

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-02/09
Date: 8 February 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 Redacted Version

Decision on the Confirmation of Charges

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively), having held the confirmation hearing in the case of *The Prosecutor v. Bahar Idriss Abu Garda* (“the Case”),

HEREBY RENDERS THE FOLLOWING DECISION:¹

I. INTRODUCTION

1. The Prosecution charges Bahar Idriss Abu Garda (“Mr Abu Garda”) with the war crimes of (i) violence to life within the meaning of articles 8(2)(c)(i) and 25(3)(a) and 25(3)(f) of the Rome Statute (“the Statute”); (ii) intentionally directing attacks against personnel, installations, material, units and vehicles involved in a peacekeeping mission, within the meaning of articles 8(2)(e)(iii) and 25(3)(a) of the Statute; and (iii) pillaging within the meaning of articles 8(2)(e)(v) and 25(3)(a) of the Statute.

2. Bahar Idriss Abu Garda is a Sudanese citizen of Zaghawa origin. He was born on 1 January 1963 in Nana, north of Tina, North Darfur, the Sudan.² From January 2005, he served as Vice President, the second-in-command, of the Justice and Equality Movement (the “JEM”), and was also its Secretary General.³ He is currently the chairman of the United Resistance Front (the “URF”), established in January 2008.⁴

¹ Judge Cuno Tarfusser, whilst concurring in the final determination taken by the Chamber, appends a separate opinion setting out the reasons for his dissent as to the scope and the reasoning of the decision as developed by the Majority of the Chamber.

² ICC-02/05-02/09-164-Conf-AnxA, para. 1.

³ ICC-02/05-02/09-164-Conf-AnxA, para. 6.

⁴ ICC-02/05-02/09-T-12-Red-ENG, p. 43, lines 1, 2 and 14; ICC-02/05-02/09-91-Red, para. 6.

A. Major Procedural Steps

3. On 20 November 2008, the Prosecution submitted the "Prosecutor's Application under Article 58", requesting the issuance of a Warrant of Arrest or alternatively a Summons to Appear for Bahar Idriss Abu Garda.⁵

4. On 7 May 2009, the Chamber issued a Summons to Appear for Mr Abu Garda.⁶

5. On 18 May 2009, during his first appearance before the Court, Mr Abu Garda was informed of the crimes he is alleged to have committed and of his rights pursuant to the Statute and the Rules of Procedure and Evidence ("the Rules"). Single Judge Cuno Tarfusser set the commencement of the confirmation hearing for Monday 12 October 2009.⁷

6. On 15 July 2009, the Chamber issued the "Second Decision on issues relating to Disclosure", wherein it set out the principles and the time frame for the disclosure of evidence between the parties and its communication to the Chamber for the purpose of the confirmation hearing.⁸

7. Throughout the following months, Single Judge Cuno Tarfusser issued a number of decisions on protective measures concerning *inter alia* redaction of

⁵ ICC-02/05-02/09-21-Conf.

⁶ ICC-02/05-02/09-2 and ICC-02/05-02/09-15-AnxA.

⁷ ICC-02/05-02/09-T-2-ENG.

⁸ ICC-02/05-02/09-35.

witness statements⁹ and non-disclosure of certain witnesses' identities to the Defence and/or the public.¹⁰

8. On 10 September 2009, the Prosecution filed its "Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute" ("the DCC"), together with the list of evidence.¹¹

9. On 11 September 2009, Single Judge Cuno Tarfusser (i) granted the extensions of time requested by the Prosecution for the filing of the Arabic translations of the list of evidence and of the revised summaries of transcripts of interviews of six witnesses, (ii) extended to 1 October 2009 the time limit for the Defence to file its list of evidence, and (iii) postponed the commencement of the confirmation hearing until Monday 19 October 2009.¹²

10. On 1 October 2009, the Defence filed its "Submission of Confidential List of Evidence for filing in the record of the Case".¹³

11. On 6 October 2009, the Chamber issued the "Decision on victims' modalities of participation at the Pre-Trial Stage of the Case", wherein it established the participatory rights for victims in the pre-trial stage of the proceedings in the Case.¹⁴ In accordance with the two decisions of Single Judge

⁹ See ICC-02/05-02/09-58 and ICC-02/05-02/09-85.

¹⁰ See ICC-02/05-02/09-74, ICC-02/05-02/09-77, ICC-02/05-02/09-117-Red, and ICC-02/05-02/09-137-Red.

¹¹ ICC-02/05-02/09-91-Conf and ICC-02/05-02/09-91-Red, and Conf-Anx1 and Anx1-Red.

¹² ICC-02/05-02/09-98.

¹³ ICC-02/05-02/09-127 and Conf-Anx.

¹⁴ ICC-02/05-02/09-136.

Sanji Monageng of 29 September 2009¹⁵ and 8 October 2009,¹⁶ 78 victims were authorised to participate in the proceedings.

12. On 14 October 2009, the parties filed the "Defence and the Office of the Prosecutor's submission of facts contained in the Document Containing the Charges that the Parties agree to for the purposes of the confirmation hearing pursuant to Rule 69 of the Rules of Procedure" ("the Agreed Facts").¹⁷

13. The confirmation hearing was held before the Chamber from 19 October 2009 to 30 October 2009, in accordance with the Decision Amending the Schedule for the Confirmation Hearing.¹⁸ At the hearing, the Prosecution and the Defence presented their evidence, which included the *viva voce* testimony of three Prosecution witnesses and one Defence witness, and the parties and participants had the opportunity to make their opening and closing statements.

14. On 30 October 2009, the Chamber authorised the Prosecution, the Legal Representatives of Victims and the Defence "to file a document in which they may address those issues raised during the confirmation hearing which are of relevance for the purpose of the decision to be taken by the Chamber under article 61(7) of the Statute" (the "final written observations"), and set the time frame for such filings.¹⁹ Accordingly, the Prosecution filed its final written

¹⁵ ICC-02/05-02/09-121.

¹⁶ ICC-02/05-02/09-147-Red.

¹⁷ ICC-02/05-02/09-164 and Conf-AnxA.

¹⁸ ICC-02/05-02/09-182 and AnxI.

¹⁹ ICC-02/05-02/09-T-21-Red-ENG, p. 82, lines 17-20.

observations on 16 November 2009,²⁰ the Legal Representatives of Victims on 19²¹ and 22²² November 2009, and the Defence on 7 December 2009.²³

B. The Conflict in the Darfur Region

15. The Chamber notes that the following factual background on the situation in Darfur, Sudan, is either public knowledge or has been agreed on by the parties, as contained in the Agreed Facts. The Chamber therefore considers these facts to have been proven in accordance with rule 69 of the Rules.

16. The Darfur region, located in the north west of the Sudan, is comprised of the three states of North Darfur, West Darfur and South Darfur,²⁴ whose capitals are El Fasher, El Geneina and Nyala respectively. It comprises a territory of 256 000 km² with an estimated five million inhabitants, made up of a complex tribal mix, the Fur, Zaghawa and Masalit being the three largest and traditionally dominant tribes.²⁵

17. From August 2002 until the date of filing of the DCC, a conflict of a non-international character existed in Darfur between the Government of Sudan (the "GoS") together with forces under its control, on the one hand, and various armed rebel groups, on the other.²⁶ Among these groups were the JEM, a

²⁰ ICC-02/05-02/09-229 and Conf-AnxA.

²¹ ICC-02/05-02/09-230-Conf.

²² ICC-02/05-02/09-235-Conf.

²³ ICC-02/05-02/09-237 with Conf-AnxA and Conf-AnxB.

²⁴ ICC-02/05-02/09-164-Conf-AnxA, para. 3.

²⁵ *Ibid.*, para. 4.

²⁶ *Ibid.*, paras. 2 and 17.

predominantly Zaghawa group established in 2001 under the chairmanship of Dr. Khalil Ibrahim, and the Sudan Liberation Army/Movement (the "SLA/M"), established in 2003 under the leadership of Abdul Wahid El Nour.²⁷

18. The SLA/M and the JEM negotiated several peace agreements with the GoS: on 3 and 4 September 2003, the GoS and the SLA/M signed a Peace Agreement;²⁸ on 8 April 2004, the GoS, JEM and SLA/M signed the Humanitarian Ceasefire Agreement ("the HCA");²⁹ on 28 May 2004, the GoS, JEM and SLA/M signed the Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in the Darfur.³⁰ In accordance with this latter agreement, the African Union Monitoring Mission was deployed in Darfur, essentially with the responsibility of monitoring and ensuring implementation of the HCA.³¹

19. Following negotiations between the GoS and the armed rebel groups, the Darfur Peace Agreement ("the DPA") was signed in Abuja, Nigeria, on 5 May 2006 by the GoS and the splinter SLA/MM under the leadership of Minni Arko Minawi; the JEM and SLA/AW³² did not sign this agreement.³³

²⁷ *Ibid.*, para. 5.

²⁸ *Ibid.*, para. 11.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, para. 12.

³² See ICC-02/05-02/09-91-Red, para. 18 and paras. 34-36. Between October and November 2005, the SLA/M split into two factions: SLA/MM under the leadership of Minni Arko Minawi and SLA/AW under the leadership of Abdul Wahid El Nour. Later, further divisions appeared within SLA/AW and SLA/MM, leading to further splits into various rebel factions. In May 2007, during a conference held in Um Rai, North Darfur, commanders from the various breakaway factions came together and formed a united faction called SLA-Unity, under the leadership of Abdallah Yahya.

³³ ICC-02/05-02/09-164-Conf-AnxA, paras. 14-15.

20. After the signing of the DPA, the SLA/MM aligned with the GoS;³⁴ fighting continued between the GoS and the SLA/MM, on the one hand, and those rebel forces which had not signed the DPA, on the other.³⁵

C. The Prosecution's allegations against Mr Abu Garda

21. The Prosecution alleges that "on 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada Locality in North Darfur, the Sudan",³⁶ Mr Abu Garda, knowingly and in the context of and associated with an armed conflict, jointly, and with JEM forces under his control and SLA-Unity forces,

(i) "killed twelve (12) AMIS peacekeeping personnel and attempted to kill eight (8) AMIS peacekeeping personnel, with the knowledge that they were personnel involved in a peacekeeping mission established in accordance with the UN Charter and were taking no active part in hostilities and thus entitled to the protection given to civilians under the international law of armed conflict",³⁷ thus committing the war crime of violence to life under articles 8(2)(c)(i) and 25(3)(a) and/or (f) of the Statute (Count 1);

(ii) "intentionally directed attacks against AMIS peacekeeping personnel, installations, material, units and vehicles involved in a peacekeeping mission established in accordance with the Charter of the United Nations, which were entitled to the protection given to civilians and civilian objects under the

³⁴ Ibid., para. 14.

³⁵ Ibid., para. 15.

³⁶ ICC-02/05-02/09-91-Red, pp. 32-33.

³⁷ Ibid.

international law of armed conflict, with the knowledge of the factual circumstances that established that protection",³⁸ thus committing the war crime of intentionally directing attacks against personnel, installations, material, units and vehicles involved in a peacekeeping mission under articles 8(2)(e)(iii) and 25(3)(a) of the Statute (Count 2); and

(iii) "appropriated property belonging to AMIS and its personnel including vehicles, refrigerators, computers, cellular phones, military boots and uniforms, fuel, ammunition and money, without the consent of the owners and for their private or personal use",³⁹ thus committing the war crime of pillaging under articles 8(2)(e)(v) and 25(3)(a) of the Statute (Count 3).

22. The Prosecution alleges that Mr Abu Garda is individually criminally responsible as a co-perpetrator or as an indirect co-perpetrator for the above-mentioned war crimes.⁴⁰ In particular, the Prosecution alleges the existence of a common plan to attack the African Union Mission in Sudan ("AMIS") at the Military Group Site Haskanita ("the MGS Haskanita"), agreed to by Mr Abu Garda and other senior commanders from JEM and SLA-Unity during meetings held before the attack.⁴¹ The Prosecution further alleges that Mr Abu Garda and other senior commanders exercised joint control over the commission of the crimes by virtue of the essential nature of the tasks assigned to them, such that they had the ability to frustrate the commission of the crimes by not performing those tasks.⁴² The Prosecution alleges further that Mr Abu Garda played an overall essential coordinating role and had direct responsibilities in the

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid., para. 117.

⁴¹ Ibid., paras. 118-130.

⁴² Ibid., para. 131.

implementation of that common plan which led to the commission of the alleged crimes, as described above.⁴³

23. The Prosecution additionally alleges that Mr Abu Garda committed these crimes through the combined rebel forces over which, together with other commanders, he exercised joint command and control.⁴⁴ In particular, the Prosecution claims that Mr Abu Garda had effective command and control over the renegade JEM rebel forces that were with him at the time of the attack.⁴⁵ The Prosecution further claims that this JEM breakaway group effectively existed as an organised and hierarchical apparatus of power as of the time of the split from the mainstream JEM and during the time relevant to the crimes charged,⁴⁶ and that Mr Abu Garda mobilised his authority and control over the apparatus to execute these crimes by securing compliance with his orders.⁴⁷

24. For these reasons, the Prosecution submits that Mr Abu Garda is individually criminally responsible as a co-perpetrator or as an indirect co-perpetrator under article 25(3)(a) of the Statute for the above-mentioned war crimes listed in article 8 of the Statute.⁴⁸

⁴³ Ibid., para. 133.

