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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 Redacted Version

**Prosecution's Application for Leave to Appeal the
"Decision on the Confirmation of Charges"**

Source: Office of the Prosecutor

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Introduction

1. On 8 February 2010, Pre-Trial Chamber I (“the Chamber”) declined to confirm charges brought by the Prosecution against Bahar Idriss Abu Garda.¹ In so deciding, the Chamber exceeded its role at the confirmation stage. It also made findings that the Prosecution considers are vitiated by legal and procedural errors. In particular, the Chamber (1) wrongly discounted evidence, because of perceived inconsistencies or credibility issues or because the witnesses were anonymous or uncorroborated, (2) applied an incorrect legal test in its evaluation of the evidence of Abu Garda’s authority and control over the group that attacked the MGS Haskanita on 29 September 2007, and (3) ignored critical factual allegations and evidence concerning events during the immediate aftermath of the attack.
2. These factors underlie the Chamber’s refusal to confirm the charges, with the result that there will be no further proceedings and no trial. The Prosecution submits that the evidence it has presented, when assessed under the correct standards, already suffices to justify confirmation.
3. The issues for which appeal is sought thus affect the fair and expeditious conduct of these proceedings and the outcome of trial; indeed, intervention by the Appeals Chamber it is *required* to advance the proceedings. Additionally, Appeals Chamber intervention is required to review and define the evidentiary burdens imposed by the Pre-Trial Chamber on the confirmation process, which have no basis in the core texts of this Court.
4. The Prosecution accordingly seeks leave to appeal the Chamber’s Decision.²

Procedural Background

5. On 20 November 2008, the Prosecution submitted an application for the issuance of a Warrant of Arrest or a Summons to Appear for Bahar Idriss Abu Garda.³ On 7 May 2009, the Chamber issued a Summons to Appear.⁴ Abu Garda made his initial appearance on 18 May 2009.
6. On 10 September 2009, the Prosecution filed its Document Containing the Charges together with the list of evidence.⁵

¹ ICC-02/05-02/09-243-Conf. (“Decision”).

² The Prosecution submits the present document as confidential pursuant to Regulation 23*bis* of the Regulations of the Court, as it refers to factual information that is not in the public domain and has previously been redacted in filings before this Court, including in the public version of the appealed Decision. A public redacted version of this document will be filed without delay.

³ ICC-02/05-02/09-21-Conf.

⁴ ICC-02/05-02/09-2 and ICC-02/05-02/09-15-AnxA.

⁵ ICC-02/05-02/09-91-Conf and ICC-02/05-02/09-91-Red, and Conf-Anx1 and Anx1-Red (“the DCC”).

7. The confirmation hearing was held from 19 October 2009 to 30 October 2009, and the parties and participants thereafter filed written observations.⁶ On 8 February 2010, the Chamber declined to confirm the charges.⁷
8. The Chamber initially declared that the time for applying for leave to appeal would commence from the date of notification of the Arabic translation of the Decision.⁸ Subsequently, the Defence requested the Chamber to lift the suspension of the commencement of the five-day period.⁹ On 8 March 2010, the Single Judge granted the request and directed that the time within which to file an application for leave to appeal would commence from that date.¹⁰
9. On 11 March the Chamber granted the Prosecution request¹¹ for an extension of page limit considering the relevance of the Decision.¹²

The issues for which leave to appeal is sought fulfil the criteria in Article 82(1)(d)

10. The Prosecution seeks leave to appeal three issues arising from the Decision:
 - (i) Whether a Pre-Trial Chamber must confirm charges if the Prosecution's evidence – when viewed in the light most favourable to the Prosecution and without regard to possible inconsistencies, ambiguities, absence of corroboration, or the fact that it comes from anonymous sources – could establish substantial grounds to believe that the suspect committed each of the crimes charged (“First Issue”).
 - (ii) Whether the Chamber applied incorrect legal criteria in relation to two key issues: the existence of an organized armed group under the effective control of Abu Garda; and the relationship of subordination between Abu Garda and [REDACTED] (“Second Issue”).
 - (iii) Whether the Chamber failed to consider factual allegations and the evidence adduced in support, relevant to substantive matters in the Decision (“Third Issue”).
11. The Prosecution submits that the requirements for leave to appeal are met in the present case: (a) each issue arises from the Decision; (b) each issue affects the fair and expeditious

⁶ The Prosecution filed on 16 November 2009 (ICC-02/05-02/09-229 and Conf-AnxA), the Legal Representatives of Victims on 19 and 22 November 2009 (ICC-02/05-02/09-230-Conf and ICC-02/05-02/09-235-Conf, respectively), and the Defence on 7 December 2009 (ICC-02/05-02/09-237 with Conf-AnxA and Conf-AnxB).

⁷ Decision, para. 236.

⁸ Decision, p. 98.

⁹ ICC-02/05-02/09-246.

¹⁰ ICC-02/05-02/09-249, p. 5.

¹¹ ICC-02/05-02/09-250.

¹² ICC-02/05-02/09-251, p.3.

conduct of the proceedings or the outcome of trial; and (c) timely intervention by the Appeals Chamber will materially advance the proceedings.

12. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues meet the criteria set out in that provision.¹³ Reference to any errors contained in the Decision will only be made when necessary to demonstrate the appellability of the Decision.

The Issues arise from the Decision

13. First, the issues clearly arise out of the Decision, for the purposes of Article 82(1)(d):¹⁴ each issue constitutes “an identifiable subject or topic requiring a decision for its resolution”, and its resolution is “essential for the determination of matters arising under the judicial cause under examination”.¹⁵

The First Issue arises from the Decision

14. The scope of the confirmation decision and the manner by which evidence would be evaluated at the confirmation stage were part of the Chamber’s decision.
15. The Chamber found that “the confirmation hearing is neither a trial before the trial nor a mini-trial.”¹⁶ Rather, “the purpose of the confirmation hearing is limited to committing to trial only those persons against whom sufficiently compelling charges going beyond mere suspicion have been brought”.¹⁷ However, after referring properly to the above correct statement of the applicable law, the Chamber did in fact apply different, higher standards.

¹³ *Situation in Uganda*, ICC-02/04-01/05-20-US-Exp, 19 August 2005, unsealed pursuant to ICC-02/04-01/05-52, 13 October 2005, para. 22.

¹⁴ The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.” *Situation in the DRC*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 13 July 2006, paras. 9-10. See also *Prosecutor v Lubanga*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008 – Dissenting Opinion of Judge Song, ICC-01/04-01/06-1433 OA11, 11 July 2008, Diss. Op., para. 4, specifying that “[a] decision ‘involves’ an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

¹⁵ ICC-01/04-168 OA3, para. 9.

¹⁶ Decision, para. 39.

¹⁷ Decision, para. 39. See also *Prosecutor v Bemba* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 29: “The Chamber concurs with the conception articulated by Pre-Trial Chamber I, namely that ‘for the Prosecut[or] to meet [the] evidentiary burden, [he] must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations’”.

16. While the Statute draws clear distinctions between the evidentiary rules governing the confirmation stage and trial,¹⁸ the Chamber did not respect such a distinction. And while the Appeals Chamber recognised that an in-depth assessment of evidence is not expected at the confirmation stage,¹⁹ the Chamber did in fact proceed with such an assessment. The Chamber's analysis disregards the fact that a full assessment of the evidence is neither required nor possible at the confirmation stage. Such an assessment can only be made after the parties have presented all their evidence, and the credibility, reliability and consistency of the evidence has been fully explored through questioning of the witnesses.
17. In applying higher and incorrect standards and processes that are appropriate only for a trial on the merits, the Chamber discounted evidence or rejected it altogether if it was uncorroborated or inconsistent with other witness statements, or offered through the summaries or statements of anonymous witnesses. In so doing, the Chamber went beyond the relevance and admissibility of evidence to the credibility and reliability of evidence and assessed the evidence with standards that are applicable to a final determination of guilt or innocence after a trial. Rejecting evidence because of assessments predicated on the basis of incorrect standards, it accordingly found no substantial grounds to confirm the charges.
18. If leave to appeal is granted, the Prosecution will develop before the Appeals Chamber arguments showing that, for purposes of confirmation, the Pre-Trial Chamber should accept as reliable the Prosecution's evidence (so long as it is relevant and admissible)²⁰, just as the other international tribunals do when reviewing mid-trial motions for acquittal.²¹ This appropriate standard means that the Pre-Trial Chamber should not reject

¹⁸ See, e.g. Article 61(5) and 68(5).

