, 122.

information which would provide a plausible and objective basis for a suspicion'.[40] However, as argued by Schabas, it is not clear how these definitions help in understanding 'reasonable grounds to believe'.[41] There is no consistency in indications of how 'reasonable suspicion' is to be considered by the ICC. There seems to be no application of this standard in assessing evidence. Two criticisms are made that lead to the ironic conclusion that referring to the jurisprudence of the ECtHR effectively lowers the threshold at the ICC.[42]

First, it has been explained in ECtHR cases and cited in ICC cases that 'facts which raise a [reasonable] 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 a later stage of the process of criminal investigation'. [43] Since the arrest warrant stage is concerned with the 'bringing of a charge', facts giving rise to a 'reasonable suspicion' standard would not necessarily rise to 'reasonable grounds to believe'. It is not appropriate to borrow the threshold where the purposes of the provisions differ. Article 58 of the Rome Statute deals with both summonses to appear as well as arrest, with the purpose of securing appearance in court, whereas arrest in the context of ECHR applies to arrest or detention only and its purpose is to further the criminal investigation by way of confirming or dispelling suspicion grounding the arrest.[44]

---

[40] *Fox, Campbell and Harley v United Kingdom,* ECtHR (1990) Series A, No. 182, 32; *Labita v Italy,* ECtHR (2000) App No. 26772/95, 156; *Murray v United Kingdom*, ECtHR (1994) Series A, No. 300, 63.

[41] Schabas, *supra* note 12, at 707.

[42] See G. De Beco, 'The Confirmation of Charges before the International Criminal Court: Evaluation and First Application', 7 *International Criminal Law Review* (2007) 475 arguing that use of ECtHR jurisprudence is dubious for defining 'substantial grounds to believe' at the confirmation of charges stage.

[43] *Murray v United Kingdom, supra* note 40, 55 cited in *Al Bashir, supra* note 22, § 9; *K-F. v Germany,* ECtHR (1997), Application No. 25629/94, 57.

[44] *Murray v United Kingdom, supra* note 40, 55.

Second, as should be obvious from a literal reading of the two thresholds, there is a distinction between 'suspicion' and 'belief'. As Judge Georghios M. Pikis observed in his separate opinion in the *Lubanga* appeal decision, belief imports 'a higher standard of acceptability of something compared to suspicion.'[45] The Judge firmly distinguished the applicable threshold of Article 58 from ECtHR's threshold by stating that '[T]he founding of a valid cause for the detention of the person does not rest on reasonable suspicion, but on "grounds" founded on evidential material giving rise to a reasonable belief that a crime has been committed by the appellant'.[46] Writing extra-judicially, Judge Pikis further explains the difference between the two: '"Suspicion" in contrast to "belief" imports the notion of something being possible or likely, a faint belief. "Reasonable grounds to believe" on the other hand, signifies a firm belief.' [47] Judge Pikis even footnotes the English dictionary definition in his book to highlight the difference between 'suspicion' and 'belief'.[48] This reasoning is persuasive, yet it is unfortunate that subsequent cases have not clearly adopted this approach. Although the Appeals Chamber in the application for interim release for *Katanga* in 2008 stated that '[s]uspicion simpliciter is not enough. Belief denotes, in this context, acceptance of a fact', this Chamber was also presided over by Judge

[45] Separate opinion of Judge Pikis, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber I entitled Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo, *Lubanga* (ICC-01/04-01/06-824), Appeals Chamber, 13 February 2007, § 5.

[46] *Ibid.*

[47] G. Pikis, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (Martinus Nijhoff Publishers, 2010), at 109.

[48] *Ibid.*, footnote 270.

Pikis.[49] Moreover, decisions for the issuance of arrest warrants after *Katanga* continued to use the 'reasonable suspicion' threshold.[50]

It is clear that 'reasonable suspicion' is a lower evidentiary standard compared to 'reasonable grounds to believe'. Some ICC jurisprudence, mainly led by Judge Pikis, has acknowledged this discrepancy, but it remains to be seen whether the difference is consistently recognised. In short, insistence on referring to 'reasonable suspicion' and the equation of the standard with 'reasonable grounds to believe' is erroneous.

C. Evaluating 'reasonableness'

If the likening of 'reasonable grounds to believe' with 'reasonable suspicion' is not appropriate, how insightful are ECtHR cases on the understanding of 'reasonableness'? ECtHR cases suggest that 'reasonableness' must satisfy an 'objective observer', though 'what may be regarded as reasonable will depend on all the circumstances of the case'.[51] In *Fox, Campbell and Hartley*, the ECtHR found that the reasonableness of the suspicion in dealing with 'terrorist-type' offences will be different from dealing with 'conventional crime', but that 'the exigencies of dealing with terrorism could not justify stretching the notion of "reasonableness" to the point where the essence of the safeguard was impaired.'[52] In *Murray v United Kingdom*, the ECtHR found that evidence giving rise to a 'plausible and objective basis' was

[49] Judgment in Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, *Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), Appeals Chamber, 9 June 2008, §18

[50] See for example *Gbagbo*, *supra* note 11, §27; *Ntaganda, supra* note 38, at § 16.