⁴⁴ Ibid., para. 134.

⁴⁵ Ibid., para. 142.

⁴⁶ Ibid., para. 146.

⁴⁷ Ibid., para. 149.

⁴⁸ Ibid., para. 117.

II. JURISDICTION AND ADMISSIBILITY

25. Article 19(1) of the Statute requires the Chamber to satisfy itself that it has jurisdiction in any case brought before it. In the "Decision on the Prosecutor's Application under Article 58", the Chamber engaged in a preliminary analysis of the issue of the jurisdiction of the Court in accordance with article 19(1) of the Statute and the precedents of the Chamber, and found that the Case fell within the jurisdiction of the Court.⁴⁹

26. Throughout the pre-trial proceedings, no challenges to the jurisdiction of the Court under article 19(2) and (3) of the Statute and rule 58 of the Rules were brought before the Chamber. No issue relating to the jurisdiction of the Court over the Case was raised,⁵⁰ although time was allocated for this purpose at the commencement of the confirmation hearing on 19 October 2009.⁵¹ Further, there has been no change in the circumstances that might affect the Chamber's previous ruling on jurisdiction. Accordingly, the Chamber is satisfied that the case against Mr Abu Garda falls within the jurisdiction of the Court, in accordance with articles 11 and 13(b) of the Statute.

27. Neither the Defence nor the Prosecution raised any challenges or questions in relation to the admissibility of the Case during the time allocated to them at the commencement of the confirmation hearing.⁵² Article 19 of the Statute, however, vests the Chamber with discretion to decide whether to rule on its own motion on the admissibility of the case before it. The Chamber finds it appropriate, in the circumstances and being mindful of the interests of the

⁴⁹ ICC-02/05-02/09-15-AnxA, paras. 2 and 3.

⁵⁰ ICC-02/05-02/09-T-12-Red-ENG, p. 15, lines 6-11 and 14-18.

⁵¹ ICC-02/05-02/09-182 and Anx1.

⁵² ICC-02/05-02/09-T-12-Red-ENG, p. 15, lines 6-11 and 14-18.

suspect in a determination of the admissibility of the Case, to examine the issues of admissibility at this stage of the proceedings.

28. The admissibility test, as established by this Chamber, is composed of two parts: the first relating to national investigations, prosecutions and trials concerning the facts alleged in the case at hand, and the second to the gravity threshold that the case should meet to be admissible before the Court.⁵³

29. With respect to admissibility *vis-à-vis* national proceedings, the Chamber notes that, according to the information provided by the Prosecution, no State with jurisdiction over the case against Mr Abu Garda is acting, or has acted, in the manner described in article 17 of the Statute in relation to the facts alleged in this case. Accordingly, in the absence of any State action, it is not necessary to address any issues relating to the unwillingness or inability of any given State to investigate or prosecute the Case.⁵⁴

30. As regards the “sufficient gravity” threshold in accordance with article 17(1)(d) of the Statute, this Chamber has already found that the gravity threshold contemplated therein “is in addition to the [Statute] drafters’ careful selection of the crimes included in articles 6 to 8 of the Statute”.⁵⁵ Hence, “the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court”.⁵⁶

⁵³ ICC-01/04-01/06-8-Corr, para. 29.

⁵⁴ ICC-01/04-01/07-1497, para. 78.

⁵⁵ ICC-01/04-01/06-8-Corr, para. 41.

⁵⁶ *Ibid.* With respect to attacks on personnel, installations, material, units or vehicles involved in peacekeeping missions, the Chamber notes that the Rome Statute “is the first multilateral treaty which explicitly considers attacks against United Nations personnel or objects involved in a humanitarian assistance or peacekeeping mission to be a war crime. The development of the

31. In the view of the Chamber, several factors may be taken into account in the assessment of the gravity of a case. In this respect, the Chamber agrees with the Prosecution's view that, in assessing the gravity of a case, "the issues of the nature, manner and impact of the [alleged] attack are critical".⁵⁷ Further, the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case.⁵⁸

32. The Chamber finds that certain factors that may be of relevance to the assessment of gravity are listed in rule 145(1)(c) of the Rules, relating to the determination of sentence. The rule makes reference to "the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime", which, in the view of the Chamber, can serve as useful guidelines for the evaluation of the gravity threshold required by article 17(1)(d) of the Statute.

elements of this crime was influenced by the 1994 Convention on the Safety of United Nations and Associated Personnel, which entered into force on 15 January 1999. The ILC Draft Code of Crimes 1996 also contained a similar provision." See Frank, D. 'Article 8(2)(b)(ii) attacking civilian objects' in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Lee R. (ed.), Transnational Publishers, New York, 2001, p. 145. The Chamber further recalls the Preamble of the 1994 Convention, which, *inter alia*, expresses deep concern "over the growing number of deaths and injuries resulting from deliberate attacks against United Nations personnel", and declares the "urgent need to adopt appropriate and effective measures for the prevention of attacks committed against United Nations and associated personnel and for the punishment of those who have committed such attacks". See Office of Legal Affairs Codification Division, *Convention on The Safety of United Nations and Associated Personnel*, 9 December 1994 at <http://www.un.org/law/cod/safety.htm>.

⁵⁷ICC-02/05-02/09-21-Conf, para. 7.

⁵⁸The Chamber takes note of the following observation: "[t]hat a purely quantitative test should be used to assess gravity for the purpose of determining prosecutorial priorities is questionable", and that "[m]any other factors other than the sheer number of victims should be relevant", Williams, S.A., and Schabas, W.A., 'Issues of Admissibility', in Triffterer, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd Edition, C.H. Beck-Hart-Nomos, München, 2008, pp. 605-625 at p. 622.

33: The Chamber notes the Prosecution's contention that, as a result of the alleged attack, killings and pillaging in the MGS Haskanita, "AMIS operations were severely disrupted, thus affecting its mandated protective roles with respect to millions of Darfurian civilians in need of humanitarian aid and security".⁵⁹ The Prosecution further states that AMIS initially suspended⁶⁰ and then reduced⁶¹ its activities in the area, and that this left a large number of civilians without AMIS protection, on which they had allegedly relied before the attack.⁶² The Chamber thus finds that the consequences of the attack were grave for the direct victims of the attack, that is, the AMIS personnel, and for their

⁵⁹ ICC-02/05-02/09-21-Conf, para. 7.

⁶⁰ ICC-02/05-02/09-91-Red, para. 113; Statement of Witness 446, DAR-OTP-0169-0808 at 0827, para. 176: "It was no longer an AMIS camp." and para. 179: "What I know is that the camp was abandoned"; Statement of Witness 419, DAR-OTP-0165-0489 at 0513, para. 130: "The Commission was to investigate what damage had been done to the Camp because this period coincided with the arrival of the UN. During the interview, they asked me questions mainly as to whether the camp could be rebuilt and re-occupied. I said that in my opinion it was possible to do so and it was very important that the Camp was re-built." *Viva voce* testimony of Witness 445, ICC-02/05-02/09-T-17-Red-ENG, p. 36, line 24, to p. 37, line 18.

⁶¹ ICC-02/05-02/09-91-Red, para. 113 and ICC-02/05-02/09-T-13-ENG, p. 34, lines 24-25.

⁶² ICC-02/05-02/09-T-12-Red-ENG, p. 17, lines 9-10 and p. 20, lines 13-14; Human Rights Watch, *SUDAN: Five Years On, No Justice for Sexual Violence in Darfur*, public source, DAR-OTP-0140-0248 at 0282; video material attached to Statement of Witness 326, DAR-OTP-0166-0021 and DAR-OTP-0166-0018-R01, Statement of Witness 446, DAR-OTP-0169-0808 at 0814, para. 43. It is submitted that AMIS personnel were, among other things, providing the local population with medical assistance: photograph attached to the statement of Witness 419, DAR-OTP-0168-0168 at 0175 and DAR-OTP-0164-1110: "This is a JEM vehicle parked outside the camp, near the clinic provided for the local population". More generally on the assistance AMIS personnel provided to the local population, Statement of Witness 419, DAR-OTP-0165-0489 at 0496, para. 34: "The local population generally had access to the Camp and would regularly come to attend the Camp clinic, or for cultural collaboration, or even for social visits. We took care of the sick in the Camp clinic and even evacuated those who required further treatment"; Statement of Witness 420, DAR-OTP-0165-0521 at 0528, para. 34, "We gave medical help to the sick from the village. Every Sunday the Christian population from the village would come to pray in the Camp church"; Statement of Witness 446, DAR-OTP-0169-0808 at 0818, para. 82, "The villagers had problems with water supply. Sometime we allowed them to take water from our camp"; photograph attached to the Statement of Witness 419, DAR-OTP-0168-0168, DAR-OTP-0164-1063 at 0174, "This photograph shows local people from the Haskanita area who came near the camp for protection during fighting between GoS and the rebels". More generally on the impact of attacks on peacekeeping missions, *viva voce* testimony of Witness 445, ICC-02/05-02/09-T-17-Red-ENG, p. 36, line 24, to p. 37, line 18.

families. In addition, the alleged initial suspension and ultimate reduction of AMIS activities in the area as a result of the attack had a grave impact on the local population.

34. In light of the foregoing, the Chamber is satisfied that the case brought before it is of sufficient gravity within the meaning of article 17(1)(d) of the Statute, and finds that the Case is admissible.

III. PRELIMINARY EVIDENTIARY MATTERS

A. The standard under article 61(7) of the Statute

35. According to article 61(7) of the Statute, the Pre-Trial Chamber shall, on the basis of the confirmation hearing, “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.

36. The Chamber has already established its interpretation of the standard of “substantial grounds to believe” in accordance with article 21(3) of the Statute⁶³ and on the basis of the case law of the European Court of Human Rights.⁶⁴ Pre-Trial Chamber II has also ruled on the evidentiary threshold for the confirmation of charges before this Court.⁶⁵ The Chamber will apply these rulings to the present case.

⁶³ ICC-01/04-01/06-803-tEN, paras. 33-39; ICC-01/04-01/07-717, paras. 61-65.

⁶⁴ See in particular ICC-01/04-01/06-803-tEN, para. 38.

⁶⁵ ICC-01/05-01/08-424, paras. 27-31.

37. In particular, it is worth recalling that “in order for the Prosecution to meet its evidentiary burden, it must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”.⁶⁶

38. The Chamber notes that, in its final oral statements, the Defence stated that “[i]f the Pre-Trial Chamber is to have a purpose, it is [not] to permit cases going ahead which would inevitably result in acquittals. It is to avoid needless trials”.⁶⁷

39. The Chamber recalls that the confirmation hearing is neither a trial before the trial nor a mini-trial,⁶⁸ and that “[t]he purpose of the confirmation hearing is limited to committing to trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the Defence against wrongful and unfounded charges.”⁶⁹

40. Accordingly, at no point should Pre-Trial Chambers exceed their mandate by entering into a premature in-depth analysis of the guilt of the suspect. The Chamber, therefore, shall not evaluate whether the evidence is sufficient to

⁶⁶ ICC-01/04-01/06-803-tEN, para. 39; see also, ICC-01/04-01/07-717, para. 65; ICC 01/05-01/08-424, para. 29.

⁶⁷ ICC-02/05-02/09-T-21-Red-ENG, p. 81, lines 13-15. The Chamber notes that this position of the Defence is similar to the argument advanced by the Defence Counsel in the Lubanga case, according to whom “(...) the evidence presented by the Prosecution must be sufficient to reasonably sustain a conviction”, ICC-01/04-01/06-803-tEN, para. 36. See also, ICC-01/04-01/06-764, paras. 37-41.

⁶⁸ ICC-02/05-02/09-35, para. 10; ICC-01/04-01/07-T-25-ENG, p. 14, lines 5-11; ICC-01/04-01/07-474, para. 100; ICC-01/04-01/07-717, para. 64.

⁶⁹ ICC-01/04-01/07-717 para. 63; ICC-01/04-01/07-428-Corr, para. 5; ICC-01/04-01/06-803-tEN, para. 37.

sustain a future conviction.⁷⁰ Such a high standard is not compatible with the standard under article 61(7) of the Statute.⁷¹

41. The Chamber will assess the evidence presented by the parties for the purpose of the confirmation hearing as a whole, in order to determine whether the Prosecution has brought sufficient evidence to establish substantial grounds to believe that the crimes charged were committed and whether the Prosecution has brought sufficient evidence to establish substantial grounds to believe that Mr Abu Garda committed the crimes with which he is charged.

42. In its final oral statements, the Defence also put forward the argument that “[t]he principle of *in dubio pro reo* continues to apply at all stages of proceedings including at this hearing, at least at this stage. So, [...] when [...] considering the evidence, the benefit of the doubt – when one is reviewing the standard – must in all cases come down on the side of the Defence.”⁷²

43. The Chamber is of the view that inconsistent, ambiguous or contradictory evidence may result in the Chamber reaching a decision not to confirm the charges. Such a conclusion would not, however, be based on the application of the principle of *in dubio pro reo* to the assessment of the probative value of the evidence presented by the Prosecution at this stage of the proceedings. A conclusion such as this would rather be based on a determination that evidence of such a nature is not sufficient to establish substantial grounds to believe that

⁷⁰ ICC-01/04-01/06-764, paras. 37-41.