¹⁹ "As the threshold for the confirmation of the charges is lower than for a conviction, the Prosecutor may be able to convince the Pre-Trial Chamber that the threshold for the confirmation of the charges has been reached even if the reliability of the witnesses and other evidence was not fully tested." *Prosecutor v Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-774, 14 December 2006, para. 47 (emphasis added).

²⁰ See Rules 63(2), 64.

²¹ The confirmation process is unique to this Court; other international tribunals do not provide similar pre-trial judicial examination of the merits of criminal charges. The ad hoc tribunals do provide, however, for a mid-trial review upon the Accused's application for an acquittal – which is, in effect, a comparable, albeit more comprehensive, screening of the case after the close of the Prosecution's evidence. See ICTY Rule 98bis. The standards by which those courts evaluate the evidence in ruling on acquittal applications are instructive. In particular, decisions of both the Yugoslav and Rwandan Tribunals consistently recognize that, in evaluating a Rule 98 bis motion for acquittal, the trial court does not assess reliability or credibility of the evidence presented in the case-in-chief, nor does it give lesser weight to evidence that it deems to be "suspect", 'contradictory' or in any other way reliable". *Prosecutor v Blagojevic and Jokic*, Judgement on Motions for Acquittal Pursuant to Rule 98bis, IT-02-60-T, 5 April 2004, para. 15. See also, e.g. *Prosecutor v Jelusic*, Appeal Judgement, IT-95-10-A, 5 July 2001, para. 37; *Prosecutor v Rukundo*, 22 May 2007, ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98bis, paras. 2-3; *Prosecutor v Rwamakuba*, Decision on Defence Motion for Judgment of Acquittal, ICTR-98-44C-R98bis, 28 October 2005, paras. 5-7, 13; *Prosecutor v Brdjanin*, Decision on Motion for Acquittal Pursuant to Rule 98bis, IT-99-36-T, 28 November 2003, paras. 2-4;

or discount evidence on the ground that it is ambiguous, subject to more than one interpretation, or is potentially inconsistent with other evidence. It also means that the Chamber should credit evidence even if the source has not yet been identified. If the evidence is not incredible on its face, the Chamber must accept it and give it due weight.

19. This standard is necessary and appropriate because of the limited nature of the confirmation hearing, which is a screening to determine if prosecution may take place, not an adjudication on the merits. In that screening process, the Prosecution's evidence is "entitled to credence unless incapable of belief."²² Similarly, the Pre-Trial Chamber should not weigh the evidence based on reliability or credibility assessments, nor should it evaluate the strengths and weaknesses of contradictory or different evidence before it.²³ And it should not reject evidence for lack of corroboration, since "it is well-established that a reasonable trier of fact may reach findings based on uncorroborated [...] evidence".²⁴
20. The First Issue arises from the decision as the standard in fact followed by the Chamber (which in actuality constituted a mini-trial, an adjudication of the credibility and relative strength of the Prosecution's evidence) is not consistent with the correct standard articulated by the Chamber. It presents a systemic and important question of law pertaining to the functions of the Pre-Trial Chamber and the process of assessing evidence at the confirmation stage.²⁵

Prosecutor v Semanza, Decision on the Defence Motion for a Judgment of Acquittal, ICTR-97-20-T, 27 September 2001, paras. 14-15, 17.

Instead, in deciding whether an accused is entitled to an acquittal at the close of the Prosecution case, "the Trial Chamber will not assess the credibility and reliability of witnesses unless the Prosecution case can be said to have 'completely broken down,' in that no trier of fact could accept the evidence relied upon by the Prosecution to maintain its case on a particular issue." *Prosecutor v Blagojevic and Jokic*, *supra*, para. 15 (citations omitted). The "applicable objective standard of proof under Rule 98bis of the Rules is 'whether a reasonable trier of fact could, upon the evidence presented by the Prosecutor, taken together with all the reasonable inferences and applicable legal presumptions and theories that might be applied to it, convict the accused'". *Prosecutor v Kvočka et al.*, IT 98-30/1-T, Decision on Defence Motions for Acquittal, 15 December 2000, citing *Prosecutor v Kordic and Cerkez*, Decision on Defence Motion for Judgement of Acquittal, IT-95-14/2-T, 6 April 2000, and *Prosecutor v Kunarac et al.*, Decision on Motion for Acquittal, IT-96-23-T, 3 July 2000.

It is noteworthy that the *ad hoc* tribunals apply this less stringent standard in evaluating the Prosecution's case after the witnesses and evidence have been tested through direct and cross examination.

²² *Prosecutor v Mrksic* IT-95-13/1-T Rule 98bis oral decision of 28 June 2006, T.11311-11313. See further *Prosecutor v Lubanga* Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, paras. 37 to 39; *Prosecutor v Katanga* Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para. 65.

²³ *Prosecutor v Martić* IT-95-11-T Rule 98bis oral decision of 3 July 2006, T.5959-5971.

²⁴ *Prosecutor v Rwamakuba*, *supra*, para. 13.

²⁵ In the case against Bashir, this Chamber has already found that the application of a potentially incorrect standard for evaluating evidence is an issue within the meaning of Article 82(1)(d) for which arose from that decision and for which leave to appeal was granted (see *Prosecutor v Bashir*, Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-21, 24 June 2009, p. 7).

21. The following examples establish specifically that the First Issue arises from the Decision and illustrate how the Pre-Trial Chamber applied a wrong standard and rejected the Prosecution's evidence because of inconsistencies, ambiguities, incompleteness, or contradictions, because it was uncorroborated, or because the source was, at the time of the hearing, anonymous. They are offered not to show that the Prosecution has a different opinion of the evidence than the Chamber, but only that the Chamber rejected evidence on grounds appropriate to a trier of fact at the end of a criminal case, but inappropriate when assessing whether the evidence is sufficient to confirm criminal charges.²⁶

- The Chamber rejected as “weak and unreliable” the evidence that Abu Garda was present at the First Meeting.²⁷ The allegedly unreliable evidence included the affirmative statement of Witness 306 stated that Abu Garda took part in the First Meeting,²⁸ which the Chamber disregarded because Witness 306 “did not make it clear whether he actually saw him at the meeting”.²⁹ On the same basis, the Chamber rejected the statement of Witness 307, who also affirmatively stated that Abu Garda “was there” though he did not personally see him.³⁰ The Chamber rejected the statement of Witness 304 that he heard about the First Meeting and that he “saw a group of high-ranking officials, including Mr Abu Garda, sitting together at the time and venue of the First Meeting”, because it was “unclear whether he only heard about the meeting or actually saw it”.³¹
- Regarding Abu Garda's split from JEM, the Chamber found that the evidence “lack[ed] specific information to enable the Chamber to establish to a satisfactory degree that, at the time of the attack on the MGS Haskanita, Mr Abu Garda had already split from JEM and had effective control over a new organized armed group.”³² The purportedly nonspecific or incomplete evidence includes statements from Witnesses 304, 305, and 312, who state clearly that the split occurred before the attack on Haskanita; evidence from Witnesses 306 and

²⁶ The Prosecution is mindful that the issue in this Application is not whether the Chamber erred. The examples are presented only to demonstrate that the issues arise out of the Decision.

²⁷ Decision, para. 173.

²⁸ Summary of Interview Transcript of Witness 306 (“Witness 306”), DAR-OTP-0171-0298, paras. 28 (“There was a meeting between one of the SLA group commanders and [REDACTED] and *Secretary* Abu Garda which ended about 1630. We did not know what they discussed, but immediately afterwards, [REDACTED] came and ordered us to move and to go on the mission.”) (emphasis added), and 39 (“I was in the vehicle of Abu Garda but he was not in the vehicle with me. *He attended the meeting with the commanders and he planned the attack*, but he did not go”) (emphasis added).

²⁹ Decision, para. 171.

³⁰ Decision, para. 171.

³¹ Decision, para. 171.

³² Decision, para. 196.