[51] *O'Hara v The United Kingdom*, ECtHR (2001), App No. 37555/97, § 34.

[52] *Supra* note 40.

reasonable.[53] The drafting history of Article 58 also indicated that 'reasonableness' is to embody objective criteria.[54]

However, apart from shedding light on the requirement for 'objectivity' using ECtHR jurisprudence, the cases provide little guidance as to what factors constitute objectivity. Instinctively, one would consider indicia of objectivity to include probative value, reliability, and consistency of evidence presented. These factors were at least implicitly considered in the case in *O'Hara*, which turned on whether intelligence derived from informants were reliable.[55] Despite this, it is arguable that the applicability of such factors to assess 'reasonableness' in Article 58(1) is questionable on a strict construction of the Rome Statute and Rules of Procedure and Evidence.

Rule 63(1) of the Rules of Procedure and Evidence provides that both Article 69 and the rules of evidence in Chapter 4 shall apply to proceedings before all Chambers, and this includes the Pre-Trial Chambers. Rule 63(2) allows Chambers 'to assess freely all evidence submitted' but only in so far as 'to determine its relevance or admissibility in accordance with article 69.' Article 69(4) in turn provides for the Court to take into account, when ruling on relevance or admissibility, the probative value of evidence, and any prejudice such evidence may cause to a fair trial. It is noted that rule 63(2) does not explicitly provide for the assessment of probative value outside of rulings on relevance and admissibility of evidence. Although rule 63(1) provides for the applicability of rule 63(2) at all stages, encompassing the proceedings under Article 58 before the Pre-Trial Chambers, its applicability is limited. This is

---

[53] *Murray v United Kingdom*, *supra* note 40, §63.

[54] *Report of the Preparatory Committee on the Establishment of the ICC*, UN Document A/CONF.183/2, 14 April 1998, footnote 153.

[55] *O'Hara*, *supra* note 51, § § 35, 41

because the application for an arrest warrant is made *ex parte*, and the defendant is not present to object to relevance or admissibility of evidence. Any objections would have to come from the judge, who is unlikely to make such objections at this early stage of the proceedings unless it is blatantly clear from surface examination that evidence is irrelevant or inadmissible.[56] Thus on a strict reading of the rules, assessment of evidence using criteria of probative value and reliability is not permitted at the arrest warrant stage. This may explain why to date, Article 69 has only been considered at the confirmation of charges stage.[57]

Even with regard to the early stage of proceedings of the arrest warrant, such a restriction of the Pre-Trial Chamber's power to assess relevance, reliability and probative value hinders the Chamber's assessment of the 'reasonableness' of the evidence. Although an assessment of reliability and probative value is in all likelihood implicit in the judges' evaluation of information, the question posited is why such powers are not explicitly provided in assessing evidence under Article 58(1). The lack of express powers to assess probative value is likely to weaken the notion of 'reasonableness', as the Pre-Trial Chamber may be forced to accept evidence provided at face value without due consideration of the specific factors constituting objectivity.

---

[56] Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC-01/09-01/11), Pre-Trial Chamber II, 23 January 2012, § 62, highlighting that all evidence is admissible, unless grounds for inadmissibility appear to exist.

[57] See e.g. Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, Jean-Pierre Bemba Gombo* (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, §§ 42, 61, 62; Decision on the confirmation of charges, *Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, § § 71-224; Decision on confirmation of charges, *Thomas Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, § 61.

The problem is less stark when many pieces of evidence are submitted to the court for consideration, and it is clear from a holistic assessment whether or not the evidentiary threshold is met. However, problems are illuminated should we embark for a moment on the thought experiment that only one piece of evidence is submitted by the prosecutor. To what extent can the Pre-Trial Chamber scrutinise this one piece of evidence to assess the 'reasonableness' of the grounds on which it purports to present? The problem faced by the Pre-Trial Chamber is that they do not have the tools to undertake evaluation of the evidence called for in this situation. Drawing from jurisprudence at the trial and appellate stages for factors to determine reliability or 'reasonableness' would be criticised.[58] In this situation, the Pre-Trial Chamber would effectively have one hand tied behind their back and would be forced to simply accept the one piece of evidence as reasonable.

