

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 23 April 2010

**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**

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

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 Brahima Koné  
Ms Héléne Cissé  
Mr Akin Akinbote  
Mr Frank Adaka

**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**

Mr Xavier-Jean Keïta

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia

**Deputy Registrar**

Mr Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**PRE-TRIAL CHAMBER I** (“the Chamber”) of the International Criminal Court (“the Court”);

**NOTING** the “Decision on the Confirmation of Charges” (“the Decision”) of 8 February 2010, in which the Chamber, having found that the evidence brought by the Prosecution was not sufficient to establish substantial grounds to believe that the suspect could be held criminally responsible for the crimes charged by the Prosecution, declined to confirm the charges against Mr Bahar Idriss Abu Garda (“Mr Abu Garda”);<sup>1</sup>

**NOTING** the “Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’” (“the Prosecution’s Application”) of 15 March 2010, whereby the Prosecution seeks leave to appeal the Decision pursuant to Article 82(1)(d) of the Rome Statute (“the Statute”) in relation to three issues;<sup>2</sup>

**NOTING** the “Response to the ‘Prosecution’s Application for leave to Appeal the ‘Decision on the Confirmation of Charges’” (“the Defence’s Response”) filed by the Defence on 19 March 2010;<sup>3</sup>

**NOTING** the “Eléments de réponse et observations sur la requête de l’accusation demandant l’autorisation de faire appel”, filed by Ms Hélène Cissé, Legal Representative of the Victims, on 18 March 2010<sup>4</sup> (“Ms Cissé’s Observations”) whereby Ms Cissé submits that the Prosecution’s Application

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<sup>1</sup> ICC-02/05-02/09-243-Red.

<sup>2</sup> ICC-02/05-02/09-252-Red.

<sup>3</sup> ICC-02/05-02/09-256-Conf.

<sup>4</sup> ICC-02/05-02/09-257-Conf.

shall be granted as the Chamber did not consider all the evidence necessary for an overall assessment of the Prosecution's case;

**NOTING** further the "Defence Application for Exclusion of Legal Representative of Victims 'Eléments de réponse et observations sur la requête de l'accusation demandant l'autorisation de faire appel'"<sup>5</sup> and the subsequent "Defence Withdrawal of the 'Defence Application for Exclusion of Legal Representative of Victims' «Eléments de réponse et observations sur la requête de l'accusation demandant l'autorisation de faire appel»",<sup>6</sup> filed on 23 and 29 March 2010 respectively;

**CONSIDERING** that both Ms Cissé<sup>7</sup> and the Registry<sup>8</sup> indicate that at least two e-mails were sent on 19 March 2010 attaching Ms Cissé's Observations, which, although apparently successfully delivered,<sup>9</sup> were not received by the Registry and that, in the circumstances, the said observations shall be treated as having been filed within the prescribed time limit;

**NOTING** the "Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09 and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case"<sup>10</sup> issued on 19 March 2010 by Judge Sanji Mmasenono Monageng, Single Judge for the Chamber on Victims' Issues,<sup>11</sup> by

<sup>5</sup> ICC-02/05-02/09-258.

<sup>6</sup> ICC-02/05-02/09-262.

<sup>7</sup> ICC-02/05-02/09-260 "Rapport sur les circonstances d'envoi du document de réponse du Représentant Légal des victimes à la demande d'autorisation du Procureur pour être autorisé à faire appel."

<sup>8</sup> ICC-02/05-02/09-261 "Registry Report on the Circumstances Surrounding the Submission of the 'Eléments de réponse et observations sur la requête de l'accusation demandant l'autorisation de faire appel' by Me Cissé."

<sup>9</sup> ICC-02/05-02/09-261-Conf-Anx1 and ICC-02/05-02/09-260, Annexe 5, p. 12.

<sup>10</sup> ICC-02/05-02/09-255.

<sup>11</sup> ICC602/05-02/09-55.

which the Single Judge decided to grant authorization to participate as victims in the proceedings at the pre-trial stage to Applicants a/0655/09, a/0656/09, a/0736/09, a/0737/09, a/0738/09, a/0739/09, a/0740/09, a/0741/09 and a/0754/09, to appoint Ms Hélène Cissé as a Legal Representative of Victims a/0736/09, a/0737/09, a/0738/09, a/0739/09, a/0740/09, a/0741/09 and a/0754/09, and ordered the Registry to notify the Legal Representatives of the Prosecution's Application for Leave to Appeal and instruct them that the time limit set in regulation 65(3) of the Regulations of the Court ("The Regulations") shall start running on the day of such notification;

**NOTING** the "Réponse du représentant légal des victimes a/0655/09, a/0656/09, a/0736/09, a/0737/09, a/0738/09, a/0739/09, a/0740/09, a/0741/09 et a/0754/09 autorisées à participer par décision ICC-02/05-02/09-255 » filed by Maître Hélène Cissé on 29 March 2010;<sup>12</sup>

**NOTING** articles 21, 25, 61, 69 and 82(1)(d) of the Statute, rules 63 and 155 of the Rules of Procedure and Evidence ("the Rules") and regulation 65 of the Regulations;

**CONSIDERING** at the outset that, as this Chamber and other Chambers of the Court have previously and consistently held, the decision on the confirmation of charges was intentionally excluded by the drafters of the Statute from the categories of decisions which may be appealed directly to the Appeals Chamber<sup>13</sup> and thus, a decision confirming (or not) the charges may

<sup>12</sup> ICC-02/05-02/09-263-Conf.

<sup>13</sup> ICC-01/04-01/06-915, para. 19; ICC-01/05-01/08-532, para. 12. See also Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, pp. 126-127; H. Brady and M. Jennings "Appeal and Revision" in R.S. Lee (ed.) *The Making of the Rome Statute* (Kluwer Law International, 1999), p. 300.

only be appealed if the specific requirements under article 82(1)(d) of the Statute are met, and leave of the Chamber is granted;

**CONSIDERING** that, according to the established jurisprudence of the Court, “[o]nly an issue may form the subject-matter of an appealable decision” under article 82(1)(d) of the Statute, and that such issue should be “[a]n identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion”;<sup>14</sup>

**CONSIDERING** further that “not every issue may constitute the subject matter of an appeal”<sup>15</sup> and therefore the issue identified by the appellant must:

- (i) have been dealt with in the relevant decision; and
- (ii) meet the following two cumulative criteria:
  - a. it must be an issue that would significantly affect:
    - (i) both the fair and expeditious conduct of the proceedings; or
    - (ii) the outcome of the trial; and
  - b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;<sup>16</sup>

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<sup>14</sup> ICC-01/04-168, para. 9. See also, “Decision on Defence Motion for Leave to Appeal”, issued by Pre-Trial Chamber I on 18 August 2006 (ICC-01/04-01/06-338); “Decision on Second Defence Motion for Leave to Appeal”, issued by Pre-Trial Chamber I on 28 September 2006 (ICC-01/04-01/06-489); and “Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions”, issued by Pre-Trial Chamber I on 14 December 2007 (ICC-01/04-01/07-108). See also “Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58”, issued by Pre-Trial Chamber II on 19 August 2005 (ICC-02/04-01/05-20-US-Exp; unsealed pursuant to Decision ICC-02/04-01/05-52 issued on 13 October 2005), in particular para. 20.

<sup>15</sup> ICC-01/04-168, para. 10.

<sup>16</sup> ICC-01/04-168, paras 9-14.

## HEREBY RENDERS THIS DECISION

### I. First issue raised by the Prosecution

1. The first issue raised by the Prosecution is “[w]hether 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.”<sup>17</sup>

2. The Prosecution alleges that, while the Chamber enunciated the correct threshold applicable at the confirmation of charges stage, it applied a standard of assessment of evidence which is higher than what is required or possible at this stage.<sup>18</sup> The Prosecution contends that the Chamber, in its Decision, erred in proceeding with an “in-depth assessment of the evidence” which is only appropriate for a trial on the merits.<sup>19</sup> The Prosecution further alleges that the Chamber therefore disregarded the “clear distinctions between the evidentiary rules governing the confirmation stage and trial” drawn by the Statute.<sup>20</sup>

3. The Defence submits that such an issue (i) “cannot be correct under any possible reading of the Statute, and is one which eviscerates the whole purpose of the confirmation hearing”; (ii) “ignores the Court’s considerable jurisprudence on the confirmation standard of proof” and (iii) “was not raised

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<sup>17</sup> Prosecution’s Application, para.10 (i).

<sup>18</sup> Prosecution’s Application, paras 15-16.

<sup>19</sup> Prosecution’s Application, paras 16-17.

<sup>20</sup> Prosecution’s Application, para.16.

by either party during proceedings, nor was it addressed” in the Decision.<sup>21</sup> The Defence further submits that the Prosecution is “attempting to hallow out the confirmation procedure as an effective and meaningful filter of cases that should be sent to trial.”<sup>22</sup>

4. The issue raised by the Prosecution concerns “the application of incorrect methods and criteria for evaluating evidence” at the confirmation of the charges stage.<sup>23</sup> As enunciated, the Prosecution’s argument appears to be that, in addition to different standards of proof applicable to various stages of the proceedings before the Court, there should also be different standards of assessment of evidence.

5. Article 21(1) of the Statute provides that the Court must apply first the Statute, the Rules of Procedure and Evidence and the Elements of Crimes. The confirmation of the charges is regulated by article 61 of the Statute, which states, at paragraph 7, that the Chamber shall “on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”

6. The Statute vests all Chambers, regardless of the stage of proceedings, with discretion to freely assess the evidence presented by the parties. Pursuant to article 69(4) of the Statute, the Chamber has discretion to “rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.”

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<sup>21</sup> Defence’s Response, para.8.

<sup>22</sup> Defence’s Response, para.17.

<sup>23</sup> Prosecution’s Application, para.44.



7. Furthermore, the general provisions relating to evidence are encapsulated in rule 63 under Chapter 4 of the Rules, under the heading “Provisions relating to the various stages of the proceedings”. Rule 63(1) states that “[t]he rules of evidence set forth in this chapter, together with article 69, shall apply in proceedings before all Chambers” thus including a Pre-Trial Chamber when dealing with confirmation of charges proceedings. In addition, pursuant to rule 63(2) of the Rules, the Chamber has a broad discretion to freely assess all the evidence submitted.<sup>24</sup>

8. Although the Statute allows the Prosecution, at the pre-trial stage of the case, to rely on documentary or summary evidence and not to call the witnesses expected to testify at trial, neither the Statute nor the Rules, contrary to the Prosecution’s assertion, draws a distinction as to the way evidence shall be assessed before a Trial Chamber and a Pre-Trial Chamber. The free assessment of the evidence presented by a party is, pursuant to the Statute, a core component of the judicial activity both at the pre-trial stage of a case and at trial.

9. The difference between the various stages of the proceedings lies instead in the threshold of proof to be met during the respective stages of the proceedings: for the charges to be confirmed by the Pre-Trial Chamber, there needs to be “sufficient evidence to establish substantial grounds to believe

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<sup>24</sup> See the consistent case law of both Pre-Trial Chambers on this matter, in particular: “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” issued by Pre-Trial Chamber II on 15 June 2009 (ICC-01/05-01/08-424) where it *inter alia* held that “evidence is relevant only if it has probative value. Probative value is the weight to be given to a piece of evidence, and weight constitutes the qualitative assessment of the evidence” and recalled that “rule 63(2) of the Rules providing for the its broad discretion to freely assess all the evidence submitted” and underlined that such discretion is, in accordance with article 69(4) and (7) of the Statute, “limited by the relevance, probative value, and admissibility of each piece of evidence.” (paras 42, 61 and 62) See also, Pre-Trial Chamber I’s “Decision on the confirmation of the charges” (ICC-01/04-01/07-717), paras 71-224 and “Decision on the confirmation of the charges” (ICC-01/04-01/06-803-tEN), notably para. 61.

that the person committed each of the crimes charged”; for the accused to be convicted, the Trial Chamber must be “convinced of the guilt of the accused beyond reasonable doubt”.

10. In light of the above, the proposition put forward by the Prosecution, namely that the Chamber should have applied a different standard to the assessment of the evidence at the confirmation of the charges stage, is without any legal basis.

11. The Chamber is thus of the view that the first issue is a mere assertion that the Chamber should have assessed the evidence before it differently. Such assessment however rests within the discretion vested equally, by the Statute and the Rules, on all Chambers of the Court to freely assess the evidence submitted to them.

12. Therefore, the Chamber finds that the argument raised by the Prosecution under the “first issue” does not constitute an issue within the meaning of article 82(1)(d) of the Statute but amounts to a mere disagreement with regard to the Chamber’s exercise of its discretionary powers to freely assess the evidence submitted to it.

## **II. Second issue raised by the Prosecution**

13. The second issue raised by the Prosecution is “[w]hether 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

members of the said organized armed group.<sup>25</sup> According to the Prosecution, the Chamber's failure to apply "the correct legal standards to determine both the existence of an organized armed group and a relationship of subordination with effective control" led the Chamber to "completely" disregard relevant evidence<sup>26</sup> and thus 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'; (ii) 'The hierarchical link [...] within an organized armed group is not sufficiently supported by evidence.'"<sup>27</sup>

14. Both of the Chamber's conclusions referred to by the Prosecution as being "unreasonable" are related to the part of the Decision dealing with the individual criminal liability of Mr Abu Garda, whom the Prosecution charged, pursuant to article 25(3)(a) of the Statute, as a co-perpetrator and, alternatively, as an indirect co-perpetrator for the alleged crimes. Thus, the contention of the Prosecution has to be analysed in relation to this part of the Decision.

15. The Defence submits that "at no point does the Prosecution identify the incorrect legal criteria or standard that the Chamber allegedly erroneously applied" and that the "Prosecution clearly disagrees with the Pre-Trial Chamber's evaluation of the evidence and its factual findings."<sup>28</sup>

16. The Chamber recalls that, to assess Mr Abu Garda's alleged individual criminal liability pursuant to article 25(3)(a) of the Statute,

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<sup>25</sup> Prosecution's Application, para.10 (ii).

<sup>26</sup> Prosecution's Application, para.23.

<sup>27</sup> Ibid.

<sup>28</sup> Defence's Response, paras 21 and 22.

paragraph 160 of the Decision identifies, as common objective requirements to both co-perpetration and indirect co-perpetration, the following elements: (i) the existence of an agreement or common plan between two or more persons; and (ii) the co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime. Further, footnote 246 states that indirect co-perpetration has, in addition, three other objective requirements, namely: (i) the existence of an organised and hierarchical apparatus of power; (ii) the perpetrator's control over such an organisation; and (iii) the execution of the crimes by the physical perpetrators by almost automatic compliance with the orders of senior leaders or commanders.

17. Thus, when analysing the alleged criminal responsibility of Mr Abu Garda, the Chamber first focused on the common objective requirements to both modes of participation charged by the Prosecution, starting with the existence of a common plan. For this purpose, the Chamber also analysed whether the existence of a common plan could be inferred from Mr Abu Garda's alleged co-ordinated essential contribution resulting in the realisation of the objective elements of the crime.

18. As the Chamber was not satisfied that there were substantial grounds to believe that a common plan to attack the MGS Haskanita existed, it did not proceed with an analysis of the other requirements of the two modes of liability charged by the Prosecutor, either common or not. More specifically, the two alleged "key issues" referred to by the Prosecution are additional legal requirements that are specific to indirect co-perpetration (objective elements); accordingly, they were not addressed in the Decision. It follows that the Chamber's determination of whether there was an agreement or common plan among Mr Abu Garda and other senior commanders to attack

the MGS Haskanita, did not depend on a finding of whether there existed an organized armed group and a relationship of subordination with effective control between Abu Garda and that group. Accordingly, the resolution of the matter raised by the Prosecution is not “essential for the determination of matters arising in the judicial cause under examination”<sup>29</sup> and thus does not meet the requirements of article 82(1)(d) of the Statute, as interpreted by the Appeals Chamber. The argument of the Prosecution shall therefore be rejected.

### **III. Third issue raised by the Prosecution**

19. The third issue raised by the Prosecution is “[w]hether the Chamber failed to consider factual allegations and the evidence adduced in support, relevant to substantive matters in the Decision.”<sup>30</sup>

20. In relation to this issue, the Prosecution contends that the Chamber failed to consider “evidence of the orders given by Abu Garda in preparation for the 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.”<sup>31</sup>

21. The Prosecution, while acknowledging that “the Chamber has the responsibility to independently assess the facts”, affirms that “in fulfilling that responsibility [the Chamber] is obligated to consider all the material and relevant evidence that the Prosecution puts before it and to draw the reasonable inferences from it”.<sup>32</sup> In the Prosecution’s view, the above

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<sup>29</sup> ICC-01/04-168, para. 9.

<sup>30</sup> Prosecution’s Application, para.10 (iii).

<sup>31</sup> Prosecution’s Application, para.35

<sup>32</sup> Prosecution’s Application, para. 36.

mentioned allegation of a failure of the Chamber does not amount to a mere disagreement with its conclusions. Rather, the Prosecution submits that it is an issue arising out of the Decision and that “[t]he question of whether there was a common plan of which Abu Garda was a member (...) could not be properly and fully resolved without its consideration”.<sup>33</sup>

22. In this respect, the Defence contends that the “Prosecution is simply re-stating its arguments from the Confirmation” which amounts to “nothing more than a disagreement with the Chamber’s evaluation of the Prosecution’s evidence.”<sup>34</sup>

23. The Chamber recalls that it has expressly stated in the Decision that, although the evidence evaluated for the purposes of the Decision is “the material that has been tendered into evidence for the purposes of the confirmation hearing further to disclosure between the parties and its communication to the Chamber pursuant to rule 121(3) of the Rules,”<sup>35</sup> “the citations in the Chamber’s conclusion will not include references to all evidence presented in respect of the specific charge.”<sup>36</sup> Therefore, the evidence referred to in the Decision was “for the purpose of providing the underlying reasoning for the findings of the Chamber, without prejudice to additional items of evidence that could also support the same the findings”.<sup>37</sup>

24. In addition, as recalled in relation to the first issue raised by the Prosecution, this evidence is freely assessed by the Chamber and such assessment falls within its discretionary powers.

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<sup>33</sup> Ibid.

<sup>34</sup> Defence’s Response, para.35.

<sup>35</sup> Decision, para. 44.

<sup>36</sup> Decision, para. 45.

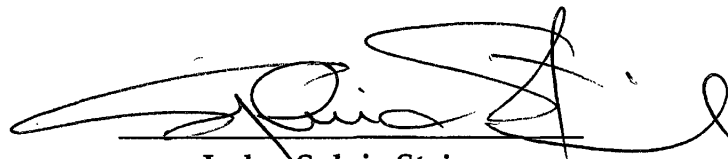
<sup>37</sup> Decision, para. 45.

25. The Chamber is thus of the view that the alleged issue amounts to a mere disagreement with the findings of the Chamber, stemming from the exercise of its discretionary powers to freely assess the evidence submitted by the Prosecution for the purposes of the confirmation hearing. Such disagreement does not amount to an issue under article 82(1)(d) of the Statute.

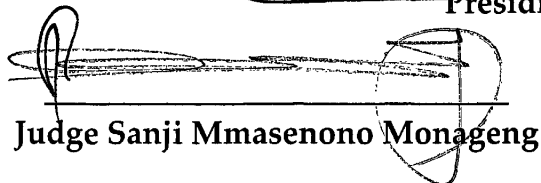
**FOR THESE REASONS,**

**REJECTS** the Prosecution's Application.

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 Friday 23 April 2010

At The Hague, The Netherlands