442 that is consistent with the split having occurred prior to the attack; and Witness 307 's description of the split without stating when it occurred.³³

- The Chamber declared that “statements of anonymous witnesses will be given a lower probative value” unless “the information contained therein is corroborated or supported by other evidence tendered into the case file.”³⁴ Accordingly, it declined to give appropriate weight to the statements of Witnesses 304, 306, 307, 312 and 433, on whom the Prosecution relied to establish Abu Garda's presence during the First Meeting,³⁵ because the statements “were given by witnesses whose identity is unknown to the Defence and have been presented in the form of summaries of interview transcripts.”³⁶ It also disregarded the Prosecution's evidence regarding the Second Meeting because the only evidence was a “summary of the interview of anonymous Witness 307”.³⁷

The Second Issue arises from the Decision

22. The Second Issue refers to the Pre-Trial Chamber's failure to apply the correct legal criteria to determine (a) the existence of an organized armed group under the control of Abu Garda; and (b) whether Abu Garda exercised effective control [REDACTED].
23. Had the Chamber applied the correct legal standards to determine both the existence of an organized armed group and a relationship of subordination with effective control, it would have considered relevant evidence that has been completely disregarded in the Decision. The correct criteria have been applied by this Chamber in similar scenarios, as well as by other international tribunals. This error led the Chamber to reach unreasonable conclusions on two issues:
 - (i) “The Chamber [cannot] establish to a satisfactory degree that, at the time of the attack on the MGS Haskanita, Mr Abu Garda had already split from JEM and had effective control over a new organized armed group”;³⁸
 - (ii) “The hierarchical link between Mr Abu Garda [REDACTED] within an organized armed group is not sufficiently supported by evidence.”³⁹

³³ Decision, paras. 192-195. Notably, *no* witness testified that the split post-dated the attack.

³⁴ Decision, paras. 52 and 173.

³⁵ Decision, paras. 171-172 (note that the Chamber purports to rely on evidence from W305 but leaves this witness out of further analysis).

³⁶ Decision, para. 173.

³⁷ Decision, paras. 176-178.

³⁸ Decision, para. 196. See paras. 192-198.

³⁹ Decision, para. 201. See paras. 199-201.

24. The issue presented is not a “mere disagreement with the [Chamber’s] assessment of the evidence submitted by the Prosecutor.”⁴⁰ The Prosecution does not question the Chamber’s conclusions; rather, it contends that the Chamber failed to apply the correct legal criteria to reach necessary findings. That failure constitutes an appellable issue arising out of the Decision for the purposes of Article 82(1)(d).

The criteria for determining the existence of the new organized armed group.

25. In order to determine the existence of an organized armed group taking active part in an armed conflict, this Court, in line with other international tribunals, has consistently considered certain factors, including particularly:

- (i) “whether the groups had a certain degree of organisation, insofar as such groups acted under a responsible command and had an operative internal disciplinary system; and
- (ii) whether the groups had the capacity to plan and carry out sustained and concerted military operations”.⁴¹

26. The Chamber here did not assess the relevant factors indicative of whether the JEM splinter group that allegedly participated in the Haskanita attack had a requisite level of organization.⁴² Rather, it focused its analysis on the absence of proof of a formal and clearly-defined date on which Abu Garda split from the main JEM. To that purpose, it referred to six witnesses (whose summaries acknowledged the split and placed it before the attack),⁴³ and two documents demonstrating the existence of a JEM splinter at least by July 2007 that carried out military operations in early September 2007.⁴⁴ But because the cited evidence either did not specify the date of the split or did not mention Abu Garda by name, the Chamber concluded that there was no evidence that this splinter organisation was Abu Garda’s organised armed group.⁴⁵

⁴⁰ ICC-02/05-01/09-21, 24 June 2009, p. 8. See also *Prosecutor v Katanga*, Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges, ICC-01/04-01/07-727, 24 October 2008, p. 16; *Prosecutor v Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, para. 71; ICC-01/04-168 OA3, para. 9.

⁴¹ See ICC-01/04-01/07-717, para. 239.

⁴² For instance, *inter alia*, the presence of a command structure that authorizes military action or assigns tasks to individuals in the organization (*Prosecutor v Limaj*, Trial Judgment, IT-03-66-T, 30 November 2005, para. 46); factors indicating that the group could carry out operations in an organized manner (*Prosecutor v Boskoski*, Trial Judgment, IT-04-82-T, 10 July 2008, 3 April 2008, para. 200); factors indicating a level of logistics such as the ability to recruit new members (*Prosecutor v Limaj*, *supra*, para. 118); factors indicating that the armed group was able to speak with one voice such as its capacity to act on behalf of its members in political negotiations (*Prosecutor v Haradinaj*, Trial Judgment, IT-04-84-T, 3 April 2008, para. 88; *Prosecutor v Limaj*, *supra*, paras. 125-129)..

⁴³ Decision, paras. 192-194.

⁴⁴ Decision, paras. 197-198.

⁴⁵ Decision, paras. 191-215. However, the Chamber disregarded the fact that five witnesses stated that the split had occurred sometime between August 2007 and days prior to the attack, while the sixth witness knew about

27. The Chamber's failure to apply the correct legal criterion led the Chamber to ignore crucial and relevant facts. Again these matters are cited not to demonstrate that the Prosecution view of the case is different, but that the Chamber failed to consider relevant factors when rejecting these facts:

- The creation of the splinter from an armed group need not have a clear-cut or fixed date; in this instance, it was a process that started [REDACTED] in 1 July 2007.⁴⁶
- The main JEM had units dispersed in several bases in Darfur.⁴⁷ These units retained the movement's structure and followed the same rules and internal discipline.⁴⁸ This would explain that not all the rebel forces knew of the split at the same time,⁴⁹ but also that the splinter group retained the organizational features of the mainstream JEM.⁵⁰
- This dispersed structure of groups such as JEM, and the fact that Khalil Ibrahim had been overseas for a long time before the attack, explains why the troops followed their commanders due to a sense of allegiance and loyalty.⁵¹ In addition, Khalil Ibrahim's absence from the field permitted Abu Garda [REDACTED] to assume the power to run the affairs of JEM in Darfur.⁵²
- Abu Garda (and other JEM commanders) exercised effective control over their troops who automatically complied with their orders. A clear example is the trip

the split but not about the exact date. The process of evaluating evidence and rejecting that which was inconsistent with other evidence is addressed within the First Issue.

⁴⁶[REDACTED] DAR-OTP-0156-0101 at 0102 (Translation), DAR-OTP-0154-0201 (original Arabic); Sudan Tribune, "JEM leader sakes veteran rebel over contacts with Sudanese government", 29 September 2007, DAR-OTP-0154-0300 at 0300; ICC-02/05-02/09-T-13 ENG ET, p. 38, lines 10-13.

⁴⁷ Summary of Interview Transcript of Witness 305 ("Witness 305"), DAR-OTP-0171-0290, para. 16; ICC-02/05-02/09-T-13 ENG ET, p. 40 line 21- p. 41 line 4. Other movements, such as SLA followed the same pattern. See ICC-02/05-02/09-T-13 ENG ET, p. 43, lines 2-3.

⁴⁸ Summary of Interview Transcript of Witness 304 ("Witness 304"), DAR-OTP-0171-0258, paras 199-201; Witness 306, paras 38, 51-52; Prosecution Final Written Observations, paras. 68, 72.

⁴⁹ Witness 304, paras. 68, 78; Witness 305, paras. 12, 15, 17; Summary of Interview Transcript of Witness 433 ("Witness 433"), DAR-OTP-0170-0435, para. 169.

⁵⁰ The Founding Declaration, only five days after the attack, confirms this fact. See: Public document titled "Founding Declaration, Important Statement, Sudanese Justice and Equality Movement – Collective Leadership", DAR-OTP-0156-0096 at 0099 (Translation), paras 1-3, DAR-OTP- 0154-0197 (Arabic). The splinter group also appears to have retained the training and discipline of the main JEM. Witness 0304, paras. 7-11, 31-52; Witness 306, paras. 9-10, 54-55; Summary of Interview Transcript of Witness 307 ("Witness 307"), DAR-OTP-0171-0308, para. 175; Witness 433, para. 141.

⁵¹ Witness 304, paras. 74, 77, 82-85, 88,90.

⁵² Witness 304. paras. 9-12, 21-23, 54-55, 85, 172-175; Witness 305, paras. 12, 42, 45; Witness 306, para. 13; Witness 307, para. 143; Witness 433, para. 33, 145; Summary of Interview Transcript of Witness 442 ("W442"), DAR-OTP-0171-0002, para. 101; ICC-02/05-02/09-T-13 ENG ET, p. 38, lines 4-9; p. 59, lines 22-24; Prosecution Final Written Observations, para.2.

from Daar el Saalam past Al Fashir down to Haskanita.⁵³ The soldiers followed Abu Garda without knowing much of the details of the upcoming attack.⁵⁴

- Abu Garda contributed troops for the attack;⁵⁵ and on the trip down to Haskanita he recruited new soldiers.⁵⁶
- After Khalil Ibrahim visited the JEM troops based Haskanita in mid September, some of the soldiers left with him while others remained and aligned themselves with [REDACTED] Abu Garda.⁵⁷
- Khalil Ibrahim officially dismissed Abu Garda on 26 September 2007, three days before the attack.⁵⁸
- The statements issued by Abu Garda [REDACTED]⁵⁹ and their formal announcement of a new collective leadership under Abu Garda on 4 October 2007, [REDACTED].⁶⁰
- The negotiations in which Abu Garda participated one week after the attack on behalf of his own movement in Juba (South Sudan), and the talks in Sirte, Libya.⁶¹

The criteria for determining the hierarchical link within an organized armed group.

28. The Chamber erred in its assessment of the existence of a relationship of subordination [REDACTED], whereby the former would control the troops through the latter. The Chamber equally ignored the factors or legal criterion that this Court and other international tribunals have applied in situations of a similar nature.

29. In particular, in the *Bemba* Confirmation Decision Pre-Trial Chamber II set out a range of relevant factors for determining whether a person acted as a military commander and had effective control.⁶² Although these findings were made in the context of superior responsibility under Article 28, the factors are analogous to the factual findings which the

⁵³ ICC-02/05-02/09-T-13 ENG ET, p. 41, lines 5-15.

⁵⁴ Witness 306, paras 26-29; Witness 305, para. 26; Witness 304, paras 105, 147; Prosecution Final Written Observations, para. 71.

⁵⁵ Witness 304, paras 92, 93, 99; Witness 306, para. 14; ICC-02/05-02/09-T-13 ENG ET, p. 53, lines 17-20.

⁵⁶ Witness 304, paras. 92, 99.

⁵⁷ Witness 305, paras. 15-18, 38; Witness 304, paras. 57, 73-74, 84-86; Witness 306, paras. 21, 32; ICC-02/05-02/09-T-13 ENG ET, p. 39, lines 21-25, p.40, lines 4-9; Prosecution Final Written Observations, para. 5.

⁵⁸ See *JEM Presidential Decree: Termination of Appointment of Mr. Bahr Idrees Abu Garda as Head of Western Sector*, 26 September 2007, DAR-OTP-0154-0205 at 0205.

⁵⁹ Witness DCW 1, DAR-D05-0001-0019, para. 26; "Exhibit TN 4" DAR-D05-0001-0040; Witness 304, paras. 187-188. Prosecution Final Written Observations, para. 5

⁶⁰ DAR-OTP-0156-0096, EVD-OTP-0058-TENG. See in particular, p. 4.

⁶¹ Witness 442, paras 41-42; Witness 433, paras. 35, 77, 135-136, 157, 168; Sudan Tribune, "Darfur rebel factions in Sirte want talks' postponement", 27 October 2007, DAR-OTP-0154-0323 at 0323; Witness 315, DAR-OTP-0164-1159 at 1175, para. 67; Witness 355, DAR-OTP-0165-0352 at 0363, para. 71, at 0371, para. 124; Prosecution Final Written Observations, para. 66.

⁶² ICC-01/05-01/08-424, paras. 408-419, in particular paras. 414-417.

Prosecution asked the Chamber to make in this case, namely that the suspect was a commander and that he had effective control over his forces, [REDACTED]. In particular, on effective control Pre-Trial Chamber II stated: “[E]ffective control’ is generally a manifestation of a superior-subordinate relationship between the suspect and the forces or subordinates in a *de jure* or *de facto* hierarchal relationship (chain of command)”.⁶³ “The concept of effective control is mainly perceived as the ‘material ability [or power] to prevent and punish’ the commission of offences, and, as such, failure to exercise such abilities of control gives rise to criminal responsibility if other requirements are met.”⁶⁴ “[I]ndicia for the existence of effective control are ‘more a matter of evidence than substantive law’, depending on the circumstances of each case, and that those *indicia* are confined to showing that the suspect had the power to prevent, repress and/or submit the matter to the competent authorities for investigation.”⁶⁵

30. The *Bemba* Pre-Trial Chamber then listed factors indicative of the existence of a superior’s position of authority and effective control, such as the official position of the suspect; his power and capacity to issue orders and ensure compliance with them; his position within the military structure and the actual tasks that he carried out; the capacity to order forces under his command to engage in hostilities; and the authority to send forces and withdraw them at any given moment.⁶⁶
31. In the instant case, the Chamber disregarded the relevant factors in considering whether a person is in a position of authority, instead limiting its analysis to only two witnesses who referred “to the existence of a hierarchical relationship [REDACTED].”⁶⁷ The Pre-Trial Chamber found that “in view of the limited value of these [two] statements and in the absence of any corroborating evidence, the Chamber concludes that the Prosecution’s claim as to the existence of a hierarchical link [REDACTED] within an organized armed group is not sufficiently supported by evidence.”⁶⁸
32. Had the Chamber applied the proper standard, which involves the analysis of multiple factors, it necessarily would have considered additional relevant evidence, including especially Abu Garda’s official position within the splinter of the main JEM that was officially announced just a few days after the attack on 4 October 2007, and the evidence presented that even before that formal announcement he acted as *de facto* chairman of the

⁶³ ICC-01/05-01/08-424, para. 414, quoting ICTY *Celibici* IT-96-21-Abis, 8 April 2003, Appeals Judgement, para. 303.

⁶⁴ *Ibid.*, para. 415.

⁶⁵ *Ibid.*, para. 416.

⁶⁶ *Ibid.*, para. 417.

⁶⁷ Decision, para. 201.

⁶⁸ Decision, para. 201.

group.⁶⁹ Further evidence of this position is the fact that in the Founding Declaration, [REDACTED]. However, even prior to the split Abu Garda was already superior [REDACTED].⁷⁰

33. The Chamber also disregarded the evidence of Abu Garda's power to issue orders and instructions and the capacity to ensure compliance with the orders; indeed, it did not address the orders issued by Abu Garda to carry out the attack despite abundant evidence presented by the Prosecution;⁷¹ It failed to give sufficient consideration to Abu Garda's movement, with a group of soldiers, from Dar Es Salaam to Haskanita shortly before the attack;⁷² it also disregarded the recruitment of new soldiers and the vehicles that it collected during the journey.⁷³ And the Chamber completely overlooked the structure (attributes and composition) of the main JEM which was replicated in the splinter.⁷⁴
34. In sum, the Chamber failed to consider important factors that have been deemed relevant by other courts and that – as the Prosecution will demonstrate before the Appeals Chamber, should leave be granted – if properly considered would have led the Chamber to the following conclusions: that Abu Garda had control over a splinter of JEM [REDACTED], over whom he exercised effective control; that the group had an organization that replicated the JEM internal structure; and that it was capable of carrying out military operations such as the Haskanita attack.

The Third Issue arises from the Decision

35. The Third Issue concerns the Chamber's failure to consider two defined bodies of evidence which were before it and were relevant to the points on which it made factual findings in the Decision, namely:

- evidence of the orders given by Abu Garda in preparation for attack; and
- evidence of Abu Garda's movement in coordination with the rebels following the attack, and his gathering at Jebel Adola with the attackers, and the events that followed the attack.

⁶⁹ Witness 304, para. 175; Witness 305, para. 45; Summary of Interview Transcript of Witness 312 ("Witness 312") , DAR-OTP-0171-0335, para. 62, para. 169; Witness 433, para. 162; Witness 442, para. 101; Founding Declaration, DAR-OTP-0156-0096 at 0099 (Translation), DAR-OTP-0154-0197 (Arabic); Sudan Tribune, "JEM veteran rebel establishes collective leadership. Confirms split", Public Source, DAR-OTP-0154-0308 at 0308. See ICC-02/05-02/09-T-13 ENG ET, p. 59, lines 13-25.

⁷⁰ Witness 307, para. 143.

⁷¹ See Third Issue below and the arguments presented therein.

⁷² ICC-02/05-02/09-T-13 ENG ET, p. 41, lines 5-15; Prosecution Final Written Observations, para. 71; Witness 306, paras 26-29; Witness 305, para. 26; Witness 304, paras 105, 147.

⁷³ Witness 304, paras. 92, 99.

⁷⁴ Founding Declaration, DAR-OTP-0156-0096 at 0099 (Translation), paras 1-3, DAR-OTP- 0154-0197 (Arabic). The splinter group also appears to have retained the training and discipline of the main JEM. Witness 0304, paras. 7-11, 31-52; Witness 306, paras. 9-10, 54-55; Witness 307, para. 175; Witness 433, para. 141.

36. This too is not a “mere disagreement” with the Chamber’s conclusion. Clearly, the Chamber has the responsibility to independently assess the facts, but in fulfilling that responsibility it is obligated to consider all the material and relevant evidence that the Prosecution puts before it and to draw reasonable inferences from it.⁷⁵ Consideration of this evidence was “essential for the determination of matters arising under the judicial cause under examination”.⁷⁶ The question of whether there was a common plan of which Abu Garda was a member,⁷⁷ including whether this could be inferred from his coordinated essential contribution and whether he issued orders,⁷⁸ could not be properly and fully resolved without its consideration.⁷⁹ The failure to consider this evidence at all therefore constitutes an issue arising out of the Decision.⁸⁰

Relevant evidence of Abu Garda giving orders

37. The Prosecution alleged that Abu Garda gave orders as part of the common plan;⁸¹ the orders were also part of the coordinated contribution which the Chamber said that it would consider for inferring whether Abu Garda was part of the common plan.⁸² The evidence of at least four witnesses demonstrates that Abu Garda issued orders or instructions to carry out the attack, often immediately after the meetings at which the Prosecution alleged those attacks were planned.⁸³ When presenting its evidence during the confirmation hearing, the

⁷⁵ As the Appeals Chamber recently established, the Chamber is not obligated to exclude all reasonable conclusions and to eliminate any reasonable doubt (with regard to proving genocidal intent at the confirmation stage), since that would elevate the standard effectively to proof beyond reasonable doubt. Rather and in this particular case, if a reasonable inference may be drawn in favour of guilt, that inference suffices at the confirmation stage. ICC-02/05-01/08-73 OA, para. 33. This rule, moreover, is consistent with the Rule 98 *Bis* discussion previously; for example, in *Prosecutor v Rukundo*, ICTR-2001-70-T, 22 May 2007, para. 3, the court explained that “under Rule 98 *Bis* the Chamber will evaluate the Prosecution’s evidence as a whole, and make any reasonable possible inferences” (emphasis added).

⁷⁶ ICC-01/04-168 OA3, para. 9.

⁷⁷ The Chamber declined to confirm the charges on the basis that OTP failed to demonstrate that Abu Garda was part of a common plan to launch the attack (see Decision, paras. 162, 180, 185, 231).

⁷⁸ Decision, paras. 180-181, 184.

⁷⁹ ICC-01/04-168 OA3, para. 9.

⁸⁰ Contrast ICC-02/05-01/09-21, denying leave to appeal two issues that “consist of mere disagreement with the Majority’s assessment of the [Prosecution’s] evidence” (p. 8).

⁸¹ See in particular DCC, paras. 121, 128.

⁸² DCC, para. 132(ii); Decision, paras. 180-181, 184.

⁸³ See in particular Witness 306, para. 27 (“It was the commanders of the group that split from JEM including Garda, and the SLA group that come to us and told us we had to attack.”); Witness 312, para. 44 (“Between 5pm and 6pm, Bahr Abu Garda other JEM and SLA Unity commanders came in their vehicles and found us there. As soon as they arrived, they ordered us to go on a mission.”), para. 80 (“In this case there was an order to go on mission. The commanders came and blew their whistles. All the soldiers stood up and received orders for the mission. In each vehicle there was a commander and it was these commanders who blew a whistle. This was Bahr’s vehicle and other vehicles.”); Witness 304, paras. 135-136 (“The higher ranking officials who held a meeting included Bahr Idris ABU GARDA [...] After they ended the meeting they said there was a mission, that there were government soldiers in Haskanita, and that we must move towards them so that we can attack them. As regards whether I saw the meeting, yes I have seen them, they were sitting in the meeting. I saw the group including ABU GARDA and SONKI and the officers sitting together.”); Witness 307, para. 38 (“From our position we could see the commanders and Garda standing in the forest and talking. After that they asked us to move behind them”), paras. 93-94 (“I did not see Abu Garda, but he was there [...] After the meeting they

Prosecution discussed the orders in connection with the mode of liability and specifically the common plan.⁸⁴

38. The Decision does discuss whether Abu Garda issued orders, but at no point did the Chamber examine or consider the direct evidence that he gave orders to troops who participated in the attack. Rather, the Decision terminates its analysis upon finding that the *other* evidence does not demonstrate that Abu Garda exercised control over an established and organized armed group prior to the attack on MGS Haskanita.⁸⁵ But the evidence that Abu Garda gave orders (which were subsequently carried out) was itself evidence that he had at least *de facto* control over troops that carried out the attack.⁸⁶ That Abu Garda in fact issued orders is even more relevant given that the Chamber accepted that he was *officially* in charge of the organized armed group a few days after the attack,⁸⁷ which indicated that this was the *de jure* recognition of an pre-existing *de facto* reality. The Chamber's failure to consider this evidence at all is thus an issue arising from the Decision.

Evidence of Abu Garda's movements after the attack and presence at Jebel Adola

39. In its Document Containing the Charges, the Prosecution set out Abu Garda's actions after the attack on MGS Haskanita, including that (a) he joined the troops shortly after the attack, where he inspected the troops and checked on the wounded; (b) he then travelled with the troops to Jebel Adola; and (c) at Jebel Adola he distributed and shared goods and vehicles looted in the attack with the other commanders.⁸⁸ The Prosecution also pleaded that *inter alia* "the sequence of the events prior to and immediately following the attack,

ordered us to get on our vehicles and move."); Witness 305, para. 25 ("After the meeting they came and ordered us to go and we went. Abu Garda and the other commanders met with SLA Unity commanders [...] After this meeting they gave us instructions for the mission."). Even if the Pre-Trial Chamber did not accept the evidence of these witnesses regarding ABU GARDA's participation at the meeting, based largely on the fact that it considered that the witnesses were not present at the meeting, this cannot justify ignoring the evidence in relation to the orders as all witnesses were present when these orders were issued. However, the giving of orders immediately following the meeting which implement the plan agreed at the meeting was also was itself evidence of ABU GARDA's participation in the plan (and even circumstantial evidence of his participation in the meetings). The Chamber also failed to consider the evidence on this point.

⁸⁴ ICC-02/05-02/09-T-13-ENG ET, 20-10-2009, p. 44 line 25 to p. 47 line 12 (discussing orders given directly by *inter alia* ABU GARDA; in contrast with those orders issued by SLA or lower-level commanders; contrast p. 47 line 12 to p. 48 line 24).

⁸⁵ Decision, paras. 191, 215.

⁸⁶ *Prosecutor v Halilovic*, Judgment, IT-01-48-T, 16 November 2005, para. 58; *Prosecutor v Ntagerura et al.*, Judgment and Sentence, ICTR-99-46-T, 25 February 2004, paras. 652, 795; *Prosecutor v Kordic and Cerkez*, Judgment, IT-95-14/2-T, 26 February 2001, paras 418-424; *Prosecutor v Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, 21 May 1999, para. 504.

⁸⁷ Decision, para. 190.

⁸⁸ DCC, paras. 82-83.

demonstrate that Abu Garda [...] and their respective forces were acting pursuant to a common plan agreed upon by the commanders.”⁸⁹

40. The Prosecution presented evidence pertaining to each step in this sequence of events.⁹⁰

The Prosecution further explained the relevance and significance of the evidence when presenting its evidence relating to the common plan,⁹¹ and again, extensively, in its closing oral submissions.⁹² The Prosecution explicitly argued that Abu Garda’s movement to Jebel Adola – where he joined with the very attackers he officially came to lead three days later, and where he helped distribute the collected looted materials – was not likely a coincidence, but instead should be regarded as part of the common plan.⁹³

41. The Chamber’s failure to consider this evidence constitutes an issue arising out of the Decision for the purposes of Article 82(1)(d).

The issues affect the fair conduct of the proceedings

42. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected.⁹⁴ In particular, that “means that the Prosecutor

⁸⁹ DCC, para. 130 (emphasis added). Abu Garda’s involvement in the distribution and/or disposal of looted property was also pleaded amongst his coordinating role and implementation of the common plan, as was the fact that he failed to punish any of the JEM perpetrators involved in the attack – DCC, para. 133(iv) and (vi).

⁹⁰ See in particular Witness 304, paras. 154-157; “As for Bahr Idris ABU GARDA [...] When people left HASKANITA, he came from the Northern side of Haskanita and he joined and we left together”); Witness 307, paras. 49-57; Summary of interview transcript of Witness 314, DAR-OTP-0170-0407, para. 54; Witness 433, paras. 143-147, 149..

⁹¹ ICC-02/05-02/09-T-13-ENG ET WT 20-10-2009, pp. 49, 51 (“In addition, several other characteristics of the attack demonstrate that Mr. Abu Garda and other commanders and their respective forces were acting according to a common plan agreed upon by the commanders. [...] Fifth, in regards of the events immediately following the attack, the combined forces all gathered in a single location and shared -- and shared the goods looted from the camp amongst themselves.”).

⁹² ICC-02/05-02/09-T-21-CONF-ENG ET 30-10-2009, pp. 24-25, 26-27, 28-29.

⁹³ ICC-02/05-02/09-T-21-CONF-ENG ET 30-10-2009, p. 28, lines 2-24. This was reiterated in the Prosecution’s closing submissions. See ICC-02/05-02/09-229-Conf-AnxA, paras. 53-55, arguing that ABU GARDA joined the troops and other commanders immediately after the attack where he examined the injured, went with them to Jebel Adola, and that from this and the presence of looted goods his participation in the common plan can be inferred.

⁹⁴ See further *Situation in the DRC*, Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v Kony et al*, Prosecution’s Request for Leave to Appeal the Decision Denying the “Application to Lift Redactions From Applications for Victims’ Participation to be Provided to the OTP”, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11; *Prosecutor v Kony et al*, Decision on the Prosecutor’s Applications for Leave to Appeal dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal dated the 11th day of May 2006, ICC-02/04-01/05-90, 11 July 2006, para. 24; *Situation in the DRC*, Decision On The Prosecution’s Application For Leave To Appeal The Chamber’s Decision Of 17 January 2006 On The Applications For Participation In The Proceedings, ICC-01/04-135-tEN, 31 March 2006, para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

must be able to exercise the powers and fulfil the duties listed in Article 54”.⁹⁵ Fairness has also been linked to the ability of a party to present its case.⁹⁶

43. The Appeals Chamber has ruled that “[t]he principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings”,⁹⁷ and that “[p]urging the pre-trial process of errors consequential to unfairness is designed as a safeguard of the integrity of the proceedings.”⁹⁸

The First Issue affects the fairness of the proceedings

44. The First Issue affects the fairness of the proceedings by detrimentally impeding the Prosecution’s ability to present its case.⁹⁹ This Chamber has already held that the application of an incorrect standard for evaluating evidence would have “a direct and detrimental impact on the Chamber’s ability to correctly assess the evidence”.¹⁰⁰ The First Issue concerns the application of incorrect methods and criteria for evaluating evidence that had precisely such an impact. By placing excessive weight on supposed inconsistencies, ambiguities and contradictions in the Prosecution’s evidence, and by discounting anonymous witness summaries out of hand, the Chamber discarded evidence prematurely, and disregarded essential consistencies among the evidence which were sufficient to establish substantial grounds to believe that the Accused committed the crimes charged. This had a direct and detrimental impact on the Chamber’s correct assessment of the evidence.
45. The Chamber’s approach in this case effectively requires the Prosecution to present complete, unambiguous, and uncontradicted evidence, an unreasonable burden even at trial and clearly excessive for the confirmation stage. Its approach suggests that the Prosecution will risk losing its case if it uses statements in lieu of live testimony whenever the statements present discrepancies or gaps that cannot be clarified without live examination. Its approach also threatens the use of anonymous statements and summaries, both of which may be essential to protect witness identities at the confirmation hearing: as Pre-Trial Chamber I has previously recognised, anonymous summaries are used due to “the grave risks to their security [...] inherent to the disclosure of their identity to the Defence”.¹⁰¹

⁹⁵ ICC-01/04-135-tEN, paras. 38-39.

⁹⁶ ICC-02/04-01/05-90, para. 24.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ ICC-02/04-01/05-90-US-Exp para. 24.

¹⁰⁰ ICC-02/05-01/09-21, p. 7.

¹⁰¹ *Prosecutor v Lubanga*, Decision concerning the Prosecution Proposed Summary Evidence, ICC-01/04-01/06-517, 4 October 2006.

The Second Issue affects the fairness of the proceedings

46. As in the First Issue, the failure to apply the correct legal criteria had “a direct and detrimental impact on the Chamber’s ability to correctly assess the evidence”.¹⁰² The Chamber had sufficient relevant evidence before it to rule on the existence of an organized armed group under the command of Abu Garda, [REDACTED]. However, by failing to apply the proper legal criteria the Chamber largely disregarded a body of relevant evidence. This incorrect and partial analysis of the evidence also impacts on the Prosecution’s right to have its case fully considered.¹⁰³
47. In addition, the Chamber’s lack of explanation for its failure to apply the correct criteria (and departure from consistent jurisprudence) deprives the Prosecution of its right to a reasoned decision, another component of a fair trial.¹⁰⁴ The unfairness is accentuated by the fact that the Chamber did not provide guidance on the applicable criteria, thus handicapping the Prosecution in a possible future effort to provide additional evidence under Article 61(8).

The Third Issue affects the fairness of the proceedings

48. In addition to the impact on the Prosecution’s ability to fulfil its obligations, in particular under Article 54(1)(a) to ensure the effective prosecution of crimes, the Third Issue especially impacts on the right of “participants [...] to present their case,” an “essential” component of fairness.¹⁰⁵ The Prosecution’s opportunity to present its case is fundamentally compromised if the Chamber fails to consider relevant evidence and submissions without providing any reasons.
49. The opportunity to present a case cannot be dissociated from the right to have that case fully considered by the Chamber. Nor is the unfairness mitigated by the right to subsequently present *additional* evidence under Article 61(8). Indeed, it would only

¹⁰² ICC-02/05-01/09-21, p. 7.

¹⁰³ ICC-02/04-01/05-90, para. 24.

¹⁰⁴ *Prosecutor v Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-773 OA5, 14 December 2006, para. 20: “the right to a reasoned decision is an element of a fair trial”; see also *Prosecutor v Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-774 OA6, 14 December 2006, para. 30. In each of these appeals, an issue relating to the degree of reasoning had been certified for appeal as the Pre-Trial Chamber recognized that this question fulfilled the criteria for leave to appeal. See *Prosecutor v Lubanga*, Decision on Second Defence Motion for Leave to Appeal, ICC-01/04-01/06-489, 28 September 2006; *Prosecutor v Lubanga*, Decision on Third Defence Motion for Leave to Appeal, ICC-01/04-01/06-514, 4 October 2006 .

¹⁰⁵ ICC-02/04-01/05-90, para. 24. Similarly, Pre-Trial Chamber I held that equality of arms (an essential component of fairness) requires that each party not be placed at a disadvantage to the other in presenting its case - *Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38 and fn. 50.

compound the unfairness to the Prosecution if it is forced to gather and present still more evidence when the totality of the evidence currently before the Chamber is sufficient to confirm the charges.

50. In addition, the Chamber did not provide any reasons for failing to consider relevant evidence presented by the Prosecution. As indicated in the Second Issue,¹⁰⁶ this lack of explanation impacts on the fairness of the proceedings as it denies the Prosecution a reasoned decision. While a Chamber is not obliged to list every factor it considered, the total absence of discussion or reasoning regarding entire bodies of relevant evidence necessarily impacts on the fairness of those proceedings, since the Prosecution is left unable to understand why the Pre-Trial Chamber disregarded this evidence.

The issues affect the expeditious conduct of the proceedings

51. The Prosecution notes that it has in previous filings expressed its view that once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).¹⁰⁷ Trial Chamber II recently granted leave to appeal after finding only that the issue “clearly has a bearing on the fairness of the proceedings”, and therefore “[t]he first requirement of Article 82(1)(d) of the Statute is met.”¹⁰⁸ Nonetheless, the Prosecution submits that the issue in this Decision does affect the expeditious conduct of the proceedings.

¹⁰⁶ See para. 47 above.

¹⁰⁷ Similarly, if a party had demonstrated that the issue does affect the expeditious conduct of the proceedings, then any showing that it also affected the fair conduct of the proceedings would likewise be superfluous. See in particular ICC-01/04-141, paras. 49-52; see further *Situation in the DRC*, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-103, 23 January 2006, fn 5; *Prosecutor v Lubanga*, Motion for Reconsideration and, in the Alternative, Leave to Appeal, ICC-01/04-01/06-125, 24 May 2006, fn. 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair, or no longer expeditious, they are no longer “fair and expeditious”; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the “fair and expeditious conduct of the proceedings”. The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition. In both tribunals, Chambers have often granted leave to appeal solely on the basis that the issue affects the fair conduct of the proceedings. See authorities set out in ICC-01/04-141, paras. 49-52; see subsequently *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005. In addition, the Appeals Chamber also stated that “[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial” - ICC-01/04-168 OA3, para.11. For a wider discussion on this matter, see also *Interlocutory Appellate Review of Early Decisions by the International Criminal Court*, American University, War Crimes Research Office, January 2008, p. 66-67, *inter alia*.

¹⁰⁸ *Prosecutor v Katanga*, Decision on the “Defence Application for Leave to Appeal the Trial Chamber's Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure. ICC-01/04-01/07-1859, 11 February 2010, para. 18.

52. The expeditious conduct means timely and efficient conduct of proceedings.¹⁰⁹ This principle requires that decisions at all stages do not unnecessarily delay the overall determination of responsibility.¹¹⁰ This could include a delay to a trial,¹¹¹ or a pre-trial process that causes the investigatory or pre-trial phase to be unduly long or inefficient or otherwise affects the expeditious nature of later proceedings.¹¹²
53. The three issues affect the expeditious conduct of the proceedings as the case would have advanced to trial if the Chamber had applied the correct legal principles and decided on the substantive matters. As a result of the Chamber's errors the Prosecution is left with no choice but to avail itself of the possibility under Article 61(8) and provide additional evidence to meet the Chamber's higher standards. This will inevitably delay the proceedings so that the parties can provide further submissions and the Chamber revisit issues that should and could already have been decided.

The First Issue affects the expeditiousness of the proceedings

54. The First Issue affects the expeditious conduct of the proceedings by delaying the closure of the pre-trial phase of this case. In the case against *Bashir*, this Chamber held that the "production of further evidence in order to meet the standard espoused by the Majority would affect the expeditiousness of the proceedings."¹¹³ In this case, the Prosecution may chose to present additional evidence which is strong enough (without the benefit of witness examination) to satisfy the Chamber's methodology and criteria. Finding such

¹⁰⁹ Expeditiousness of proceedings is intimately connected with the efficient administration of international justice. See *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003: "the Court's obligation to do justice expeditiously and effectively, as well as fairly." (para. 6); "we can only do justice that is expeditious, fair and efficient" (para. 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003, where in relation to each of the two grounds the Chamber noted that the issue "will significantly affect the efficient and expeditious conduct of the proceedings", Jones and Powles, *International Criminal Practice* at para. 8.5.60.

¹¹⁰ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place. The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. *Prosecutor v Norman, Kallon and Gbao*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, at para. 8; and Terrier, Powers of the Trial Chamber in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

¹¹¹ *Prosecutor v Milosevic*, IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004, at paras 56, 64-65 and 70; *Prosecution v Brima, Kamaru and Kanu*, SCSL-2004-16-T, Decision on Joint Defence Application for Leave to Appeal against the ruling of Trial Chamber II of 5 April 2005, 15 June 2005 at paras. 21-22; *Prosecutor v Kallon*, SCSL-2003-07-PT, Decision on the Defence Application for Leave to Appeal, 10 December 2003 at para. 34. A Trial Chamber may "limit the amount of time that each party has to present evidence in the interests of an expeditious trial and the efficient administration of justice" – Jones and Powles, *International Criminal Practice* (2003: OUP) at para. 8.5.60.

¹¹² *Prosecutor v Blagojevic et al.*, IT-02-60-PT, Decision on Accused Nikolic's Motion to Order the Prosecution to File Copies of All Witness Statements whom the Prosecution Intends to Call for Trial and Copies of all Exhibits the Prosecution Intends to Tender at Trial, 10 February 2003.

¹¹³ ICC-02/05-01/09-21, p. 8.

evidence (preferably from witnesses whose safety is not at issue), presenting it to the parties, and perhaps holding additional hearings will significantly delay the conduct of the proceedings.

55. Additionally, the Single Judge of this Chamber has previously held that an issue relating to the scope of the protection of Prosecution sources “significantly affect[s] the expeditious conduct of the proceedings because, depending on the approach taken, it may have an impact on how the Prosecution goes about selecting its witnesses for the purpose of the confirmation hearing”.¹¹⁴ The First Issue has such an impact. If the Chamber continues to give less credence to anonymous summaries without considering all the relevant circumstances of a particular statement, the Prosecution must either attempt to find witnesses whose identities can be introduced to the Defence without endangering their safety, or must find witnesses whose evidence is so thoroughly consistent and unambiguous that it cannot be misinterpreted even in the absence of clarification through questioning.

The Second Issue affects the expeditiousness of the proceedings

56. The Second Issue also affects the expeditious conduct of the proceedings by inefficiently delaying the closure of the pre-trial phase. Either the proceedings end now or, as in the First Issue and considering the *Bashir* precedent highlighted above,¹¹⁵ the Prosecution may, under Article 61(8), attempt to present additional evidence. However, in light of the unclear criteria adopted by the Chamber and the lack of guidance provided in that regard, the search for additional material may unduly and inefficiently delay the proceedings.

The Third Issue affects the expeditiousness of the proceedings

57. The third issue also affects the expeditious conduct of the proceedings. The failure to consider important evidence establishing Abu Garda’s participation in the common plan has delayed the conduct of this case. What is more, the Prosecution has already presented this evidence to the Pre-Trial Chamber. Yet to have it considered it will need to present still more evidence, make still further submissions (as will the Defence), and require another decision from the Chamber.

¹¹⁴ *Prosecutor v Katanga*, Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116, 19 December 2007, p. 6.

¹¹⁵ ICC-02/05-01/09-21, p. 8. The Chamber in the *Al Bashir* case held that the “production of further evidence in order to meet the standard espoused by the Majority would affect the expeditiousness of the proceedings.”

The issues affect the outcome of the trial

58. An issue only needs to impact the fair and expeditious conduct of the proceedings or the outcome of the trial.¹¹⁶ Nevertheless, the Prosecution stresses that these issues do also affect the outcome of the trial.
59. According to the Appeals Chamber, under this limb the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case.”¹¹⁷ In this instance, this Decision does not merely impact the outcome; it may in fact be the outcome of this case. As a result of the Chamber’s approach – the principles which it applied to its assessment of evidence, the impact of this on certain specific issues, and the failure to consider other bodies of relevant evidence at all – there very well may be no trial at all. A more fundamental and direct impact on the outcome of trial is difficult to envisage.
60. The Prosecution’s ability pursuant to Article 61(8) to present the Pre-Trial Chamber with additional evidence at a later date and again request the confirmation of charges¹¹⁸ does not lessen the impact of the three issues on the outcome of the trial. First, the Prosecution has already presented sufficient evidence, and thus additional evidence should not be required now. Moreover and with respect to the First Issue, in presenting evidence at a confirmation proceeding, the Prosecution must act carefully, to offer a sufficient case without jeopardizing unduly the security of its witnesses and their families. Requiring the Prosecution to present additional evidence, to breach the anonymity of witnesses at this preliminary stage, or to take other steps that present risks to persons – risks that might compromise the witnesses’ willingness or availability later to testify at trial – is a significant matter that should be avoided where possible. Secondly, as it concerns the First and Second Issues, any new evidence will be assessed against the Chamber’s excessively critical methods and criteria that ignored relevant evidence. What is required now is not additional evidence, but rather (a) consideration of all of the relevant evidence of the Prosecution, and (b) assessment of that evidence according to the correct principles.

¹¹⁶ *Prosecutor v Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 8; *Situation in Uganda*, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation, ICC-02/04-112, 20 December 2007, para. 17; *Prosecutor v Lubanga*, Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused', ICC-01/04-01/06-1417, 2 July 2008, paras. 17-18; *Prosecutor v Lubanga*, Decision on the Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application to Lift the Stay of the Proceedings", ICC-01/04-01/06-1473, 24 September 2008, paras. 21-22.

¹¹⁷ ICC-01/04-168 OA3, para.13. “The exercise involves a forecast of the consequences of such an occurrence.”

¹¹⁸ See Decision, para. 236.

61. Additionally, in *Lubanga*, Trial Chamber I noted that an issue impacts the outcome of the trial where it “is likely to have consequences as regards the evidence which it is considered necessary to put before the Chamber”.¹¹⁹ Though this statement was made in the context of trial, similar logic applies at the pre-trial stage. Questions concerning the evidence that a Chamber will hear even at the pre-trial stage directly influences the outcome of the trial by shaping the charges against the accused. As the issues directly impact on the quality and nature of the evidence that the Prosecution must put before a Pre-Trial Chamber at the confirmation stage, they affect whether, and which, charges will be confirmed against the accused, and consequently the outcome of trial.
62. What is more, if the Pre-Trial Chamber eventually confirms charges based on new evidence from the Prosecution and through a continuing application of its incorrect methods of analysis, the outcome of this process will unavoidably impact the Trial Chamber’s ability to decide on the same issues – e.g. whether Abu Garda attended the planning meetings, the existence of an organized armed group under Abu Garda’s control, and whether Abu Garda was superior [REDACTED]. Although the Trial Chamber is free to apply legal criteria different from that of the Pre-Trial Chamber, Article 74(2) constrains the Trial Chamber’s analysis to the facts and circumstances described in the charges. Thus, a continued misevaluation and rejection of relevant evidence by the Pre-Trial Chamber in this case will affect what the Trial Chamber is permitted to consider, and thus the outcome of the trial.

Immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings

63. Immediate resolution of all three issues will materially advance the proceedings. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”¹²⁰ The Appeals Chamber has

¹¹⁹ *Prosecutor v Lubanga*, ICC-0/04-01/06-2107, para. 29; see also para. 33. See also *Prosecutor v Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para. 42 (“the introduction of evidence touching on the issue of the guilt or innocence of the accused may materially affect the content and the substance of the evidence introduced during the trial”).

¹²⁰ ICC-01/04-168, paras. 14-15, 18.

also confirmed that proceedings are “not confined to the proceedings in hand but extends to the proceedings prior and subsequent thereto.”¹²¹

64. It is imperative that the preparation for and conduct of trial takes place, from the outset, on the correct basis in order to prevent any error from having an ongoing impact on the proceedings. In this instance, immediate resolution of the three issues by the Appeals Chamber is manifestly required in order to advance the proceedings. The proceedings in this case have been effectively halted. If these issues are not addressed now by granting leave to appeal, there is no possibility of them being raised as part of an appeal against a judgment under Article 74. Thus, review of these issues by the Appeals Chamber is required to ensure that they are reviewed at all, and will determine whether, and if so in what form, the case will proceed.
65. Moreover, despite the possibility of the Prosecution gathering and presenting additional evidence under Article 61(8), these issues must be resolved now. Absent such a resolution, any error in the principles which the Pre-Trial Chamber applied to approaching the evidence at the confirmation hearing stage will equally infect its consideration of additional evidence. In addition, an immediate resolution of all three issues will advance all other proceedings before this Court.¹²²
66. The Pre-Trial Chamber has recognised that leave should be granted when “immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings by providing clarity on the law on proof by inference, particularly at the arrest warrant stage”.¹²³ This principle applies in particular to the First and Second Issues. Immediate resolution will provide clarity and ensure that the correct principles are applied at the confirmation hearing stage. As to the First issue, immediate resolution by the Appeals Chamber will clarify the correct methods and criteria for evaluating evidence at the confirmation stage. As to the Second Issue, immediate resolution by the Appeals Chamber will provide clarity on the law governing the existence of an organized armed group (and factors to consider) in the context of an armed conflict, as well as a relation of subordination with effective control between two persons. In both cases, this will ensure that the evidence that has been

¹²¹ ICC-01/04-168, para. 12; see also para. 17.

¹²² While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See *Situation in Uganda*, ICC-01/05-20-US-Exp, 19 August 2005, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

¹²³ ICC-02/05-01/09-21, p. 8.

and may in the future be presented to the Chamber is assessed against the correct legal standards.

67. In addition, an immediate resolution by the Appeals Chamber will provide consistency. The First and the Second Issues have been addressed differently in other cases. As to the First Issue, previous confirmation decisions have handled matters of assessment of evidence differently. In fact this same Chamber has departed from its own approach in the *Katanga* confirmation decision, in which it did not automatically give a lower probative value to anonymous summaries¹²⁴ and even relied on an uncorroborated anonymous summary as sole evidentiary support for one factual finding.¹²⁵ Moreover, the Chamber's analysis in relation to the First Issue also diverges from principles established by the Appeals Chamber to be followed when deciding whether anonymous summary statements can be admitted into evidence.¹²⁶ These principles, and particularly the need for a case-by-case assessment which includes an analysis of whether and to what degree there is actually any prejudice, should be applied *mutatis mutandis* to the evaluation of the weight that anonymous summaries receive.
68. The Second Issue has also been addressed differently in other confirmation decisions. For instance, the same Chamber had previously considered other factors when ruling on the existence of an organized armed group in the *Katanga* Confirmation Decision.¹²⁷ Another Chamber applied the correct test when assessing the existence of effective control in the *Bemba* Confirmation Decision.¹²⁸ In addition, the Prosecution notes that Trial Chambers of the Court will have to rule on the matters encompassed within the Second Issue for the purpose of their final judgment. Therefore, in addition to the direct impact on the present

¹²⁴ ICC-01/04-01/07-717, paras. 159-160 ("While there is no requirement *per se* that summaries of the statements of anonymous witnesses are corroborated in order for them to be admissible, the Chamber is of the view that lack of support or corroboration from other evidence in the record of the proceedings *could* affect the probative value of those summaries or statements. However, in respect of the summaries of anonymous statements of Witnesses 267, 243 and 271, the Chamber finds that the evidence in the record adequately supports the accounts of these witnesses, such that the Chamber finds that the arguments raised by the Defence do not affect the probative value accorded to these statements.").

¹²⁵ ICC-01/04-01/07-717, para. 543 and fn 714 ("There is sufficient evidence to establish substantial grounds to believe that the FRPI, over which Germain Katanga had the command, was a hierarchically organised group. This is shown in particular by the fact that: [...] v. Germain Katanga, in his powers as a superior leader, had the ability to jail and adjudicate - for instance, he [...] punished an Ngiti soldier for raping an Ngiti woman" [citing only Summary of statement of W-243 at DRC-OTP-1016-0089 at 0090]).

¹²⁶ ICC-01/04-01/06-773 OA5, paras. 50-51: The Appeals Chamber found that the Prosecution's use of summaries of anonymous witnesses is not "necessarily prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". It also found that "where the [respective] Chamber takes sufficient steps to ensure that summaries of evidence in the circumstances described above are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial, the use of such summaries is permissible. This will have to be determined on a case-by-case basis, also bearing in mind the character of the confirmation hearing."

¹²⁷ ICC-01/04-01/07-717, para. 239.

¹²⁸ ICC-01/05-01/08-424, paras. 414-417.

proceedings, the prompt resolution of this issue will also assist to advance all other proceedings before this Court.¹²⁹

69. As to the Third Issue, corrective action by the Appeals Chamber, directing the Pre-Trial Chamber to consider the critical evidence that has been overlooked will materially advance the proceedings, by ensuring that the totality of the material before the Chamber, including any fresh evidence brought by the Prosecution, be properly examined before a determination on the charges is reached.

Relief sought

70. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal pursuant to Article 82(1)(d).



Luis Moreno-Ocampo
Prosecutor

Dated this 15th day of March 2010

At The Hague, The Netherlands

¹²⁹ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to require a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to authorize appeal. Pre-Trial Chamber II previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See *Situation in Uganda*, ICC-01/05-20-US-Exp, 19 August 2005, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.