A second, related question brought up by the hypothetical scenario is to ask whether corroborating pieces of evidence are required. It is clear from rule 63(4) that there is no legal requirement for corroboration to prove any crime within the jurisdiction of the Court. However, ICC cases at both the confirmation of charges stage and the earliest authorisation of investigation stage have suggested that corroboration is necessary in some situations. At the confirmation of charges stage, an approach in relation to indirect evidence has been laid down, requiring the existence of corroborating evidence to verify whether the piece of evidence, considered together with other evidence, acquires high probative value as a whole.[59] Judge Silvia Ferńandez in her separate opinion on the authorisation of *proprio motu* investigations

[58] Factors of reliability contained for example in Decision on the Prosecutor's Bar Table Motions, *Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), Trial Chamber II, 17 December 2010.

[59] See for example, *Bemba*, supra note 57, § 52.

into the situation in Côte d'Ivoire suggested that 'the material should be considered in its entirety in order for the Chamber to determine whether the documents corroborate each other and whether, as a whole, they substantiate the main conclusions of the Prosecutor.'[60] This is because '[a]s a further consequence of this lack of evidence-gathering capabilities, at this stage, the Chamber has no independent way to assess the reliability, credibility or completeness of the information available to it.'[61] Indeed if judges are not expressly provided with the powers to assess reliability and completeness of evidence to determine 'reasonableness' of the basis to proceed, it would seem that corroboration is required. Without additional supporting pieces, the judge's role in conducting a holistic assessment is impossible. Therefore it seems that the Chamber must either be provided with tools to assess reliability, or there should be a requirement for corroboration. Otherwise the 'reasonableness' requirement in the threshold is effectively made redundant.

In principle, one piece of evidence could establish 'reasonable grounds to believe' if sufficiently comprehensive and reliable. Yet the threshold currently lacks a mechanism to allow the imperative assessment of reliability and comprehensiveness. Perhaps such reasoning led Judge Ferńandez to condemn the widely used methods of singling out elements from the supporting material to establish facts and draw conclusions on criminal responsibility in decisions.[62] Despite the disclaimer in many judgments that sources referred to do not represent the only sources in their consideration, we simply do not know how much weight is placed on one source

[60] Corrigendum to Judge Fernández de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the republic of Côte d'Ivoire* (ICC-02/11-14), Pre-Trial Chamber III, 5 October 2011, § 37.

[61] *Ibid.,* § 36.

[62] *Ibid.,* § 38.

without explicit reference to the probative value and reliability of evidence. Without corroboration, how can inconsistencies, contradictions and incompleteness be found to exist?

The defendant does not have the power to challenge use of unreliable pieces of evidence during the application of a warrant for his arrest. Any stretching of the notion of 'reasonableness' in the Article 58 threshold should be safeguarded by the Pre-Trial Chamber. Unfortunately, as shown, the Chambers are not armed with the right ammunition to defend against prosecutor's use of nebulous information as they cannot rule on reliability or impose an obligation of corroboration. Although the hypothetical situation of only one piece of evidence being adduced has never arisen before, there is potential for this hypothetical to become a very real problem.

3. 'Reasonable grounds to believe' compared to 'reasonable basis to proceed'

Since elaborations of the term 'reasonable grounds to believe' have proved unhelpful, Schabas has commented that the 'most productive approach' is to compare the standard to other thresholds stipulated within the Rome Statute. [63] It is arguably possible to identify four different, progressively higher standards of proof, beginning with 'reasonable basis to proceed' in relation to authorisation to initiate investigations into a situation pursuant to Article 15(3) and 53(1). Above the standard of 'reasonable grounds to believe' lie the thresholds of 'substantial grounds to believe' and 'beyond reasonable doubt' for the confirmation of charges and trial stages respectively.[64] In construing the thresholds with regards to the underlying purpose of the Article, it is clear that 'reasonable grounds to believe' should lie above 'reasonable basis to proceed' and below 'substantial grounds to believe'. However, closer reading shows it

[63] Schabas, *supra* note 12, at 707.

[64] Arts 61(7) and 66(3) ICCSt.

is unclear how much higher and how much lower the applicable standard under Article 58 is in relation to the Article 15 and 61 standards, placing doubt on how 'productive' such a comparison really is.

The words 'reasonable basis to proceed' under Articles 15(4) and 53(1)(a) bear striking similarity to the threshold of 'reasonable grounds to believe'. Indeed, until the decision on authorisation for an investigation in the *Kenya* situation,[65] previous jurisprudence has suggested that the 'reasonable grounds to believe' threshold was the lowest of only three evidentiary thresholds provided in the Statute.[66] Judge Pikis believes that there is no material difference between the tests, as 'grounds' and 'basis' in the context under consideration are synonymous terms.'[67] The view that 'reasonable basis to proceed' and 'reasonable grounds to believe' indicate the same threshold is also advanced by Ventura, who argues persuasively that there is a lack of substantive difference between the two tests, the difference only being one of context.[68] Ventura suggests that the ECtHR's jurisprudence on 'reasonable suspicion' informs the 'reasonable basis' threshold to the same degree as the 'reasonable grounds' threshold, and that the two standards are 'almost indistinguishable'.[69] In spite of the authorisation of investigation decisions by the Pre-Trial Chambers in *Kenya* and followed in the *Côte d'Ivoire* decision that explicitly state the 'reasonable basis to believe' test is 'the lowest evidentiary standard provided

---

[65] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya* (ICC-01/09-19), Pre-Trial Chamber II, 31 March 2010.