⁷¹ Such standard can be found in some ICTY precedents related to the confirmation of the indictment. For instance, it is mentioned that “(...) in *Kordic et al.*, Judge McDonald adopted a higher standard, as a ‘credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge’”. See May, R., and Wierda, M., *International Criminal Evidence*. Transnational Publishers, 2002, pp. 124-126, esp. para. 4.70.

⁷² ICC-02/05-02/09-T-21-Red-ENG, p. 66, lines 6-11; see also ICC-01/05-01/08-424, para. 31.

the suspect committed the crimes with which he is charged and thus that the threshold required by article 61(7) of the Statute has not been met.

B. Matters relating to the evidence presented by the parties

44. With respect to the evidence to be evaluated for the purposes of this decision, the Chamber, in accordance with its precedents,⁷³ will analyse the material that has been tendered into evidence for the purposes of the confirmation hearing further to the disclosure between the parties and its communication to the Chamber pursuant to rule 121(3) of the Rules.

45. The Chamber recalls that, "although [it] will reference items of evidence which provide substantial grounds to believe that specific charges could or could not be confirmed, the citations in the Chamber's conclusions will not include references to all evidence presented in respect of the specific charge".⁷⁴ In other words, the evidence referred to in the present Decision is 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 findings.

⁷³ ICC-02/05-02/09-35 and ICC-02/05-02/09-T-13-ENG, p. 15, lines 17-19. See also ICC-01/04-01/06-102 and ICC-01/04-01/07-T-12-ENG, pp.8-10.

⁷⁴ ICC-01/04-01/07-717 para. 69.

1. *The Prosecution's alleged failure to comply with its obligations under article 54 of the Statute*

46. During the confirmation hearing, the Defence raised the issue of the Prosecution's alleged failure to comply with its investigative obligations in accordance with article 54 of the Statute.⁷⁵

47. The Defence focused *inter alia* on the alleged failure of the Prosecution to collect evidence mentioned by Witness 355, which the witness was willing to provide,⁷⁶ but which was never requested by the investigation team.⁷⁷

48. As the Chamber has already made clear,⁷⁸ at this stage of the proceedings, the Defence's objections to the manner in which the investigations were conducted can only be viewed in the context of the purpose of the confirmation hearing, and should thus be regarded as a means of seeking a decision declining to confirm the charges. It follows, therefore, that the Defence's objection raised in this instance cannot in itself cause the Chamber to decline to confirm the charges on the basis of an alleged investigative failure on the part of the Prosecution. Rather, this objection may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the "substantial grounds to believe" threshold.

⁷⁵ ICC-02/05-02/09-237-Conf-Exp-AnxA, para. 115; ICC-02/05-02/09-T-21-Red-ENG, p. 69, lines 3-19; p. 71, lines 21-25; p. 72, lines 1-20.

⁷⁶ Statement of Witness 355, DAR-OTP-0165-0352 at 0388, para. 110. See also ICC-02/05-02/09-T-21-Red-ENG, p. 69, lines 10-15.

⁷⁷ ICC-02/05-02/09-T-18-CONF-ENG, p. 30, lines 22-25; p. 31, lines 1-25; p. 32, lines 1-4.

⁷⁸ ICC-02/05-02/09-120-Conf-Exp, para. 3.

2. *Summaries of interviews of anonymous Prosecution witnesses*

49. In relation to the Defence's submissions relating to the probative value of summaries of interviews of anonymous Prosecution witnesses,⁷⁹ the Chamber recalls, at the outset, that article 61(5) of the Statute expressly allows the Prosecution to "rely on documentary or summary evidence", and provides that the Prosecution "need not call the witnesses expected to testify at the trial". The Chamber also recalls that rule 81(4) of the Rules establishes that "the Chamber dealing with the matter shall, on its own motion or at the request of the Prosecution, the accused or any State, take the necessary measures to ensure the confidentiality of information [...] including by authorizing the non disclosure of [the witnesses'] identity prior to the commencement of the trial".

50. The Chamber is of the view that the Prosecution should not be unduly disadvantaged as a result of the use of evidence in a form that is expressly allowed by the governing legal provisions of the Court. However, the Prosecution's right to rely on summary evidence in accordance with article 61(5) of the Statute must be balanced with the right of the Defence, in accordance with article 61(6) of the Statute, to challenge the evidence presented by the Prosecution.

51. Accordingly, the Chamber "may [...] determine that the evidence will have a lower probative value if the Defence does not know the witness's identity

⁷⁹ ICC-02/05-02/09-237-Conf-AnxA, paras. 8-10.

and only a summary of the statement, and not the entire statement, may be challenged or assessed".⁸⁰

52. Therefore, statements of anonymous witnesses will be given a lower probative value⁸¹ and will be evaluated on a case-by-case basis, according to whether the information contained therein is corroborated or supported by other evidence tendered into the case file.⁸²

3. *Mr Abu Garda's unsworn statement*

53. The Chamber notes that, at the opening of the hearing, Mr Abu Garda decided to avail himself of his statutory right to make an unsworn oral statement in his defence in accordance with article 67(1)(h) of the Statute.⁸³ Later during the hearing, the Defence submitted that this statement should be recognised by the Chamber as evidence.⁸⁴ The Prosecution, which has cited the unsworn statement in support of its submissions on several occasions,⁸⁵ stated in its final written observations, albeit in passing, that it also considered Mr Abu Garda's unsworn

⁸⁰ ICC-01/04-01/07-717, para. 159.

⁸¹ *Ibid.*, paras. 159 and 160; ICC-01/04-01/06-517, pp. 4 and 6; and ICC-01/04-01/07-428-Corr, para. 18; see also PTC II, ICC-01/05-01/08-424, paras. 50-51.

⁸² ICC-01/04-01/07-717, paras. 159-160, wherein the Chamber stated that "[w]hile 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". The Chamber acknowledges that corroboration will not be required in order to prove crimes of sexual violence, as envisaged in Rule 63(4) of the Rules. See ICC-01/04-01/07-717, para. 155.

⁸³ ICC-02/05-02/09-T-12-Red-ENG, pp. 42-52.

⁸⁴ ICC-02/05-02/09-T-21-Red-ENG, p. 67, lines 17-24.

⁸⁵ See *e.g.* ICC-02/05-02/09-T-13-ENG, p. 32, line 25, to p. 33, line 2; p. 71, lines 2-11; p. 91, lines 8-13; ICC-02/05-02/09-T-21-Red-ENG, p. 23, lines 9-11; p. 24, lines 14-16; ICC-02/05-02/09-229-Conf-AnxA, para. 2, footnotes 3 and 4; para. 53, footnote 115.

statement to be evidence.⁸⁶ The Chamber therefore considers it necessary to determine the nature of Mr Abu Garda's unsworn statement.

54. The Chamber is of the view that there are two factors which militate against considering an unsworn statement by the suspect to be evidence, namely that (i) the suspect making an unsworn statement does not undergo any form of questioning by the parties, the participants, or the judges; and (ii) the suspect, unlike witnesses, who are obliged to tell the truth,⁸⁷ is under no such obligation and may therefore provide unreliable information to a Chamber.⁸⁸ In the view of the Chamber, an unsworn statement cannot be used as evidence.

55. For these reasons, the Chamber will not consider the unsworn statement of the suspect made pursuant to article 67(1)(h) of the Statute as evidence, but as part of the Defence's submissions.

IV. MATERIAL ELEMENTS OF THE CRIMES

A. Existence and Nature of the Armed Conflict in Darfur

56. The Chamber recalls that the parties have expressed their agreement that the war crimes alleged in the DCC "occurred in the context of and was [sic] associated with a protracted period of armed conflict of a non-international character between the Government of Sudan (GoS) together with forces under its

⁸⁶ ICC-02/05-02/09-229-Conf-AnxA, para. 54.

⁸⁷ Articles 69(1) and 70(1)(a) of the Statute.

⁸⁸ Article 70(1) of the Statute.

control and the various armed rebel groups that operated in the Darfur region including the JEM and the SLA-Unity".⁸⁹

57. In light of this, the Chamber is satisfied that there are substantial grounds to believe that, at the time relevant to the charges, an armed conflict not of an international character existed in Darfur, and it will therefore not further analyse the evidence in that respect.

B. Existence of the Offences under Articles 8(2)(c)(i), 8(2)(e)(iii) and 8(2)(e)(v) of the Statute

58. The Majority of the Chamber ("the Majority") will now turn to the analysis of the elements of the offences with which Mr Abu Garda is charged.⁹⁰

59. The Majority notes at the outset that the offences under articles 8(2)(c)(i) and 8(2)(e)(v) of the Statute, as described in counts 1 and 3 of the DCC, were allegedly committed during and in the aftermath of the alleged attack on the MGS Haskanita on 29 September 2007. In addition, the Majority notes that its findings in relation to the offence charged under Count 2 – especially in relation to whether the MGS Haskanita retained its protected civilian status or should rather be considered a legitimate military objective – will have legal consequences for its findings in relation to the alleged murders charged under

⁸⁹ ICC-02/05-02/09-164-Conf-AnxA, para. 17.

⁹⁰ In his separate opinion, Judge Cuno Tarfusser will elaborate on the reasons why, in his view, the Chamber should refrain from a legal characterisation of the events. As a consequence, he takes no position on the merits of the determination contained in this section.

Count 1 in the DCC. Finally, the Majority also notes that the elements of the offence charged under Count 2 were the main subject of contention between the parties during the confirmation hearing. Taking these factors into consideration, the Majority deems it appropriate to begin by analysing the elements of the offence charged under Count 2 in the DCC.

1. *Directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission: Applicable Law*

60. In **Count 2**, pursuant to article 8 (2)(e)(iii) of the Statute, the Prosecution charges Bahar Idriss Abu Garda with the following:

On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada Locality in North Darfur, the Sudan, knowingly and in the context of and associated with an armed conflict, ABU GARDA, jointly and with JEM forces under his control and SLA-Unity forces, intentionally directed attacks against AMIS peacekeeping personnel, installations, materials, units and vehicles involved in a peacekeeping mission established in accordance with the Charter of the United Nations, which were entitled to the protection given to civilians and civilian objects under the international law of armed conflict, with the knowledge of the factual circumstances that established that protection.⁹¹

61. The war crime provided for in article 8 (2)(e)(iii) of the Statute is defined as “intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.”

⁹¹ ICC-02/05-02/09-91-Red, p. 33.

62. According to the Elements of Crimes, for the conduct in question to constitute the crime provided for in article 8 (2)(e)(iii) of the Statute, the following subjective and objective elements are required:

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

63. The Majority will first analyse the objective elements before turning to the subjective elements.

a. Objective Elements

i. The perpetrator directed an attack

64. The Majority notes that there is no definition of the term “attack” in the Statute or in the Elements of Crimes. Taking into consideration the reference to “the established framework of international law” in the chapeau of article 8 (2)(e) of the Statute, and the reference to the “applicable treaties and the principles and

rules of international law, including the established principles of the international law of armed conflict" in article 21 (1)(b) of the Statute, the Majority is of the view that it must refer in this regard to the four Geneva Conventions adopted on 12 August 1949 and their two Additional Protocols adopted on 8 June 1977.

65. The term "attack" is defined in article 49 of Additional Protocol I to the Geneva Conventions of 12 August 1949 ("API") as "acts of violence against the adversary, whether in offence or in defence". Although the definition of an attack is in API, which is only applicable to international armed conflicts, this term is given the same meaning in article 13(2) of Additional Protocol II ("APII"), which applies to armed conflicts not of an international character.⁹² Furthermore, unlike article 85 (3) of API, article 8 (2)(e)(iii) of the Statute does not require any material result or any harmful impact on the personnel, installations, material, units or vehicles involved in the peacekeeping mission which are being targeted by the attack.⁹³

66. Another essential part of this element is the need for a causal connection between the perpetrator and the attack. The requirement that "the perpetrator" directed the attack indicates that, for this particular crime, a causal link between the perpetrator's conduct and the consequence is necessary, so that the concrete

⁹² Junod, S.S., 'Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)' in Sandoz Y., Swinarski C., and Zimmerman B. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff Publishers, Geneva 1987, p. 1452, para. 4783.

⁹³ Dörmann, K., *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge 2003, p. 452 in relation with p. 153. See also Cottier, M. 'Article 8 – War Crimes' in Triffterer, O. (ed.), *op. cit.*, pp. 494-495 as well as the United Nations, Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/RES/49/59 (1994), article 9, para. 1.

consequence, the attack in this case, can be seen as having been caused by the perpetrator.⁹⁴

67. A determination as to whether there is sufficient evidence to establish substantial grounds to believe that a person committed the crime in issue will depend on the assessment of the precise form of participation under articles 25 and 28 of the Statute for which that person was charged. However, as commentators have pointed out:

No matter whether one starts from the final act which constitutes the crime and moves up the chain of causation, or whether one starts from the initial conduct that brought about the final result and seeks to identify contributing causal factors, the relationship between the final result and any causal conduct must be established. Such causal connection can be of a direct nature or of a contributing one and it must be established through a rational causal connection.⁹⁵

- ii. *The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations*

68. According to the Elements of Crimes, the second element requires that the “object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.”

69. While noting the requirement that the peacekeeping mission be established in accordance with the UN Charter, as analysed below, the Majority

⁹⁴ See Werle, G., *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague 2005, p. 98.

⁹⁵ Bassiouni, M.C., *Crimes Against Humanity in International Criminal Law*, 2nd Revised Edition, Kluwer Law International, The Hague 1999, p. 397.

considers it worth emphasizing that the UN Charter does not define “peacekeeping”, nor does it mention the term. “Peacekeeping” developed out of practical experience, and has been described by the United Nations as a “unique and dynamic instrument developed by the Organization as a way to help countries torn by conflict create the conditions for lasting peace.”⁹⁶

70. The United Nations further states that the term “peacekeeping [...] defies simple definition”⁹⁷ and that “[o]ver the years, UN peacekeeping has evolved to meet the demands of different conflicts and a changing political landscape [...] UN peacekeeping continues to evolve, both conceptually and operationally, to meet new challenges and political realities.”⁹⁸

71. The Majority thus notes that peacekeeping missions are not static and that their features may vary depending, *inter alia*, on the context in which they operate. However, despite the absence of any specific legal basis in the UN Charter and having regard to the evolving nature of such missions, the Majority notes that three basic principles are accepted as determining whether a given mission constitutes a peacekeeping mission, namely (i) consent of the parties; (ii) impartiality; and (iii) the non-use of force except in self-defence.⁹⁹

⁹⁶ See UN Peacekeeping webpage, retrieved from <http://www.un.org/en/peacekeeping/>, last visited 2 February 2010.

⁹⁷ Ibid.

⁹⁸ Ibid. According to the UN, the first peacekeeping mission was established in 1948 and since then the UN has launched more than 60 peacekeeping missions around the world. See <http://www.un.org/en/peacekeeping/list.shtml>.

⁹⁹ United Nations, Department of Peacekeeping Operations, “United Nations Peacekeeping Operations: Principles and Guidelines,” 2008 (hereinafter the “UN Peacekeeping Principles and Guidelines”), p. 31; United Nations General Assembly – Security Council, “Report of the Panel on United Nations Peace Operations”, A/55/305-S/2000/809, 21 August 2000 (hereinafter the “Brahimi Report”); United Nations Secretary-General, Report of the Secretary General, “Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of

72. More specifically in relation to the consent of the parties, the Majority acknowledges the fact that the consent of the host State is a prerequisite for a peacekeeping mission to be stationed on its territory¹⁰⁰ and that, accordingly, such consent must be obtained.¹⁰¹ Consent of the main parties to the conflict is also sought in practice.¹⁰² In this regard, although the Report of the Panel on United Nations Peace Operations (the "Brahimi Report") states that "consent of local parties [...] should remain [one of] the bedrock principles of peacekeeping,"¹⁰³ as stated by the Special Court for Sierra Leone in its 2 March 2009 Judgment, in non-international armed conflicts, "consent is obtained from the warring parties, not out of legal obligation, but rather to ensure the effectiveness of the peacekeeping operation."¹⁰⁴

73. With regard to the impartiality requirement, it is worth noting that according, *inter alia*, to the Brahimi Report and the "United Nations Peacekeeping Operations: Principles and Guidelines" (hereinafter the "UN Peacekeeping Principles and Guidelines"),¹⁰⁵ impartiality is not to be confused

the Fiftieth Anniversary of the United Nations", A/50/60-S/1995/1, 3 January 1995, para. 33. See also Cottier, M., *op. cit.*, pp. 333 and 494. Concerning the use of force for the defence of the mission's mandate, the Majority notes that this issue not being at stake in the present case will not be entertained in the present decision.

¹⁰⁰ This notably stems from article 2 (7) of the UN Charter.

¹⁰¹ International Court of Justice (hereinafter "the ICJ"), *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 151, at pp. 164-165, cited by Gray, C., *International Law and the Use of Force*, 3rd ed., Oxford University Press, Oxford 2008, p. 298.

¹⁰² UN Peacekeeping Principles and Guidelines, p. 31. See also Cottier M., *op. cit.*, pp. 333-334.

¹⁰³ Brahimi Report, para. 48.

¹⁰⁴ Special Court for Sierra Leone, Trial Chamber I, *The Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgment of 2 March 2009, para. 226.

¹⁰⁵ UN Peacekeeping Principles and Guidelines, p. 31

with neutrality or inactivity.¹⁰⁶ The Majority notes in particular the UN Peacekeeping Principles and Guidelines according to which:

United Nations peacekeeping operations must implement their mandate without favour or prejudice to any party. Impartiality is crucial to maintaining the consent and cooperation of the main parties, but should not be confused with neutrality or inactivity. United Nations peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in their execution of their mandate [...] Notwithstanding the need to establish and maintain good relations with the parties, a peacekeeping operation must scrupulously avoid activities that might compromise its image of impartiality. A mission should not shy away from a rigorous application of the principle of impartiality for fear of misinterpretation or retaliation, but before acting it is always prudent to ensure the grounds for acting are well-established and can be clearly communicated to all [...] Where the peacekeeping operation is required to counter such breaches, it must do so with transparency, openness and effective communication as to the rationale and appropriate nature of its response.¹⁰⁷

74. The Majority, moreover, notes the distinction between those peacekeeping missions which may only use force in self-defence and the so-called peace-enforcement missions established by the UN Security Council under Chapter VII of the UN Charter, which have a mandate or are authorized to use force beyond self-defence in order to achieve their objective.¹⁰⁸ Similarly, the Convention on the Safety of United Nations and Associated Personnel excludes from its scope “a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of

¹⁰⁶ According to the Brahimi Report, para. 50: “impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement.”

¹⁰⁷ UN Peacekeeping Principles and Guidelines, p. 33.

¹⁰⁸ Cottier M., *op. cit.*, p. 333. See also UN Peacekeeping Principles and Guidelines, p. 18. Article 42 of the UN Charter indeed allows the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”

the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”¹⁰⁹

75. Finally, the Statute also requires the peacekeeping mission to be established “in accordance with the Charter of the United Nations.” The Majority is of the view that such a condition is not tantamount to a requirement that the mission be established by the United Nations only, and shall be understood to encompass also missions that are otherwise foreseen by the UN Charter.

76. In this regard, the Majority notes that pursuant to article 52 (1) of the UN Charter, “[n]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.” The term “arrangements or agencies” has been analysed as meaning “a union of States or an international organization based upon a collective treaty or a constitution and consistent with the Purposes and Principles of the United Nations, whose primary task is the maintenance of peace and security under the control and within the framework of the United Nations.”¹¹⁰ The only limitation on the activity of these regional arrangements or agencies with regard to the maintenance of peace and security is set out in article 53 (1) of the UN Charter, which states that “no enforcement action shall be taken under regional

¹⁰⁹ See article 2(2) of the Convention on the Safety of United Nations and Associated Personnel, 9 December 1994.

¹¹⁰ Simma, B. *The United Nations Charter: A Commentary* Oxford University Press, Oxford 1995, p. 699.

arrangements or by regional agencies without the authorization of the Security Council”.

- iii. *Such personnel, installations, material, units or vehicles were entitled to the protection given to civilians or civilians objects under the international law of armed conflict*

77. The Majority notes that an attack against a peacekeeping mission constitutes a crime under the Statute as long as its personnel, installations, material, units or vehicles are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

Protection given to civilians

78. Article 13 (3) of APII provides that “civilians shall enjoy the protection afforded by [Part IV of the Protocol], *unless and for such time* as they take a direct part in hostilities” [emphasis added]. The same exclusion applies, under article 2 (2) of the Convention on the Safety of United Nations and Associated Personnel, to personnel engaged as combatants.

79. In this respect, article 50(1) of API defines civilians as “any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.”¹¹¹

¹¹¹ See also ICC-01/04-01/07-717, para. 266 and footnote 366. See also Henckaerts, J.M. and Doswald-Beck, L. *Customary International Humanitarian Law, Volume 1: Rules*, Oxford University Press, Oxford 2005, at Rule 5.

80. On the other hand, neither treaty law nor customary law expressly define what constitutes direct participation in hostilities. However, the Commentary to article 13 of APII provides guidance as to its meaning. According to the Commentary, “[h]ostilities have been defined as ‘acts of war’ that by their nature or purpose struck at the personnel and ‘*matériel*’ of enemy armed forces.”¹¹² The Commentary further indicates that taking direct part in hostilities “implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.”¹¹³

81. Furthermore, in the Appeal Judgement in the *Strugar* case, the ICTY gave examples of “direct participation in hostilities”, as recognised in “military manuals, soft law, decisions of international bodies and the commentaries to the Geneva Conventions and the Additional Protocols”.¹¹⁴ These examples include: bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, and transporting weapons in proximity to combat operations.¹¹⁵

82. In the *Lubanga* case, the Chamber also held, in relation to the use of children under the age of fifteen years to actively participate in hostilities,¹¹⁶ that active participation in hostilities “means not only direct participation in

¹¹² Junod, S.S., op. cit, p. 1453, para. 4788.

¹¹³ Ibid., para. 4787.

¹¹⁴ ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Appeal Judgement, 17 July 2008, para. 177.

¹¹⁵ Ibid.

¹¹⁶ Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute.

hostilities, combat in other words, but also covers active participation in combat-related activities [...]."¹¹⁷

83. In light of the foregoing considerations, the Majority concludes that, under the Statute, personnel involved in peacekeeping missions enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities.¹¹⁸ The Majority also finds that such protection does not cease if such persons only use armed force in exercise of their right to self-defence.¹¹⁹ Finally, and adopting the precedent of the ICTY, the Majority finds that any determination as to whether a person is directly participating in hostilities must be carried out on a case-by-case basis.¹²⁰

84. The Majority notes the non-exhaustive list of criteria¹²¹ established by the Special Court for Sierra Leone in its 2 March 2009 Judgment in order to determine whether peacekeeping personnel or objects of a peacekeeping mission

¹¹⁷ ICC-01/04-01/06-803-tEN, para. 261. Furthermore, the Chamber previously underlined that "[t]he expressions "direct part in hostilities" and "active part in hostilities" are to be treated as synonymous, see ICC-01/04-01/07-717, para. 266 and footnote 366.

¹¹⁸ Dörmann K., *op. cit.*, p. 454.

¹¹⁹ *Ibid.*, p. 159; see also Special Court for Sierra Leone, Trial Chamber I, *The Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgment of 2 March 2009, para. 233. The Majority also notes that the SCSL held that "the use of force by peacekeepers in self-defence in the discharge of their mandate, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers" (para. 233).

¹²⁰ ICTY, *The Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Appeal Judgement, 17 July 2008, para. 178.

¹²¹ Special Court for Sierra Leone, Trial Chamber I, *The Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgment of 2 March 2009, para. 234; these criteria were: (a) the relevant Security Council resolutions for the operation; (b) the role and practices actually adopted by the peacekeeping mission during the particular conflict; (c) their rules of engagement and operational orders; (d) the nature of the arms and equipment used by the peacekeeping force; (e) the interaction between the peacekeeping force and the parties involved in the conflict, (f) any use of force between the peacekeeping force and the parties in the conflict, and (g) the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel.

were entitled to protection. That case before the Special Court for Sierra Leone was, however, limited to attacks on peacekeeping personnel, as the indictment did not contain allegations of attacks against installations, material, units or vehicles involved in a peacekeeping mission.¹²² By contrast, the issue in the present count before this Chamber is the lawfulness of an attack not only on the personnel but also on the objects involved in a peacekeeping mission.

Protection given to civilian objects

85. The Majority notes that, while international humanitarian law offers protection to all civilians in both international armed conflict and armed conflict not of an international character, the same cannot be said of all civilian objects, in respect of which protection differs according to the nature of the conflict. Whereas article 52 of API provides for “general protection of civilian objects” during international armed conflict,¹²³ such broad protection is not explicitly provided under Additional Protocol II, which only affords protection to a limited number of civilian objects.¹²⁴ The negotiators of the Statute were certainly aware of this marked difference between international armed conflict and armed conflict not of an international character. Accordingly, the war crime of attacking civilian objects described in article 8 (2)(b)(ii) has no equivalent in article 8 (2)(e) of the Statute, which pertains to armed conflict not of an international character.

¹²² Ibid., para. 213.

¹²³ Article 52 states that “[c]ivilian objects shall not be the object of attack or of reprisals.”

¹²⁴ APII, article 14 (protection of objects indispensable to the survival of the civilian population), article 15 (protection of works and installations containing dangerous forces) and article 16 (protection of cultural objects and of places of worship).

86. During discussions within the Preparatory Commission for the International Criminal Court, the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa and the Permanent Observer Mission of Switzerland to the United Nations submitted to the Working Group on Elements of Crimes a paper prepared by the International Committee of the Red Cross (ICRC) on, *inter alia*, the elements of article 8 (2)(e)(iii) of the Statute. In this document it was argued that, although there is no comparable provision under APII to article 52 of API, "the indication found in [the latter] for when an object is no longer entitled to protection as a civilian object might be of relevance in a non-international armed conflict as well".¹²⁵

87. In three international instruments, a definition identical to that in article 52 of Additional Protocol I was used to describe what was meant by a "military objective" and hence, *a contrario*, a civilian object, in both international armed conflict and armed conflict not of an international character. In article 2(6) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices,¹²⁶ "military objective" means, as far as objects are concerned, "any object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". A similar definition can be found in article 1(f) of the Second

¹²⁵ "Request from the Governments of Belgium, Costa Rica, Finland, Hungary, the Republic of Korea, South Africa and the Permanent Observer Mission of Switzerland to the United Nations regarding the text prepared by the International Committee of the Red Cross on article 8, paragraph 2 (e) (i), (ii), (iii), (iv), (ix) and (x), of the Rome Statute of the International Criminal Court", PCNICC/1999/WGEC/INF/2/Add.3, 24 November 1999, p. 16.

¹²⁶ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons) which may be deemed to be excessively injurious or to have indiscriminate effects, as amended on 3 May 1996.

Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted on 26 March 1999,¹²⁷ and in Article 1(3) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons.¹²⁸ On the basis of the first two texts, the ICRC paper submitted during the Preparatory Commission concluded that “an object is entitled to protection, unless and for such time as it is used to make an effective contribution to the military action of a party to a conflict”.¹²⁹

88. In its study on Customary International Humanitarian Law,¹³⁰ the ICRC identifies four rules on the distinction between civilian objects and military objectives, which are considered customary law in relation to both international and non-international armed conflicts. Of particular relevance is rule 8, which establishes that the definition of military objective in article 52 (2) of API is also applicable, as a customary rule of international humanitarian law, to armed conflict not of an international character.

89. In light of the foregoing considerations, the Majority concludes that installations, material, units or vehicles involved in a peacekeeping mission in

¹²⁷ The Second Protocol defines a military objective as: “an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.”

¹²⁸ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons) which may be deemed to be excessively injurious or to have indiscriminate effects 10 October 1980 and amendment to article 1, 21 December 2001, which extended the applicability of the Protocol to armed conflicts not of an international character.

¹²⁹ See document PCNICC/1999/WGEC/INF/2/Add.3, 24 November 1999, p. 17; see also Dörmann K., op. cit., p. 159.

¹³⁰ See Henckaerts J.-M. and Doswald-Beck L., op. cit., pp. 25-36; the ICTY Appeals Chamber reached the same conclusion in following cases: *The Prosecutor v. Dario Kordić and Mario Čerkez*, 17 December 2004, case No. IT-95-14/2-A, para. 59 and *The Prosecutor v. Stanislav Galić*, 30 November 2006, case No. IT-98-29-A, para. 190.

the context of an armed conflict not of an international character shall not be considered military objectives, and thus shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.¹³¹

iv. The conduct took place in the context of, and was associated with, an armed conflict not of an international character

90. The Majority recalls that a crime has taken place in the context of, or in association with, an armed conflict where “the alleged crimes were closely related to the hostilities.”¹³² This means that the armed conflict “must play a substantial role in the perpetrator’s decision, in his or her ability to commit the crime or in the manner in which the conduct was ultimately committed.”¹³³

91. As this Chamber has already held in the *Lubanga* case, “the involvement of armed groups with some degree of organisation and the ability to plan and carry out sustained military operations would allow for the conflict to be characterised as an armed conflict not of an international character.”¹³⁴ In addition, “the armed

¹³¹ Article 52(2) of API. See also ICTY, *The Prosecutor v. Stanislav Galić*, Trial Chamber Judgment, 5 December 2003, case No. IT-98-29-T, para. 51: “In case of doubts as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action”.

¹³² ICC-01/04-01/06-803-tEN, para. 288.

¹³³ *Ibid.*, para. 287.

¹³⁴ *Ibid.*, para. 233.

groups in question [need] to have the ability to plan and carry out military operations for a prolonged period of time.”¹³⁵

92. In the view of the Majority, it is not necessary for the armed conflict to have been regarded as the ultimate reason for the criminal conduct, nor must the conduct have taken place in the midst of battle.¹³⁶ It should however, be related to it, because “criminal acts or offences unrelated to the armed conflict are not considered to be war crimes.”¹³⁷

b. Subjective elements

i. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack

93. The Majority notes that this subjective element is similar to that found in the Elements of Crimes for articles 8 (2)(b)(i) and 8 (2)(e)(i) concerning attacks on civilians, whether in international armed conflict or in armed conflict not of an international character. In this regard, the Chamber held in the *Katanga and Ngudjolo* case that, “in addition to the standard *mens rea* requirement provided in article 30 of the Statute, the perpetrator must intend to make individual civilians not taking direct part in the hostilities or the civilian population the object of the

¹³⁵ *Ibid.*, para. 234.

¹³⁶ *Ibid.*, para. 287.

¹³⁷ See ICC-01/04-01/07-717, para. 383. In that decision the Chamber endorsed the ICTY’s findings in the *Tadić* case, which considered the following factors as decisive in assessing the sufficient nexus between conduct and the armed conflict: “the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.”, para. 382.

attack. This offence therefore, first and foremost, encompasses *dolus directus* of the first degree".¹³⁸ The Majority considers that this finding is also applicable to article 8(2)(e)(iii) of the Statute in relation both to attacks on personnel involved in a peacekeeping mission and to attacks on installations, material, units or vehicles involved in a peacekeeping mission.¹³⁹

ii. *The perpetrator was aware of the factual circumstances that established the protection*

94. The Majority is of the view that this fifth element under article 8(2)(e)(iii) of the Elements of Crimes excludes the defence of mistake of law provided for in article 32 of the Statute, as only knowledge in relation to facts establishing that the installations, material, units or vehicles and personnel were involved in a peacekeeping mission is necessary, and not legal knowledge pertaining to the protection thereof.¹⁴⁰

¹³⁸ ICC-01/04-01/07-717, para. 271.

¹³⁹ See also Frank D., 'Article 8(2) (b) (iii) – Attacking Personnel or Objects Involved in a Humanitarian Assistance or Peacekeeping Mission' in Lee R. (ed.), op. cit., p. 147.

¹⁴⁰ Piragoff, D.K. and Robinson, D. M., 'Article 30 – Mental Element', in Triffterer, O. (ed.), op. cit., pp. 852-853. Frank D., 'Article 8(2) (b) (iii) – Attacking Personnel or Objects Involved in a Humanitarian Assistance or Peacekeeping Mission' in Lee R. (ed.), op. cit., p. 147. See also for a definition of "knowledge" ICC-01/04-01/07-717, paras. 529-530 and footnote 691 and ICC-01/04-01/06-803-tEN, paras. 315 and 352.

- iii. *The perpetrator was aware of the factual circumstances that established the existence of an armed conflict*

95. The Majority notes that the Introduction to article 8 of the Elements of Crimes explains that:

With respect to the last two elements listed for each crime:

- There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
- In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
- There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'.

96. As the Chamber has already held in this regard, this provision does not go as far as to require the perpetrator to conclude, "on the basis of a legal assessment of the said circumstances, that there was an armed conflict."¹⁴¹

2. *Whether there is sufficient evidence to establish substantial grounds to believe that the war crime of intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission was committed at the AMIS MGS Haskanita compound on 29 September 2007*

97. The evidence submitted in the present case shows that, in response to the situation in Darfur, the GoS, the SLA/M and the JEM entered into a series of binding agreements, albeit at different times. A peace agreement was signed on 3 September 2003 by the GoS and the SLA/M which aimed "to call a ceasefire

¹⁴¹ ICC-01/04-01/06-803-tEN, para. 360; see also PTC II, ICC-01/05-01/08-424, paras. 238-239.

between the two parties and end all hostile operations that, by their nature, might lead to an intensification of the situation.”¹⁴² Subsequently, on 8 April 2004, the GoS¹⁴³ and representatives of both the SLA/M¹⁴⁴ and the JEM¹⁴⁵ signed the Humanitarian Ceasefire Agreement (“the HCA”) in N’Djamena.¹⁴⁶ Of particular importance is the meeting held by the African Union Peace and Security Council on 25 May 2004, during which it authorized all necessary steps to be taken “to ensure an effective monitoring of the Humanitarian Ceasefire Agreement, in particular through the deployment of an AU Observer Mission, with the required civilian component and, if necessary the protection element, to support the work of the Ceasefire Commission (CFC), based on the outcome of the AU-led Reconnaissance Mission to the Sudan and Chad (from 7 to 16 May 2004).”¹⁴⁷

98. Further to that meeting, on 28 May 2004 representatives of the GoS, the SLA/M and the JEM, under the auspices of the African Union and Chadian mediators, signed the Agreement on the Modalities for the Establishment of the

¹⁴² DAR-OTP-0116-0433, *A Peace Agreement between the Government of the Republic of Sudan and the Sudanese Liberation Army*, 3 September 2003, in particular article 1.

¹⁴³ Represented by Acherif Ahmad Oumar Badour, Minister of Investment.

¹⁴⁴ Represented by Minni Arkou Minawi, Secretary General.

¹⁴⁵ Represented by Nasradine Hussein Diffallah, President of the Sudanese Justice and Equality Movement (SJEM).

¹⁴⁶ Humanitarian Ceasefire Agreement, DAR-OTP-0171-0579.

¹⁴⁷ DAR-OTP-0154-0495 at 0496-0497, para. 6, *Communiqué of the Solemn Launching of the Tenth Meeting of the Peace and Security Council*; See also DAR-OTP-0154-0056 at 0058, para. 8: “Takes note of the progress made in the deployment of the military observers and the steps taken towards the deployment of the Protection Force, provided for by the Agreement of 28 May 2004 on the Establishment of the CFC and the Deployment of Military Observers, and whose mandate, as per the understanding reached during the 3rd Ordinary Session of the Assembly, includes the protection, within the capacity of the Force, of the civilian population [...]”

Ceasefire Commission and the Deployment of Observers in the Darfur ("the Modalities Agreement").¹⁴⁸

99. AMIS was thus created as the CFC's "operational arm",¹⁴⁹ and started its deployment in June 2004.¹⁵⁰

100. AMIS was divided into sectors, which were further divided into Military Group Sites (the "MGS").¹⁵¹ The MGS were composed of Military Observers ("MILOBs"), Civilian Police ("CivPols"), a Protection Force ("the PF") and interpreters. Furthermore, in compliance with the Modalities Agreement,¹⁵² representatives of the parties to the conflict were also to be present at the CFC headquarters as well as in each sector. The Majority notes that, from the available evidence, it further appears that the parties' representatives were also present in the MGS.¹⁵³

¹⁴⁸ DAR-OTP-0021-0261.

¹⁴⁹ *Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC)*, DAR-OTP-0154-0021 at 0023.

¹⁵⁰ *Communiqué of the Peace and Security Council*, 12th meeting held on 4 July 2004 [PSC/MIN/Comm.(XII)], DAR-OTP-0154-0051 at 0053; DAR-OTP-0154-0074, HRW Report, *Sudan, Imperatives for Immediate Change. The African Mission in Sudan*, at 0089-0090; Press article, *Sudan Rebels kill 10 Darfur peacekeepers*, at DAR-OTP-0154-0292 at 0293; Press article, *Darfur Raid kills 10 African peacekeepers*, at DAR-OTP-0154-0329.

¹⁵¹ Statement of Witness 416, DAR-OTP-0165-0381 at 0385, para 18; Statement of Witness 315, DAR-OTP-0164-1159 at 1164, para. 19; Statement of Witness 417, DAR-OTP-0165-0424 at 0427, para 13; Statement of Witness 420, DAR-OTP-0165-0521 at 0524, para. 15; Statement of Witness 419, DAR-OTP-0165-0489 at 0494, para. 24.

¹⁵² Modalities Agreement, DAR-OTP-0021-0261 at 0264 and 0267, para. 6.

¹⁵³ Statement of Witness 447, DAR-OTP-0169-1160 at 1165, para. 27: "People who lived in the MGS apart from soldiers, were representatives of the warring factions. These are: Government of Sudan and SLA Minni Minawi. There were also about three language assistants."; Statement of Witness 416, DAR-OTP-0165-0381 at 0387, para. 28; Statement of Witness 419, DAR-OTP-0165-0489 at 0496, para. 32 and at 0501, paras. 60-62; Statement of Witness 446, DAR-OTP-0169-0808 at 0812, para. 21; Statement of Witness 420, DAR-OTP-0165-0521 at 0524, para. 15 and at 0526, para. 23.

101. The protection of personnel, as well as of the MGS, was provided by the PF, which was the only armed force present at the sites.¹⁵⁴

102. Sector 8 in Al Daein comprised four MGS, one of which was the MGS Haskanita, the subject of the case before the Chamber.¹⁵⁵

103. The Majority notes that the fact that the conduct took place in the context of and was associated with an armed conflict has already been agreed to by the parties.¹⁵⁶ As previously indicated, the Chamber considers this fact to have been proven in accordance with rule 69 of the Rules and deems it unnecessary to analyse it in detail.

104. The Majority will examine the available evidence relating to the following objective elements: (i) whether an attack was directed against the MGS Haskanita; (ii) whether AMIS was involved in a peacekeeping mission in accordance with the UN Charter; and (iii) whether its personnel and installations, material, units or vehicles were entitled to the protection given to civilians and civilian objects under the international law of armed conflict.

¹⁵⁴ See for example Modalities Agreement, DAR-OTP-0021-0261 at 0269. See also Statement of Witness 446, DAR-OTP-0169-0808 at 0811, para. 15: "The first goal was to protect the MILOBs and guard the AMIS camp in Haskanita, then to defend ourselves." Statement of Witness 419, DAR-OTP-0165-0489 at 0504, para. 78 and Statement of Witness 417, DAR-OTP-0165-0424 at 0427, para. 12.

¹⁵⁵ Statement of Witness 416, DAR-OTP-0165-0381 at 0385, para. 18 and statement of Witness 417, DAR-OTP-0165-0424 at 0427, para. 13.

¹⁵⁶ ICC-02/05-02/09-164-Conf-AnxA, para. 17.

i. *Whether the perpetrator directed an attack against the MGS Haskanita*¹⁵⁷

105. The Majority notes the extensive evidence adduced by the Prosecution in proof of the fact that the MGS Haskanita was attacked at about 7 pm on the evening of 29 September 2007.¹⁵⁸ This evidence includes witness statements,¹⁵⁹ United Nations and African Union reports,¹⁶⁰ media reports and press articles.¹⁶¹ Furthermore, having analysed the submissions of the Defence, the Majority is of the view that the fact that an attack took place is not in dispute in this case.¹⁶² The

¹⁵⁷ As the alleged responsibility of Mr Abu Garda as a co-perpetrator or as an indirect co-perpetrator will be analysed in a separate section of the Decision, in this section the Majority will only assess the occurrence of the alleged attack.

¹⁵⁸ United Nations Security Council, *Security Council Presidential Statement Condemns Deadly Attack on Peacekeepers in Darfur, Says Any Attempt to Undermine Peace Process is Unacceptable*, SC/9135, 2 October 2007, DAR-OTP-0161-0072; International Crisis Group, *Darfur's New Security Reality*, Africa report No 134, 26 November 2007, DAR-OTP-0148-0461 at 0481; *African Peacekeepers Killed in Darfur Attack*, Sudan Tribune, 15 September 2008, DAR-OTP-0154-0138; *Darfur Attack Kills 10 AU Troops; Dozens Missing*, Reuters, 30 September 2007, DAR-OTP-0154-0366; Statement of Witness 420, DAR-OTP-0165-0521 at 0531, para. 52; Statement of Witness 446, DAR-OTP-0169-0808 at 0819, paras. 91-92.

¹⁵⁹ Statement of Witness 416, DAR-OTP-0165-0381 at 0389, para. 34; Statement of Witness 419, DAR-OTP-0165-0489 at 0504, paras. 73-74; Statement of Witness 417, DAR-OTP-0165-0424 at 0432, para.37; Statement of Witness 420, DAR-OTP-0165-0521 at 0531, para. 52; Statement of Witness 446, DAR-OTP-0169-0808 at 0819, paras. 91-92; Statement of Witness 447, DAR-OTP-0169-1160 at 1172, paras. 77-79.

¹⁶⁰ UN Security Council, *Report of the Secretary General on the Deployment of the African Union-United Nations Hybrid Operation in Darfur*, S/2007/596, DAR-OTP-0157-1318 at 1322, para. 19; *Investigation Report on the Attack on MGS Haskanita on 29/30 Sep 2007 by Armed Faction to the Darfur Conflict*, African Union, AMIS/FHQ/INTSY/G/002, 9 October 2007, DAR-OTP-0160-0826; United Nations Security Council, *Security Council Presidential Statement Condemns Deadly Attack on Peacekeepers in Darfur, Says Any Attempt to Undermine Peace Process is Unacceptable*, SC/9135, 2 October 2007, DAR-OTP-0161-0072.

¹⁶¹ *Peacekeepers in Darfur Hold Farewell Parade for Slain Troops*, available at <http://www.guardiannewsngr.com/news/article02/051007>, DAR-OTP-0152-0244; *Tribute to the Brave, AMIS Bids Farewell to "Soldiers-for-Peace"*, AMIS News Bulletin, 9 October 2007, DAR-OTP-0153-1860; *African Peacekeepers Killed in Darfur Attack*, Sudan Tribune, 15 September 2008, DAR-OTP-0154-0138; *African Union Attacked, Seven Killed in Darfur*, Reuters, 30 September 2007, DAR-OTP-0154-0368; *U.N. Says Darfur Attack Shows Need for Robust Force*, 2nd October 2007, DAR-OTP-0154-0378.

¹⁶² ICC-02/05-02/09-237-Conf-AnxA; ICC-02/05-02/09-T-21-Red-ENG, pp. 47-81.

Majority is therefore satisfied that there are substantial grounds to believe that an attack was directed against the MGS Haskanita on 29 September 2007.

ii. *Whether AMIS was involved in a peacekeeping mission in accordance with the Charter of the United Nations*

106. As explained above, in assessing whether AMIS is to be considered as a peacekeeping mission, the Majority will be guided by the following three principles: consent of the parties; impartiality; and non-use of force except in self-defence.

Consent of the parties

107. As previously discussed, after signing the HCA in N'Djamena on 8 April 2004, on 28 May 2004 the GoS and representatives of the SLA/M and JEM further agreed on the modalities for the establishment of the CFC and the deployment of observers in Darfur.¹⁶³ Thus AMIS was established by an agreement between the host State, namely the GoS, and two of the militia involved in the armed conflict not of an international character that was ongoing in Darfur at the time of the agreement.¹⁶⁴

108. The Majority further notes that on 4 June 2004 the GoS, acting as host State for the CFC on Darfur, *inter alia* agreed to: (i) the application of the AU Convention on Diplomatic Privileges and Immunities *vis-à-vis* the CFC's

¹⁶³ DAR-OTP-0005-0308.

¹⁶⁴ See also DAR-OTP-0154-0004, *Protocol between the Government of the Sudan (GoS), the Sudan Liberation Movement/Army (SLM/A), the Justice and Equality Movement (JEM) on the Enhancement of the Security Situation in Darfur in accordance with the N'Djamena Agreement of 9 November 2004, at 0006-0008; and DAR-OTP-0005-0308, Modalities Agreement.*

property and members;¹⁶⁵ (ii) the treatment, at all times, of "the military and civilian personnel of the CFC with full respect for the principles and rules of the international conventions applicable to the treatment of military and civilian personnel, including the Vienna Convention on Diplomatic Relations of 18 April 1961;"¹⁶⁶ and (iii) the display within its territory of the AU flag at CFC headquarters, camps or other premises, and on vehicles and aircraft.¹⁶⁷

109. In light of the abovementioned agreements, the Majority finds that the consent of the host State to the deployment of AMIS was obtained. The Majority further notes that, in addition to the host State's consent, the consent of parties to the conflict active at the time of the agreements was also obtained.

Impartiality

110. The Majority recalls that AMIS was essentially mandated: (i) to monitor and observe compliance with the HCA of 8 April 2004; (ii) to assist in the process of confidence building; and (iii) to contribute to a secure environment for the delivery of humanitarian relief and, beyond that, the return of IDPs and refugees to their homes, in order to assist in increasing the level of compliance of all parties with the HCA and to contribute to the improvement of the security situation throughout Darfur.¹⁶⁸

¹⁶⁵ Modalities Agreement, at 0023.

¹⁶⁶ Ibid. at 0024, para. 8(b).

¹⁶⁷ Ibid. at 0025, para. 11.

¹⁶⁸ DAR-OTP-0154-0500 at 0501, *Communiqué of the Seventeenth Meeting of the Peace and Security Council*, para. 4.

111. According to its mandate, the role ascribed to AMIS as an independent monitoring mission required that it treat all parties to the conflict in an impartial manner.

112. Witness statements from AMIS personnel make it clear that they were made to understand that their mandate was to treat the parties to the conflict on an equal footing. It appears from the evidence before the Chamber that the relationship between the warring parties in the MGS Haskanita area was such that, at times when they encountered difficulties in the exercise of their mandated function, AMIS personnel nevertheless continued to interact with the various parties on an equal footing.¹⁶⁹

Non-use of force except in self-defence

113. The HCA signed on 8 April 2004 provided for the establishment of the CFC,¹⁷⁰ which was initially entrusted with the mandate of, *inter alia*: (i) planning, verifying and ensuring the implementation of the rules and provisions of the ceasefire; and (ii) receiving, verifying, analysing and judging complaints related to possible violations of the ceasefire.¹⁷¹ The CFC was also to report to a Joint

¹⁶⁹ Statement of Witness 416, DAR-OTP-0165-0381 at 0393, para. 59: "In my view, AMIS never took sides with any of the parties during the conflict. The only assistance Mgs Haskanita provided to non-AMIS personnel was in the form of medical treatment they provided to the local community in Haskanita."; Statement of Witness 420, DAR-OTP-0165-0521 at 0525, para. 18: "As a serving personnel of AMIS in this period and based on my knowledge of events, I can confirm that at the level of Haskanita, Al Daein and Al Fasher, AMIS was neutral and not partial to either the GoS or the rebels."

¹⁷⁰ Humanitarian Ceasefire Agreement, DAR-OTP-0043-0045 at 0050, article 3.

¹⁷¹ *Ibid.*, at 0051, article 4.

Commission composed of the parties, the Chadian mediators and the international community.¹⁷²

114. Following the 17 September 2004 meeting, where the Peace and Security Council of the AU requested "the [AU] Commission to expedite the preparation for the enhancement of the AMIS,"¹⁷³ on 20 October 2004 the Peace and Security Council, at its seventeenth meeting, decided to revise and enhance the AMIS mandate. The enhanced mandate included some provision for civilian protection, but it did not extend to a peace enforcement or disarmament mandate. The Peace and Security Council decided that:

[T]he enhanced AMIS shall be deployed for a period of one year renewable if need be, to perform the following mandate:

- to monitor and observe compliance with the Humanitarian Ceasefire Agreement of 8 April 2004 and all such agreements in the future,
- to assist in the process of confidence building,
- to contribute to a secure environment for the delivery of humanitarian relief and, beyond that, the return of IDPs and refugees to their homes, in order to assist in increasing the level of compliance of all Parties with the Humanitarian Ceasefire Agreement and to contribute to the improvement of the Security situation throughout Darfur.¹⁷⁴

115. The Peace and Security Council of the AU further decided that, within the framework of the aforementioned mandate, AMIS shall *inter alia* "[...] protect civilians whom it encounters under imminent threat and in the immediate

¹⁷² Ibid.

¹⁷³ DAR-OTP-0154-0059 at 0060, para. 8, *Communiqué of the Sixteenth meeting of the Peace and Security Council, PSC/PR/Comm. (XVI)*.

¹⁷⁴ DAR-OTP-0154-0500 at 0501, *Communiqué of the Seventeenth meeting of the Peace and Security Council*, para. 4.

vicinity, within resources and capability, it being understood that the protection of the civilian population is the responsibility of the GoS.”¹⁷⁵

116. To illustrate the AMIS Rules of Engagement (the “RoE”), the Prosecution has submitted an NGO Report.¹⁷⁶ The report states that the NGO received a copy of the draft RoE dated February 2005 from the AU headquarters.¹⁷⁷ According to the RoE draft, AMIS personnel were allowed to use deadly force for self-defence only and to use non-deadly force notably to protect AU installations and equipment.¹⁷⁸

117. Although the Majority has at its disposal only indirect references to the content of the draft RoE of AMIS, it has to be emphasised that the information contained therein is corroborated by witnesses, including AMIS personnel present in the MGS Haskanita at the time of the attack. In particular, witnesses 446¹⁷⁹ and 447¹⁸⁰ state that they underwent training prior to their deployment which included briefing on the RoE and the mandate of AMIS. Witness 447 further states that, while they were not allowed to fire at or kill a rebel or any member of any factions, they were allowed to do so when the lives of AMIS

¹⁷⁵ Ibid., at 0502, *Communiqué of the Seventeenth meeting of the Peace and Security Council*, para. 6.

¹⁷⁶ Human Rights Watch, *Imperatives for Immediate Change: the African Union Mission in Sudan*, DAR-OTP-0154-0074.

¹⁷⁷ Ibid., at 0102, footnote 51.

¹⁷⁸ Ibid. at 0102.

¹⁷⁹ Statement of Witness 446, DAR-OTP-0169-0808 at 0811, paras. 13, 15, 16 and *viva voce* testimony ICC-02/05-02/09-T-15-Conf-ENG ET, p. 26, line 9 to p. 29, line 2.

¹⁸⁰ Statement of Witness 447, DAR-OTP-0169-1160 at 1164, para. 17: “In Al Fashir I received induction training. This training was about the rules of AMIS, the culture, the places we were supposed to go, first aid, conduct and behaviour with the locals, etc” and at 1165, para. 22: “The mandate of AMIS was to maintain the ceasefire between the warring factions, to provide support services and protection to NGOs; and to conduct patrols. AMIS should not fire at or kill a rebel or a member of any faction until the life (of AMIS soldiers) is totally in danger. This was discussed in the induction training.”

personnel were "totally in danger."¹⁸¹ Witness 446 also states that the Protection Force's first goal was to protect the MILOBs, to guard the AMIS camp in Haskanita and to defend themselves.¹⁸² AMIS personnel were not only aware of the boundaries of their mandate but also demonstrated their compliance therewith.¹⁸³

118. In light of the foregoing, the Majority finds that AMIS personnel were authorised to use force only in self-defence.

119. The Majority therefore finds that AMIS was established and operated in compliance with the three basic principles of consent of the parties, impartiality, and non-use of force except in self-defence. The Majority is thus satisfied that there are substantial grounds to believe that AMIS was involved in a peacekeeping mission.

120. Furthermore, the AMIS peacekeeping mission also had to accord with the terms of the Charter of the United Nations. As previously outlined, in order to fulfil this criterion the AMIS peacekeeping mission need not have been authorized by the United Nations, as long as the mission was compatible with the provisions of the United Nations Charter. Article 52(1) of that Charter provides for the existence of regional arrangements or agencies for the maintenance of international peace and security where the matter is appropriate

¹⁸¹ Statement of Witness 447, DAR-OTP-0169-1160, para. 22.

¹⁸² Statement of Witness 446, DAR-OTP-0169-0808 at 811, para. 15.

¹⁸³ Ibid. at 819, para. 92: "We were trying to figure out what was happening. I did not want to mistake clashes between rebels and GoS as an attack on my camp. But the shots were too accurate and massive. I concluded it was an attack on our camp [...] Anybody should open fire in case they were shot at."; Statement of Witness 420, DAR-OTP-0165-0521 at 0532, para. 65: "As I mentioned already, only PF personnel were armed. Thus, apart from the PFs no other MGS personnel, was manning a weapon during the attack because their mission was not to fight. The resistance from the PF lasted for only about fifteen minutes."

for regional action, and provided that such arrangements or agencies are consistent with the purposes and principles of the United Nations.¹⁸⁴

121. In this regard, the Constitutive Act of the African Union, adopted on 11 July 2000, proclaims as one of its objectives the encouragement of international cooperation *taking due account of the Charter of the United Nations* and the Universal Declaration of Human Rights.¹⁸⁵ The Majority accordingly concludes that the Organization of the African Union¹⁸⁶ was a regional agency within the meaning of Article 52 of the Charter of the United Nations.

122. AMIS itself was deployed under the auspices of the African Union, which on 25 May 2004 authorised “all steps deemed necessary [be taken] to ensure an effective monitoring of the Humanitarian Ceasefire Agreement, in particular through the deployment of an AU Observer Mission, with the required civilian component and, if necessary the protection element, to support the work of the Ceasefire Commission.”¹⁸⁷ Further, as described above, the mandate of AMIS essentially involved the monitoring of the implementation of the HCA, and while it included some provision for civilian protection, it did not extend to a peace enforcement or disarmament mandate.¹⁸⁸

¹⁸⁴ Article 52(1) of Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

¹⁸⁵ Article 3(e), Organization of African Unity, Constitutive Act of the African Union, 11 July 2000.

¹⁸⁶ The African Union was established on 9 July 2002.

¹⁸⁷ DAR-OTP-0154-0495 at 0496-0497, *Communiqué of the Solemn Launching of the Tenth Meeting of the Peace and Security Council*.

¹⁸⁸ DAR-OTP-0154-0500 at 0501, para. 4, *Communiqué of the Seventeenth Meeting of the Peace and Security Council*, 20 October 2004. See also Statement of Witness 315, DAR-OTP-0164-1159 at 1164, para. 16: “AMIS had a Standard Operating Procedure similar to that of a UN Mission [...] They were not allowed to use artillery and mortars. They could use their firearms to protect unarmed AMIS military observers and police officers as well as IDPs in the camps.”

123. In addition, the Majority notes that “the deployment of international observers including the protection force envisioned by the African Union” was specifically endorsed by the UN Security Council, notably in Resolution 1556.¹⁸⁹ In Resolution 1564, the UN Security Council also declared its support for the proposed enhancement and augmentation of the African Union’s monitoring mission in Darfur. It also encouraged the undertaking of proactive monitoring by AMIS, in accordance with the expanded peacekeeping mandate, which was subsequently authorized by the Peace and Security Council of the African Union in October 2004.¹⁹⁰ The UN Security Council reiterated its support for AMIS throughout the exercise of its mandate,¹⁹¹ and condemned attacks on AMIS personnel as serious violations of international law, contravening relevant resolutions of the UN Security Council¹⁹². This endorsement of and support for the action of AMIS by the UN Security Council further lends support to the view

¹⁸⁹ DAR-OTP-0155-0002 at 0004, para. 2, Security Council Resolution 1556 (2004), 30 July 2004. Moreover, the Security Council urged “member states to reinforce the international monitoring team, led by the African Union, including the protection force, by providing personnel and other assistance including financing, supplies, transport, vehicles, command support, communications and headquarters support as needed for the monitoring operation”(para. 3 at 0004), expressed “its full support for the African Union – led ceasefire commission and monitoring mission in Darfur” and requested “the Secretary-General to assist the African Union with planning and assessments for its mission in Darfur, and in accordance with the Joint Communiqué to prepare to support implementation of a future agreement in Darfur in close cooperation with the African Union” (para. 16, at 0006).

¹⁹⁰ DAR-OTP-0152-0194 at 0195, Security Council resolution 1564 (2004), 18 September 2004 S/RES/1564 (2004).

¹⁹¹ Notably on the commencement of the seventh round of peace talks, which culminated in the signing of the DPA, DAR-OTP-0164-0247: Statement of the President of the Security Council, 21 December 2005 (S/PRST/2005/67); and in the aftermath of the attack of 29 September 2007 on the MGS Haskanita, DAR-OTP-0154-0561: Statement by the President of the Security Council, 2 October 2007 (S/PRST/2007/35).

¹⁹² DAR-OTP-0152-0186, Statement by President of the Security Council, 13 October 2005 (S/PRST/2005/48), wherein the recent attacks on AMIS personnel were strongly condemned and the President expressed the Security Council’s “unequivocal support for the African Union Mission in Sudan”.

that AMIS was a peacekeeping mission operating in accordance with the UN Charter.

124. The Majority accordingly finds that AMIS was established under the auspices of the African Union, with a mandate to maintain peace and security in compliance with the provisions of Chapter VIII of the UN Charter.

125. Finally, the Majority observes that on 31 July 2007, in its Resolution 1769, the UN Security Council authorized the establishment of the AU/UN Hybrid operation Darfur ("UNAMID"). According to the Resolution, UNAMID, which was to "incorporate AMIS personnel and the UN Heavy and Light Support Packages to AMIS", was to assume authority from AMIS "as soon as possible and no later than 31 December 2007."¹⁹³ However, the Majority notes that, at the time of the attack on the MGS Haskanita on 29 September 2007, the Haskanita compound was still under AMIS authority and within the mandate described above.¹⁹⁴

- iii. *Whether AMIS personnel and installations, material, units or vehicles were entitled to the protection given to civilians and civilian objects under the international law of armed conflict*

126. The Majority has found that, in light of its mandate, AMIS was a peacekeeping mission in accordance with the UN Charter and therefore that its

¹⁹³ UN Security Council Resolution 1769, S/RES/1769 (2007), 31 July 2007, DAR-OTP-0152-0201 at 0203-0204.

¹⁹⁴ Statement of Witness 420, DAR-OTP-0165-0521 at 0525, paras. 18 and 21; Statement of Witness 446, DAR-OTP-0169-0808 at 0823, para. 130; UN Security Council Resolution 1769, S/RES/1769(2007), 31 July 2007, DAR-OTP-0152-0201 at 0203, para. 5.

personnel and objects should enjoy the protection given to civilians and civilian objects respectively. The Majority must now address the question of whether the AMIS personnel and installations, material, units or vehicles stationed at the MGS Haskanita were entitled to the protection given to civilians and civilian objects under the international law of armed conflict at the time of the 29 September 2007 attack.

127. The Defence does not challenge the fact that AMIS was a peacekeeping mission.¹⁹⁵ It challenges the Prosecution's submission that the MGS Haskanita was entitled to the protection given to civilian objects, without, however, challenging the issue of whether AMIS personnel were entitled to the protection given to civilians.¹⁹⁶ It contends that "the base [MGS Haskanita] was being used to send military orders to direct military attacks that resulted in the loss of life, so as to deprive the base of its protected status and to make that base a legitimate military objective."¹⁹⁷

AMIS personnel stationed at the MGS Haskanita

128. Peacekeeping personnel are entitled to the protection given to civilians only insofar as they do not take direct part in hostilities.¹⁹⁸

129. The evidence submitted to the Chamber, in particular the statements of witnesses 416, 419, 420, 446 and 447, shows that the personnel present in the

¹⁹⁵ See for example ICC-02/05-02/09-T-19-ENG, p. 39, lines 1-2.

¹⁹⁶ ICC-02-05/02/09-237-Conf-AnxA, paras. 14-23. See also para. 96, where the Defence contends that if the MGS Haskanita was a legitimate military target "then any deaths of AMIS persons who were not *hors de combat* cannot be crimes under the Statute".

¹⁹⁷ ICC-02/05-02/09-T-19-ENG, p. 17, lines 21-24.

¹⁹⁸ See above paras. 78 to 84.

MGS Haskanita at the time of the attack understood that AMIS was intended to be an impartial mission¹⁹⁹ entrusted with an observation mandate.²⁰⁰

130. Further to this and as established above, AMIS personnel were not entitled to use force except in self-defence, and in order to protect AU installations, and civilians in the immediate vicinity thereof whom they found to be under imminent threat. To ensure the protection of AMIS personnel, the PF was deployed within each MGS, including the MGS Haskanita.²⁰¹ Accordingly, the PF was the only AMIS component to be armed in the MGS Haskanita.²⁰² The

¹⁹⁹ Statement of Witness 420, DAR-OTP-0165-0521 at 0525 para. 18: "Since my deployment to AMIS on 20 February 2007, AMIS completely adhered to its neutrality. AMIS proved that it was neutral through its MILOBs, CivPols and PPs. In exercising their duties they proved that they were neutral [...] I can confirm that at the level of Haskanita, Al Daein and Al Fasher, AMIS was neutral and was not partial to either the GoS or the rebels"; and para. 21: "We were neutral because we did not have a mandate to intervene in the fighting between the belligerents, but our mission was to observe and report on ceasefire violations"; Statement of Witness 446, DAR-OTP-0169-0808 at 0822-0823, para. 130; Statement of Witness 419, DAR-OTP-0165-0489 at 0500-0501, para. 56.

²⁰⁰ Statement of Witness 419, DAR-OTP-0165-0489 at 0493-0494, paras. 21-23, where he *inter alia* states: "The African Union Mission in Sudan was an observation mission. More specifically, it was to observe, carry out investigations and draft reports [...] AMIS was not mandated to intervene militarily"; see also at 0500, para. 56. Statement of Witness 416, DAR-OTP-0165-0381 at 0385, para. 16: "Whenever there are problems, such as cases of rape, we would follow it up to identify the offenders. We would then hand over the case findings to the Sudanese authorities or local police [...] our mandate did not empower us to follow up on these cases after handing them over." Statement of Witness 420, DAR-OTP-0165-0521 at 0525, para. 20: "We had a mission of observation and not of intervention (*interposition*)." Statement of Witness 447, DAR-OTP-0169-1160 at 1165, para. 22: "The mandate of AMIS was to maintain the ceasefire between the warring factions; to provide support services and protection to NGO's; and to conduct patrols."

²⁰¹ Statement of Witness 419, DAR-OTP-0165-0489 at 0494, para. 23; Statement of Witness 315, DAR-OTP-0164-1159 at 1163-1164, paras. 16 and 20; Statement of Witness 417, DAR-OTP-0165-0424 at 0427, para. 12.

²⁰² Statement of Witness 419, DAR-OTP-0165-0489 at 0504, para. 78; Statement of Witness 315, DAR-OTP-0164-1159 at 1163-1164, para. 16; Statement of Witness 417, DAR-OTP-0165-0424 at 0427, para. 12.

evidence further shows that PF personnel were well aware of the extent of their mandate,²⁰³ including at the time of the 29 September 2007 attack.²⁰⁴

131. The Majority notes that there is no evidence suggesting that AMIS personnel took any direct part in hostilities or used force beyond self-defence. On the contrary, the evidence indicates that, when faced with hostility, AMIS personnel reduced their activities within the area. Witnesses 419 and 420 declare for example that when armed rebel groups took control of Haskanita village and threatened them, the MGS commander ordered the suspension of all patrols and external activities. Patrols were restricted to the camp perimeters, and movement of personnel outside the camp was restricted.²⁰⁵ Witnesses 417²⁰⁶, 419²⁰⁷ and 447²⁰⁸ further state that on September 2007 rebels imposed a flight restriction on AMIS helicopters,²⁰⁹ before a compromise was reached under which AMIS "would inform them in advance of the arrival of [their] helicopters. Then the rebels used

²⁰³ Witness 447 further declares that while they were not allowed to fire or kill a rebel or any member of any factions, they were allowed to do so when AMIS personnel's life was "totally in danger", DAR-OTP-0169-1160 at 1165, para. 22. Witness 446 further declares that the Protection Force's first goal was to protect the MILOBs, to guard the AMIS camp in Haskanita and to defend themselves, DAR-OTP-0169-0808 at 0811, para. 15.

²⁰⁴ Statement of Witness 446, DAR-OTP-0169-0808 at 0819, para. 92; Statement of Witness 447, DAR-OTP-0169-1160 at 1172-1173, paras. 79 and 85; Statement of Witness 419, DAR-OTP-0165-0489 at 0505, paras. 78 and 80.

²⁰⁵ Statement of Witness 420, DAR-OTP-0165-0521 at 0529, paras. 43-46. Statement of Witness 419, DAR-OTP-0165-0489 at 0503, paras. 70-72: "In September 2007, the situation was still insecure. Between June and September, we did not leave the Camp. Rebel forces forbade us to go on patrol. There were almost no helicopters permitted to land in the Camp to bring re-supplies" (para. 72).

²⁰⁶ Statement of Witness 417, DAR-OTP-0165-0424 at 0432, para. 34.

²⁰⁷ Statement of Witness 419, DAR-OTP-0165-0489 at 0503, para. 72: "[...] There were almost no helicopters permitted to land in the camp to bring re-supplies. The few helicopters bringing supplies to the Camp were controlled by the rebels."

²⁰⁸ Statement of Witness 447, DAR-OTP-0169-1160 at 1170, para. 59 "After 10 September we remained under restriction of the rebels not to leave the camp. We did not go on patrols, and we did not go to the village. We ran out of food and supplies. We had to ask the rebels for permission to have choppers."

²⁰⁹ See also African Union, *Investigation Report on the Attack on Haskanita on 29/30 Sept 07 by Armed Faction to the Darfur Conflict*, DAR-OTP-0160-0826 at 0828, para. 4.

to come to the landing strip to monitor what was being offloaded from the helicopters.”²¹⁰

132. In light of the foregoing, the Majority finds that there are substantial grounds to believe that AMIS personnel were entitled to the protection afforded to civilians at the time relevant to the present case.

AMIS installations, material, units or vehicles stationed at the MGS Haskanita

133. The Majority recalls that installations, material, units or vehicles of peacekeeping missions are entitled to the protection given to civilian objects (i) unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party, and (ii) insofar as their total or partial destruction, capture or neutralization, in the circumstances prevailing at the time, offers a definite military advantage.

134. In this regard, the Defence alleges that the GoS representatives used their presence inside the MGS Haskanita compound to provide intelligence to the GoS on the movement of the rebel troops.²¹¹ The Defence’s allegations refer to the alleged inappropriate activities of two different GoS representatives, and thus to their alleged use of the AMIS compound in the MGS Haskanita.

135. The Majority will accordingly proceed to analyse the allegations in order to determine whether or not the alleged inappropriate use of MGS Haskanita made it a lawful military target. In other words, whether AMIS installations,

²¹⁰ Statement of Witness 417, DAR-OTP-0165-0424 at 0432, para. 34.

²¹¹ ICC-02/05-02/09-T-21-Red-ENG, p. 55, lines 14-20.

material, units or vehicles in the MGS Haskanita were entitled to the protection afforded to civilian objects at the time of the attack of 29 September 2007.

136. In order to address the argument put forward by the Defence at the hearing, the Majority will first examine the evidence relating to the relevant alleged events prior to the attack of 29 September 2007.

137. According to the evidence, on 10 September 2007 fighting broke out in Haskanita village in the course of which GoS aircraft bombed the area.²¹²

138. According to the statements of AMIS personnel, Witnesses 416, 417, 446 and 447, as well as the statements of Witnesses 315 and 355, following the 10 September 2007 attack by the GoS, members of rebel armed groups, including Mohammed Osman from the SLA-Unity, went to the MGS Haskanita. The witnesses state that these rebels accused the GoS representative, who was present in the MGS Haskanita, of relaying information to the GoS for the purpose of bombing their groups,²¹³ and threatened that they would attack the MGS Haskanita if the GoS attacked them again.²¹⁴

²¹² African Union, *Investigation Report on the attack on MGS Haskanita on 29/30 Sept 07 by armed faction to the Darfur conflict*, DAR-OTP-0160-0826 at 0828, para. 4; Statement of Witness 417, DAR-OTP-0165-0424 at 0430, para. 25.

²¹³ Statement of Witness 416, DAR-OTP-0165-0381 at 0388, para. 33; Statement of Witness 417, DAR-OTP-0165-0424 at 0431, para. 29: "They also accused Captain Bashir, the Government of Sudan representative who used to stay with us in the compound, of giving the government information about their activities. They demanded that he should leave the camp immediately."; Statement of Witness 446, DAR-OTP-0169-0808 at 0817, para. 75: "We called OSMAN on the phone, and he came to visit us. We tried to explain him what our powers were, that we had diplomatic means only. OSMAN said he believes the GoS is getting intelligence from our camp."; Statement of Witness 447, DAR-OTP-0169-1160 at 1167, paras. 36 and 40. Also at 1169, para. 55; Statement of Witness 315, DAR-OTP-0164-1159 at 1175, para. 70. See also photographs of the visit referred to by Witness 315, DAR-OTP-0164-0994 to DAR-OTP-0164-1112. Statement of Witness

139. While Witness 419 places the threats received by AMIS personnel earlier than 10 September 2007, it appears that this account differs in this regard from that of other witnesses.²¹⁵ Nevertheless, the Majority notes that, in all other material respects, Witness 419 gives the same account of the threats received by AMIS from rebels and of the principal underlying reason for the said threats, namely the alleged inappropriate activities of the GoS representative present at the compound, Captain Bashir.²¹⁶

140. The above analysis is further supported by documentary evidence, in particular the African Union Investigation Report, according to which, on 10

419, DAR-OTP-0165-0489 at 0498-0499, para. 45. *Viva voce* testimony of Witness 446, ICC-02/05-02/09-T-16-Conf-ENG, pp. 23-24.

²¹⁴ Statement of Witness 355, DAR-OTP-0165-0352 at 0359, para. 40: "These groups warned the MGS Haskanita that if the GoS attack them again, then they would turn their gunpoint to the AMIS in Haskanita." Statement of Witness 446, DAR-OTP-0169-0808 at 0817, para. 75; Statement of Witness 447, DAR-OTP-0169-1160 at 1169, para. 55.

²¹⁵ It seems that the events that Witness 419 describes as having taken place in May and June 2007 correspond to the events that are elsewhere reported to have occurred in August and September 2007. For example Witness 419 initially states that an alliance was formed between SLA and JEM in July 2007 (DAR-OTP-0165-0489 at 0497, para. 39). However, he then goes on to describe demands issued by leaders of this rebel alliance between May and June 2007 that GoS aerial bombardments should cease and at least one demand that Captain Bashir be expelled from the camp (DAR-OTP-0168-0168 at 0171, para 12; and DAR-OTP-0165-0489 at 0498, paras. 43 and 45). The Witness states that he believed the evidence provided by the rebels and the narrative gives the strong impression that the evacuation of Bashir took place shortly thereafter (DAR-OTP-0165-0489 at 0499, para. 46). He particularly recalls an attack on Haskanita village by the GoS between May and June, 2007, which was repelled by the rebel forces and in the aftermath of which a GoS soldier who had been allegedly injured came to the camp to get water (DAR-OTP-0165-0489 at 0497, para. 36). This seems to correspond to the attack of the 10th September as described by other witnesses (Statement of Witness 417, DAR-OTP-0165-0424 at 0430, para. 25 and at 0431, para. 32; Statement of Witness 446, DAR-OTP-0169-0808 at 0815, para. 56 and Statement of Witness 447, DAR-OTP-0169-1160 at 1169, para. 54) He also describes a demonstration by the Haskanita villagers on the 6th June 2007 against the MGS Haskanita reproaching AMIS personnel not to protect them from GoS aerial attacks (Statement of Witness 419, DAR-OTP-0165-0489 at 0497, para. 37), which seems to correspond with the demonstration reported by other witnesses to have taken place in September 2007 (Statement of Witness 416, DAR-OTP-0165-0381 at 0388, paras. 30-32; Statement of Witness 417, DAR-OTP-0165-0424 at 0432, para. 33; Statement of Witness 446, DAR-OTP-0169-0808 at 0815, para. 53).

²¹⁶ Statement of Witness 419, DAR-OTP-0165-0489 at 0498, para. 45, at 0499, para. 46 and at 0500, para. 53 and DAR-OTP-0168-0168 at 0171, para. 11.

September 2007, after a battle between two rebel factions, "the JEM commander in company of his officers visited the MGS [...] equally pressed for eviction of the GoS Rep. Capt Bashir whom they accused of availing GoS pilots with coordinates of their positions from the MGS."²¹⁷

141. The evidence presented by the Prosecution also shows that, as a result of these threats, AMIS took preventive measures in order to protect the MGS Haskanita. In particular, Witnesses 419, 417 and 446 state that the MGS Haskanita commander reported the complaints to AMIS headquarters in Al Daein.²¹⁸ Witnesses 446 and 417 state that a helicopter was thereafter sent to evacuate Captain Bashir from MGS Haskanita.²¹⁹ Witness 446 estimated that Captain Bashir had left the camp on or about 17 September 2007,²²⁰ that is almost two weeks before the attack of 29 September 2007 on the MGS Haskanita.

Witnesses 419 and 446 state that the evacuation of Captain Bashir took place in the presence of the members of the armed rebel groups.²²¹

²¹⁷ African Union, *Investigation Report on the attack on MGS Haskanita on 29/30 Sept 07 by armed faction to the Darfur conflict*, DAR-OTP-0160-0826 at 0828, para. 4.

²¹⁸ Statement of Witness 417, DAR-OTP-0165-0424 at 0431, para. 30: "After the visiting rebels left, we communicated with our superiors and they sent a helicopter the next day to evacuate Captain Bashir to Al Daein"; Statement of Witness 419, DAR-OTP-0165-0489 at 0499-0500, paras. 46 and 53; and DAR-OTP-0168-0168 at 0171, para. 14; *viva voce* testimony of Witness 446, ICC-02/05-02/09-T-16-Conf-ENG, p. 30, lines 3-5 and p. 33, lines 4-6.

²¹⁹ Statement of Witness 417, DAR-OTP-0165-0424 at 0431, para. 30; Statement of Witness 446, DAR-OTP-0169-0808 at 0817, paras. 69-72.

²²⁰ *Viva voce* testimony of Witness 446, ICC-02/05-02/09-T-16-CONF-ENG, p. 30, lines 9-13.

"Q: And you say in your statement that, about a week later, Captain Bashir finally left the camp, is that right?

A: Correct

Q: So that would take us to about 17 September, is that right?

A: I suppose".

²²¹ Statement of Witness 419, DAR-OTP-0168-0168 at 0171, para. 14: "The head of the SLA/JEM alliance in the Haskanita group was there with his troops when Captain Bashir was evacuated and they saw this for themselves. The AMIS helicopter landed on the helipad just outside the camp perimeters. I would say that the SLA and JEM knew that Captain Bashir had been

142. The Majority thus finds that, regardless of the veracity and duration of the alleged inappropriate activities performed by Captain Bashir during his stay at the MGS Haskanita, he was removed from the compound well before the attack which is the subject of the charges in the present case, and that his departure was witnessed by some members of the armed rebel groups.²²² The alleged inappropriate activities of Captain Bashir cannot therefore be considered as having had an impact on the protected status of AMIS installations, material, units or vehicles at the MGS Haskanita at the time of the 29 September 2007 attack, as alleged by the Defence.

143. The Defence further contends that Captain Bashir was replaced by another GoS representative, who continued Captain Bashir's alleged inappropriate use of MGS Haskanita installations.²²³

144. Witness 446 said in his statement that, after Captain Bashir's removal, Mohammed Osman, from the SLA-Unity, stated that he "*believes* the GoS is getting intelligence"²²⁴ from the MGS Haskanita. The witness further states that Captain Bashir was replaced. During his testimony in Court, Witness 446 referred to Major Abdul Malik as being the "replacement".²²⁵ He further stated

evacuated the camp well before the attack of 29 September 2007."; Statement of Witness 446, DAR-OTP-0169-0169-0808 at 0817, para. 72: "Still, when the chopper landed, rebels came and surrounded it and my men guarding it at the airfield. I drove to the airfield and told the rebels that green light had been given by their leaders. They said they were not aware of this and that the chopper should not take off. These were SLA United Movement rebels. Finally, after one hour, they said o.k."

²²² See photographs DAR-OTP-0164-1024 and DAR-OTP-1690-0865 and *viva voce* testimony of Witness 446, ICC-02/05-02/09-T-15-Conf-ENG, p. 55, line 1, to p. 56, line 6.

²²³ ICC-02/05-02/09-T-21-Conf-ENG, p. 58, lines 3-18.

²²⁴ Emphasis added, