

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-02/09

Date: 6 October 2009

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

IN THE CASE OF THE PROSECUTOR V. BAHAR IDRIS ABU GARDA

Public Document

Decision on victims' modalities of participation at the Pre-Trial Stage of the Case

Decision to be notified, in accordance with regulation 31 of the *Regulations of the*

Court, to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Mr Essa Faal

Counsel for the Defence

Mr. Karim A.A. Khan

Mr Andrew J. Burrow

Legal Representatives of Victims

Mr Brahim Koné

Ms Hélène Cissé

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Ms. Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively),

NOTING the “Decision on the Prosecutor’s Application under article 58” issued by the Chamber on 7 May 2009, wherein it was decided to issue a summons to appear for Bahar Idriss Abu Garda;¹

NOTING the hearing of first appearance of Mr Bahar Idriss Abu Garda held on 18 May 2009, wherein the commencement of the confirmation of charges hearing was scheduled for Monday 12 October 2009;²

NOTING the “Document Containing the Charges submitted pursuant to article 61(3)”³ (“the Prosecution’s Charging Document”) filed by the Prosecution on 9 September 2009;

NOTING the “Decision on the Prosecutor’s request for extension of time-limit”,⁴ issued by the Single Judge Cuno Tarfusser on 11 September 2009, wherein the commencement of the confirmation hearing was postponed until Monday, 19 October 2009;

¹ ICC-02/05-02/09-1-Conf and ICC-02/05-02/09-15-AnxA.

² ICC-02/05-02/09-T-2-ENG.

³ ICC-02/05-02/09-91-Conf and ICC-02/05-02/09-91-Conf-Anx1-Anx2; and its public redacted version ICC-02/05-02/09-118.

⁴ ICC-02/05-02/09-98.

NOTING the “Decision on the 34 Application for Participation at the Pre-Trial Stage of the Case” issued by the Single Judge Sanji Mmasenono Monageng on 25 September 2009;⁵

NOTING the “Submission of Confidential List of Evidence for filing in the record of the Case” (the “List of Evidence”) filed by the Defence on 1 October 2009;⁶

NOTING articles 57, 61, 67 and 68 of the *Rome Statute* (“the Statute”); rules 87 to 92, 121 and 122 of the *Rules of Procedure and Evidence* (“the Rules”); regulations 24, 81 and 86 of the *Regulations of the Court* (“the Regulations”) and article 8 of the Code of Professional Conduct;

HEREBY RENDER THIS DECISION

1. The Chamber notes that 86 applicants had requested to participate in the pre-trial stage of the proceedings in the Abu Garda Case and that to date 34 of them have been recognised as victims for the purposes of the present case.⁷
2. Article 68(3) of the Statute provides that “[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or

⁵ ICC-02/05-02/09-121.

⁶ ICC-02/05-02/09-127 and ICC-02/05-02/09-127-Conf-Anx.

⁷ ICC-02/05-02/09-121.

inconsistent with the rights of the accused and a fair and impartial trial.” As stated by the Appeals Chamber, the participation of victims within the meaning of article 68(3) of the Statute “can take place only within the context of judicial proceedings.”⁸

3. The Chamber notes that the present decision relates to victims who requested authorisation to participate at the pre-trial phase of the proceedings in the Abu Garda Case. The confirmation hearing in this case is scheduled to start on Monday 19 October 2009.⁹

4. In this respect, it shall be recalled that, pursuant to article 61(7) of the Statute, the Chamber shall, on the basis of the confirmation of charges hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. In this regard, the Chamber recalls that the “confirmation hearing has a limited scope and by no means can it be seen as an end in itself, but it must be seen as a means to distinguish those cases that should go to trial from those that should not go to trial.” Therefore, the confirmation hearing is neither a “mini-trial” nor a “trial before the trial.”¹⁰

5. In addition, as already stated by the Chamber, the personal interests of victims are affected by the outcome of the pre-trial stage of the case insofar as it is directed at either (i) confirming the charges against those allegedly responsible for perpetrating the crimes which caused the victims to suffer harm; or (ii)

⁸ Appeals Chamber, ICC-01/04-556, para.45.

⁹ ICC-02/05-02/09-98.