[66] See *Bemba*, *supra* note 57, § 27; *Al Bashir*, *supra* note 22, § 30.

[67] Pikis, *supra* note 47, at 264.

[68] M. Ventura, 'The "Reasonable Basis to Proceed" Threshold in the Kenya and Côte d'Ivoire Proprio Motu Investigation Decisions: The International Criminal Court's Lowest Evidentiary Standard?', 12 *The Law and Practice of International Courts and Tribunals* (2013), at 49-80.

[69] *Ibid*., at 68.

for in the Statute', this does not seem to be a settled position.[70] The fact that Judge Kaul in his dissenting opinion remained silent as to acknowledging this fourth evidentiary statement,[71] and commentators such as Bergsmo and Kruger state that the test of 'reasonable basis to proceed' '*may*' constitute a lower threshold than 'reasonable grounds', shows the lack of definitive consensus on the relative positions of the two thresholds.[72]

Lack of clarity on whether, and how much the two thresholds differ arguably lowers the 'reasonable grounds to believe' threshold by virtue of association with 'reasonable basis to proceed', which is a purposefully low test. A low standard under Article 15(4) is necessary because the prosecutor does not have the full range of investigative powers during the preliminary examination phase to present such comprehensive and conclusive evidence.[73] Article 54 provides for wide powers during an investigation for the prosecutor to collect and examine evidence, request the presence of and question persons, victims and witnesses, and to seek cooperation of States and intergovernmental organizations.[74] Absent such powers in the early stages of investigation, the Article 15(4) threshold should be low enough so as not to impede *proprio motu* investigations. The fact that the object and purpose of Article 58 – to ascertain criminal responsibility of an individual – differs from Article 15(4) suggests that a uniform test is inappropriate for the two different stages.

---

[70] *Kenya situation*, *supra* note 65, §§ 31-32; Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, *Situation in the republic of Côte d'Ivoire* (ICC-02/11-14), Pre-Trial Chamber III, 3 October 2011, § 24.

[71] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of judge Hans-Peter Kaul, *Situation in the Republic of Kenya* (ICC-01/09-19), Pre-Trial Chamber II, 31 March 2010.

[72] M. Bergsmo and J. Pejić, 'Article 15 – Prosecutor', in Triffterer, *supra* note 10, at 589.

[73] *Kenya situation*, supra note 65, § 27.

[74] Art. 54(3)(a)-(c) ICCSt.

As to the difference between the 'substantial grounds to believe' and 'reasonable grounds to believe' thresholds, the *Abu Garda* confirmation decision would have provided a good opportunity to examine the difference in evidentiary material assessed, as the charge was ultimately not confirmed.[75] Unfortunately, this exercise is not possible given restricted accessibility to the relevant documents and the 'arcane witness – and document – numbering systems'.[76] What can be seen, simply from the length of confirmation decisions and the applicable rules, is that much more guidance is provided at the confirmation stage as to what the threshold requires. For example, the *Abu Garda* confirmation decision runs to 103 pages as compared to 15 pages in the arrest warrant decision, and the *Bemba* confirmation decision sets approaches to direct and indirect evidence, explains the effects of corroboration and inconsistencies in evidence on probative value.[77] It is understood that as we approach the trial stage, more and more evidence is gathered during investigations, and thus there will be more to consider to ensure that evidence is 'sufficient to justify committal for trial'.[78] However, should the same clarity regarding approaches to evidence not be provided at the earlier stages? Why is the gateway to trial more important than the gateway to what may amount to arbitrary arrest and detention?

4. Consequences of lowering the threshold

[75] Decision on the Confirmation of Charges, *Bahar Idriss Abu Garda* (ICC-02/05-02/09), Pre-Trial Chamber I, 8 February 2010.

[76] A. J. Burrow, 'The Standard of Proof in Pre-Trial Proceedings', in K. A. A. Khan, C. Buisman and C. Gosnell (eds), *Principles of Evidence in International Criminal Justice* (Oxford University Press, 2010), at 682.

[77] Decision on the Prosecutor's Application under Article 58, *Bahar Idriss Abu Garda* (ICC-02/05-02/09), Pre-Trial Chamber I, 7 May 2009; *Bemba*, *supra* note 57, §§ 47-57.

[78] *Lubanga*, *supra* note 57, § 34.

As a result of inherent ambiguities in the wording, unhelpful clarifications by the ICC and misguided use of ECtHR jurisprudence, the threshold of Article 58 has been unjustifiably lowered. This not only has consequences on the prosecutor's perceived burden to investigate and to present evidence, but also has dire effects on the defendant's liberty.

A. Undermines Prosecutor's duty

The ICC framework imposes a duty upon the prosecutor to 'establish the truth', and 'extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility' and, to that end, to 'investigate incriminating and exonerating circumstances equally'.[79] The question has been asked at the trial stage, whether 'it is incumbent on the ICC Prosecutor to remain non-partisan when submitting evidence to the Trial Chamber, in the sense of being empowered or duty-bound to present exculpatory evidence and to draw the attention of the judges to the exculpatory or mitigating aspects of the case'.[80] Although the statement was made in the context of trial proceedings, it applies equally to the pre-trial proceedings. Similarly, the prevalence of the adversarial model at the ICC means that in reality, the prosecutor still brings the case to court as an adversary, such that the reliability of impartiality is not readily identifiable in this structure. [81] The investigative role of the Pre-Trial judge has so far been limited to disclosure matters rather than to actively

[79] Art. 54 ICCSt.

[80] L. Reydams, J. Wouters, and C. Ryngaert (eds), *International Prosecutors* (Oxford University Press, 2012), at 709.

[81] M. C. Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' 32 *Cornell International Law Journal* (1999) 464.

impose on prosecutors the duty to seek exculpatory as well as inculpatory material.[82] At an *ex parte* stage of the proceedings, the Chamber is completely reliant on the prosecution for information. The danger in practice is that there is no equality of arms if the prosecutor is merely required to disclose what he deems appropriate and necessary.

As presented above in this paper, ICC jurisprudence has potentially decreased the prosecutor's incentive to be non-partisan. First, the underlying existence of a presumption that an inference is reasonable, unless evidence is also provided that renders such inference unreasonable, inadvertently reduces the prosecutor's burden. Second, the fact that case law has equated the threshold with the lower 'reasonable suspicion' standard, and stated that any conclusions need not be the *only* reasonable inference drawn from the evidence, suggests that the prosecutor does not have to produce extensive information. Even the existence of exculpatory and inconsistent information would not be detrimental to the prosecutor's application. In any case, an understanding that the threshold is low does not provide the prosecutor with much incentive to perform his investigative duties with rigour, at least for the initial stages of prosecution. It also enables, as one commentator put it, the prosecutor to reserve the use of a 'smoking gun' for the trial phase.[83] Indeed, the sufficiency of the evidentiary threshold may have a bearing on the form of evidence furnished by the prosecutor: thus the PTC III issued an arrest warrant for Laurent Gbagbo based primarily on NGO reports and hearsay evidence, even though such evidence was

[82] J. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals', 7 *JICJ* (2009) 36.

[83] K. Ambos, 'The Structure of International Criminal Procedure: Adversarial, Inquisitorial or Mixed?' in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May, 2007). at 472.

insufficient to confirm charges against the accused and which ultimately led to a deferral of decision on confirmation of charges.[84]

Thus far, it has always been the case that the prosecutor has presented numerous supporting pieces of evidence that corroborate each other, such that difficulties defining the boundaries of 'reasonableness' have not been an issue. However, having embarked on the thought experiment where only one piece of evidence is presented, the potential gap that the prosecutor could take advantage of is brought to light. Knowing that probative value is not explicitly tested at the arrest warrant stage, the prosecutor could possibly present one piece of evidence at his discretion and the Pre-Trial Chamber would not be able to sufficiently examine it. Such an approach would undermine the pertinence of probative value to the examination of whether the threshold has been reached.

In addition, if the threshold of 'reasonable grounds to believe' is to be equated with 'reasonable basis to proceed', then the effect of lowering the 'reasonable grounds to believe' standard arguably also has an effect on the barrier to unwarranted, frivolous or politically motivated investigations. Given the wide prosecutorial discretion conferred upon the prosecutor to select cases and frame charges, there is a need to ensure that politically motivated cases are filtered out. [85] This is especially true when prosecutors are viewed as insufficiently independent from political actors, with some even arguing that 'the ICC often acts as a political actor implementing

[84] Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i), *Laurent Gbagbo* (ICC-02/11-01/11), Pre-Trial Chamber I, 3 June 2013.

[85] C. Stahn, 'Judicial Review of Prosecutorial Discretion: Five Years On', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009), 249.

policy'.[86] In light of the Court's focus on African cases so far, a high threshold will help to stave off criticism that the Court was established to prosecute African cases. The recent abandoned prosecution of Kenyan President Uhuru Kenyatta helps illustrate this: had a higher standard been applied at the confirmation of charges stage, the case may not have reached the point where the charges had to be withdrawn prior to trial in December 2014 due to a lack of evidence.[87] There is a need to put sufficient internal safeguards to mitigate the external political factors. Lowering the Article 58 in turn could detrimentally affect the Court's credibility.[88] The ICC's perceived legitimacy in turn has an impact on obtaining international cooperation, which is so critical to the enforcement of its decisions. The recent backlash by the African states and their regional organisations highlights the potential danger of a lower threshold.[89] The novel characterisation of the prosecutor as an organ of justice at the ICC is supplemented by the role entrusted to the Pre-Trial Chamber to oversee prosecutorial discretion. The political nature of cases and the need for national cooperation of State authorities necessitates a truly unbiased role in investigation and prosecution.[90]

---

[86] M. Drumbl, 'A Response to Sasha Greenawalt', *Virginia Journal of International Law Online Symposium*, available at http://opiniojuris.org/2009/11/04/a-response-to-sasha-greenawalt-by-mark-a-drumbl/ (last visited 20 January 2015).

[87] Consider generally the PTC II's reasoning on the sufficiency of the evidence in the confirmation of charges decision: Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11), Pre-Trial Chamber II, 23 January 2012.

[88] *Kenya situation*, *supra* note 65, § 33; A. Burrow, *supra* note 76, 669.

[89] L.F. Horton, 'Prosecutorial Discretion Before International Criminal Courts and Perceptions of Justice: How expanded prosecutorial independence can increase the accountability of international actors, 7 *Eyes on the ICC* (2011) 46-48.

[90] S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford University Press, 2003), 42-43.

B. Undermines the safeguard to defendant's right to liberty

The importance of human rights in the Rome Statute is enshrined in Article 21(3), which requires the interpretation and application of applicable law to be consistent with human rights. [91] This is what directed the Pre-Trial Chambers to ECtHR jurisprudence in the first place, however inapt its final use was. Indeed it has been highlighted in cases such as *Lubanga* that '[h]uman rights underpin the Statute; every aspect of it, including the existence of the jurisdiction of the Court.'[92]

In *Bemba*, it was noted that different thresholds are 'consistent with the forseeable impact of the relevant decisions on the fundamental human rights of the person charged.'[93] At the arrest warrant stage, it is recognised that 'apart from other collateral consequences of being the subject of a case before the Court, the fundamental right of the relevant person to his liberty is at stake.'[94] The fundamental right to liberty is part and parcel to fair trial rights derived from Article 14 of ICCPR – itself a *jus cogens* norm. [95] That the defendant is not entitled to representation at the arrest warrant stage gives even more weight to the argument that the threshold needs to be high and articulated with sufficient clarity.

The consequences of an arrest are dramatic – be it the direct impact on personal liberty and economic livelihood whilst in detention, or the wider political implications where, as often is the case, the suspect is a political leader. Deprivation

---

[91] R Young, '"Internationally Recognized Human Rights" before the International Criminal Court', 60 *International and Comparative Law Quarterly* (2011) 189, 193.

[92] Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute, *Prosecutor v Lubanga* (ICC-01/04-01/06), Appeals Chamber, 3 October 2006, § 39.

[93] *Bemba, supra* note 57, § 27.

[94] *Lubanga*, *supra* note 9, § 11.

[95] Boas, *supra* note 32, 12.

of liberty could be a matter of years; historically the issuance of an arrest warrant has led to incarceration of an individual for a long period of time while the office gathers further evidence.[96] For instance Mr. Callixte Mbarushimana was detained for eight months before the confirmation of charges hearing.[97] Laurent Gbagbo, who was the President of Côte d'Ivoire before his arrest, was detained for 15 months before the confirmation of charges hearing.[98] Proceedings for Mathieu Ngudjolo Chui lasted for over four years after his arrest before he was finally acquitted.[99] As recognised by Judge Pikis, 'the presence of reasonable grounds to believe that a person has committed an offence foreshadows in many ways the charging of the person, making his/her trial not a mere probability, but a real one.'[100] The process of arrest at the international level is just as, if not more invasive than at the domestic level.

The political implications of such an arrest are incalculable. World media subjects individuals suspected of committing violations of international criminal law to public accusations and labels such as 'war criminals' before they are afforded a

[96] Such delays have even contravened the Court's own Regulations, see in particular Regulation 53, Regulations of the Court (ICC-BD-0101-04), 2004. See also Y. McDermott Rees, 'Some thoughts on the Ntaganda and Gbagbo confirmation of the charges decisions at the ICC', PhD Studies in Human Rights, 14 June 2014, available at http://humanrightsdoctorate.blogspot.co.uk/2014/06/some-thoughts-on-ntaganda-and-gbagbo.html (last visited 20 January 2015)

[97] The International Criminal Court, *Case Information Sheet* –Mbarushimana, available at< http://www.icc-cpi.int/iccdocs/PIDS/publications/MbarushimanaENG.pdf> (last visited 20 January 2015)..

[98] The International Criminal Court, *Case Information Sheet* –Gbgabo, available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/GbagboEng.pdf> (last visited 20 January 2015)..

[99] The International Criminal Court, *Case Information Sheet* – Chui, available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/ChuiEng.pdf> (last visited 20 January 2015)..

[100] Pikis, *supra* note 47, 112.

chance to claim their innocence.[101] The stigma from an arrest warrant or a summons may potentially isolate a political leader from his sources of political support and marginalise him in political discourse.[102] The momentous impact of court proceedings that begin with the arrest warrant are highlighted by Jorda, who writes:

> The trial of a political leader or military commander is truly a pivotal moment in the troubled history of a nation confronted with major humanitarian catastrophes, such as crimes against humanity, committed on a massive scale, or even genocide…through their individual trials, fallen leaders will try to explain or justify their actions, calling for history to be the Judge…history is thus summoned to the Bar.[103]

Apart from the political impact on the individual, States are drawn into the arena. To illustrate, the warrant of arrest for President Al Bashir of Sudan led to Libyan President Muanmar Al-Qaddafi branding the indictment 'First World terrorism', and the African Union Commission publically denounced the February 2010 judgment by the Appeals Chamber.[104] Prosecution of Kenya's President Uhuru Kenyatta and Vice-President William Ruto provides another example of the political upheaval that can follow even a summons to appear before the court. Given the

---

[101] S. Beresford, 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals' 96 *American Journal of International Law* (2002) 628, at 630.

[102] Human Rights Watch, *Policy Paper: The Meaning of the "Interests of Justice" in Article 53 of the Rome Statute* (June 2005).

[103] C. Jorda, 'The Major Hurdles and Accomplishments of the ICTY', 2 *JICJ* (2004) 572, at 575, 584.

[104] J. A. Goldston, 'More Candour about Criteria', 8 *JICJ* (2010) 383-406.

severity of these repercussions, a rigorous standard of proof is required to establish 'reasonable grounds to believe'.

The threshold is also important for interim release pursuant to Article 59(4), which provides for the considerations under Article 58(1) to be undertaken. According to the ICTY, the principle of interim release is a corollary of the principle of the presumption of innocence.[105] Although the provision for consideration of provisional release at least every 120 days is a significant improvement from the ICTY framework, the threshold under Article 58(1) must not be lowered to derogate from the presumption of innocence.[106] Lowering of 'reasonable grounds to believe' would not only increase the chance of an unlawful issuance of arrest warrant, but also simultaneously decrease the chance of the individual from securing a remedy to the unlawful arrest. As another form of redress, the Rome Statute does contain provisions for compensation to persons who were illegally detained, prosecuted or convicted.[107] However, such provisions have been criticised for their ineffectiveness.[108]

5. Conclusion

Article 58 defines the legal framework within which to examine the legality of arrest. The 'reasonable grounds to believe' threshold is vital to ensure that the prosecutor

[105] Decision denying a Request for Provisional Release, *Aleksovski*, (IT-94-14/1-T), Trial Chamber, 23 January 1998, § 3.

[106] Rule 118(2), ICC RPE.

[107] Art.85, ICCSt.

[108] G. Bitti 'Compensation to an Arrested or Convicted Person' in R.S. Lee et al (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers Ardsley, 2001) 623; S. Beresford 'Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals' 96 *AJIL* (2002) 628.

fulfills his role in conducting proper investigations and prosecutions, and that the fundamental human rights of the accused are respected. Yet clarifications from ICC jurisprudence have been counterproductive, leading to a lower threshold than what was envisaged by the drafters of the Rome Statute.

First, the correction from the Appeals Chamber in *Al Bashir* and dicta from Judge Ušacka depresses the threshold. It would have been convenient had the Appeals Chamber in *Al Bashir* taken the opportunity to elaborate on the precise definition of 'reasonable grounds to believe'. A suggestion could be, for example, Judge Pikis' advancement of the definition that there must be 'evidence justifying, as a matter of reason and good sense, acceptance that the person whose arrest is sought has committed a crime within the jurisdiction of the Court' combined with a precise comparison of how it differs from the standards set out in Articles 15 and 66.[109]

Second, equating 'reasonable grounds to believe' with 'reasonable suspicion' clearly pushes the threshold down, despite the Court's best intentions in referring to ECtHR jurisprudence. Notwithstanding the ECtHR's element of 'universal-legitimacy' and its establishment as a result of a similar normative 'compromise' between the common law and civil law systems, we suggest that equation of 'reasonable grounds to believe' with 'reasonable suspicion' should be dispensed with.[110] It is hoped that as case law of the ICC is further developed and enriched, the rigid adherence and frequent reference to ECtHR will be replaced by references to general principles and the relevant rules of the ICC as interpreted by ICC judges in their own body of jurisprudence.[111]

---

[109] Pikis, *supra* note 47, 108.

[110] Croquet, *supra* note 39, 124.

[111] A. Cassese, 'The influence of the European Court of Human Rights on international criminal tribunals – some methodological remarks', in M. Bergsmo (eds), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjørn Eide* (Brill, 2003) 52.

Regarding 'reasonableness', although evaluation methods are set out in detail at the confirmation of charges decisions, this analysis is lacking in arrest warrant decisions. Is it to be inferred that evaluations of evidence are not to be undertaken, at least explicitly, at the arrest warrant stage? If so, how can any notion of 'reasonableness' be substantiated? It is suggested that to avoid the hypothetical scenario where one piece of potentially scant evidence would be sufficient to meet the threshold, the rules regarding free evaluation of evidence using probative value and relevance should be explicitly introduced in the initial *ex parte* proceedings. Clarifications on approaches regarding use of indirect or circumstantial evidence and requirements for corroboration would provide greater clarity to the prosecutor submitting his application. It is argued that transparency in evaluation of evidence should be important even at this early stage. The inclusion of details in the Statute but not the Rules of Procedure and Evidence has indeed been criticised by commentators.[112]

The definition and interpretation of the Article 58 threshold merits attention especially if it is found that the standard is close to the 'reasonable basis to proceed' one. As 'reasonable basis to proceed' is the threshold under which the Chamber exercises judicial oversight of prosecutorial discretion, the definition of 'reasonable grounds to believe' has the potential to profoundly impact the prosecutor's ability to carry out the mandate entrusted to his office. It is important to ensure that politically motivated cases are filtered out and are seen to be free from bias.

It has been remarked that '[a]ccuracy in the fact finding process, transparency in the procedure, and respect for human rights are all essential to the legitimacy of the

[112] O. Fourmy, 'Powers of the Pre-Trial Chambers' in Cassese et al. supra note 6, 1207.

international criminal procedure.' [113] A high threshold under Article 58 is of utmost importance to the alleged defendant, as his right to liberty is at stake. Yet the consequences of a heightened threshold for the prosecutor seem trivial in comparison. If an application is declined, the prosecutor is not barred from submitting another application once more evidence is secured. In *Al Bashir*, the defendant was still charged with war crimes and crimes against humanity with the first arrest warrant. In *Muducumura*, despite the Chamber's finding that no reasonable grounds to believe an organizational policy to direct attacks at a civilian population existed, they still found reasonable grounds to believe Mr. Muducumura was guilty of war crimes.[114] Thus a strict interpretation of the threshold upholds the rights of the defendant without significant downsides to the prosecutor in terms of prejudicing a subsequent application. Without losing sight of the purpose of the ICC set up as a court to end impunity to the gravest crimes, this high standard asked of the prosecution is acceptable.

One limitation of the conclusions in this paper is that most documents footnoted in decisions are not accessible. The multitude of files, redactions in decisions and confidential documents mean that useful comparisons have been impeded. In relation to the consequences of a lower threshold, it is difficult to measure the extent of impact upon the individual and the wider community, not least because the interactions between subsection (a) and subsection (b) of Article 58(1) have not been explored.

---

[113] L. Gradoni, D A Lewis et al, 'General Framework of International Criminal Procedure' in Göran Sluiter (ed) *International Criminal Procedure: Principles and Rules* (Oxford University Press, 2013), 54.

[114] *Muducumura supra* note 34.

Despite these limitations, it is suggested that judicial recognition of the difficulties contained in the threshold of Article 58 would go towards improving the ICC's criminal procedure. Indeed, it is acknowledged that a balance needs to be struck between rigorous fact-finding and efficiency of prosecutions. It is also understood that arrests are often time-sensitive issues. However, the exigencies of arrest cannot undermine an individual's rights. The threshold in Article 58 should not reach that of the later proceedings, but an unduly low threshold cannot be used as a panacea for all the difficulties that the prosecutor may confront during the investigation process. To do so would undermine the prosecutorial independence and credibility of the ICC. Most importantly, an individual's right to liberty is at stake, and we cannot pay mere lip service to adherence with international human rights standards. By departing from unnecessary jurisprudence that adds little substantive value, clarity is ensured in both the prosecutor's work and also the decisions of judges such that both States and individuals know by which standard they can be subject to arrest and subsequent prosecution. It is hoped that as jurisprudence develops, there will be more examples of effective application to help reach clarity in the international tribunal's criminal procedure. A rigorous evidentiary threshold under Article 58 will enhance the legitimacy of the ICC, which no doubt remains one of its paramount objectives.