¹⁰ ICC-01/04-01/07-428-Corr, paras. 5-6, and 78-81. See also ICC-01/04-01/07-446, p. 7; ICC-01/04-01/07-412, p. 4; ICC-01/04-01/07-T-25-ENG ET, p. 14, lines 4-11; ICC-01/04-01/07-474, para.100. Pre-Trial Chamber III, ICC-01/05-01/08-320, para.94.

declining to confirm the charges against those not responsible for such crimes, so that the search for those who are criminally liable can continue.¹¹

6. The Chamber however notes that the language of article 68 of the Statute does not define the modalities of participation of victims but rather gives the Chamber discretion in their determination. Along the same lines, rule 91(2) of the Rules *inter alia* states that victims' legal representatives shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber.

7. In such determination, the Chamber shall nevertheless bear in mind two aspects. First of all, the Statute and the Rules provide victims with a meaningful role in criminal proceedings before the Court so that they can have a substantial impact on the proceedings.¹² In this regard, the Chamber has already found that article 68(3) of the Statute:

[...] grants victims an independent voice and role in proceedings before the Court. It should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests. As the European Court has affirmed on several occasions, victims participating in criminal proceedings cannot be regarded as "either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different".¹³

Therefore, victims shall be enabled to fully participate in the debate held at the confirmation hearing, bearing in mind its limited scope.

8. Secondly, while defining the modalities of participation of victims, the Chamber must strike a balance between the rights of the victims and the rights of

¹¹ ICC-01/04-01/07-474, para.36.

¹² ICC-01/04-01/07-474, para.157.

¹³ ICC-01/04-101-tEN-Corr, para. 51. ICC-01/04-01/07-474, para.155. See also Pre-Trial Chamber III, ICC-01/05-01/08-320, para.90.

the person charged by ensuring that such modalities are not prejudicial to the rights of the suspect and the requirements of a fair and impartial trial.

9. In the view of the Chamber, article 68(3) of the Statute and rules 91 and 92 of the Rules further allow that the modalities of participation can be limited by the Chamber *proprio motu*, or at the request of the parties, the Registry or any other participants, if it is demonstrated that such limitations are necessary to safeguard a competing interest protected by the Statute and the Rules such as the Prosecution's investigations, national security or the physical or psychological well-being of victims and witnesses. Nevertheless, the extent of any such limitation shall be strictly in accordance with the principle of proportionality.

10. Mindful of the abovementioned considerations and the necessity of balancing the rights of the victims and those of the Defence, the Chamber considers that the modalities of the victims' participation in the present case, which cannot be exercised retroactively, shall be as follows:

1. Access prior to and during the confirmation hearing to the public record of the case kept by the Registry

11. Pursuant to rule 121(10) of the Rules, the Registry shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber. Rule 121(10) of the Rules further states that victims or their legal representatives may, subject to any restrictions concerning confidentiality and the protection of national security information, consult such record.

12. Furthermore, according to rule 92 (5) and (6) of the Rules, victims' legal representatives shall be notified of the proceedings before the Chamber.

13. The Chamber is thus of the view that the legal representatives of the victims authorised to participate at the pre-trial stage of the present case have, prior to and during the confirmation hearing, the right to:

- (i) have access to all public filings and public decisions contained in the record of the case;
- (ii) be notified on the same basis as the Prosecution and the Defence of all public requests, submissions, motions, responses and other procedural documents which are filed as public in the record of the case;
- (iii) be notified of the decisions of the Chamber in the proceedings;
- (iv) have access to the transcripts of hearings held in public sessions;
- (v) be notified on the same basis as the Prosecution and the Defence of all public proceedings before the Court, including the date of hearings and any postponements thereof, and the date of delivery of the decision; and
- (vi) have access to the public evidence filed by the Prosecution and the Defence pursuant to rule 121 of the Rules and contained in the record of the case. Such right is, however, limited to the format (unredacted versions, redacted versions or summaries, as well as electronic versions with the *data* required by the e-Court Protocol) in which the evidence is made available to the party which has not proposed it.

14. The Chamber, however, notes that if a party to or a participant in the present proceedings wishes to notify a document classified as confidential to the victims' legal representatives, it may do so by including in the said document the name(s) of the legal representative(s) to be notified. The Registry shall then notify the parties and the participants accordingly.

15. In relation to those filings that are marked confidential and are not notified to the victims' legal representatives under the conditions set forth in the previous paragraph, the Chamber retains the option to decide, on a case by case basis and upon receipt of a specific and motivated request, whether to grant victims' legal representatives access thereto.

2. Attendance and participation at hearings

16. According to rule 91(2) of the Rules, the right to attend and participate in the proceedings shall include participation in hearings, unless, in the circumstances of the case, the Chamber is of the view that the representatives' intervention should be confined to written observations or submissions.

17. In the present case, the Chamber considers that the victims' legal representatives have the right to attend all public session hearings convened in the proceedings leading to the confirmation hearing, as well as all public sessions of the confirmation hearing.

18. The Chamber also recognises that the victims' legal representatives have the right to participate by way of oral motions, responses and submissions in: (i) all those hearings which they have the right to attend; and (ii) in relation to all

matters other than those in which their intervention has been excluded by the Statute and the Rules.

19. Pursuant to rule 89(1) of the Rules, the Chamber further considers that the victims' legal representatives are entitled to make opening and closing statements at the confirmation hearing.

20. In the event that the Chamber decides to hold parts of the hearings *in camera* or *ex parte*, the Chamber retains the option to decide, on a case by case basis, whether to authorise, upon request, the victims' legal representatives to attend those sessions.

3. Questioning of witnesses

21. The Prosecution has informed the Defence and the Chamber of its intention to call three witnesses to testify at the confirmation hearing.¹⁴ The Defence, according to its List of Evidence,¹⁵ also intends to call a witness to testify at the confirmation hearing.

22. At the outset, the Chamber wishes to recall that, bearing in mind the principle of prohibiting anonymous accusations, the victims who are granted anonymity throughout the pre-trial stage of a case, are not entitled to examine witnesses pursuant to the procedure provided for in rule 91(3) of the Rules.¹⁶

23. However, when the identities of the victims are disclosed to the parties, the Chamber considers that the aforementioned limitation may not be applicable.

¹⁴ ICC-02/05-02/09-92 and ICC-02/05-02/09-92-Conf-Anx.

¹⁵ ICC-02/05-02/09-127 and ICC-02/05-02/09-127-Conf-Anx.

¹⁶ ICC-01/04-01/06-462-tEN, pp. 8 and 9 and ICC-01/04-01/07-474, paras.180-182.

Thus, pursuant to rule 91(3) of the Rules, if any of the victims' legal representatives wish to question any of the witnesses called to testify at the confirmation hearing, they must make an application to the Chamber.

24. If a request is made in that sense, the Chamber will decide, at that time, on the procedure that must be followed, taking into account, among other factors, the stage of the proceedings, the rights of the suspect, the interests of the witnesses, the need for a fair, impartial and expeditious trial and the requirements under article 68(3) of the Statute.

4. Filing of documents

25. In accordance with regulation 24 of the Regulations, the victims' legal representatives are also entitled to file written motions, responses and replies in relation to all matters for which the Statute and the Rules does not exclude their intervention and for which the Chamber has not limited their participation either *proprio motu* or at the request of the parties, the Registry or any other participants.

FOR THESE REASONS,

DECIDES to grant to victims of the case, as of this day, the participatory rights described in paragraphs 11 to 25 of the present decision;

ORDERS the Registry to make all necessary arrangements to provide the legal representatives of victims of the present case with the access described in paragraphs 13 and 14 of the present decision;

ORDERS the OPCV to provide support and assistance to the victims' legal representatives in accordance with regulation 81(4) of the Regulations;

RECALLS that all victims authorised to participate at the pre-trial stage of the case of *The Prosecutor v. Bahar Idriss Abu Garda*:

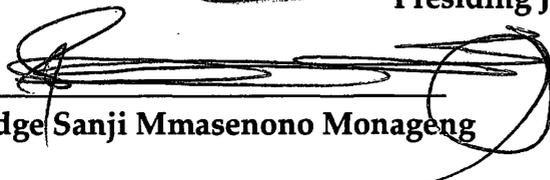
- (i) must only be referred to by the numbers assigned to them by the Registry, unless otherwise ordered by the Chamber; and
- (ii) shall only be contacted through their Legal Representatives;

ORDERS the Prosecutor and the Defence to keep the information related to victims confidential or confidential *ex parte*, as the case may be, and to ensure that it is not passed on to the public;

ORDERS the legal representatives of victims to keep any information, which is shared with them, confidential or confidential *ex parte*, as the case may be, and to ensure that it is not passed on to the public.

Done in both English and French, the English version being authoritative.


Judge Sylvia Steiner
Presiding Judge


Judge Sanji Mmasenono Monageng


Judge Cuno Tarfusser

Dated this Monday 6 October 2009

At The Hague, the Netherlands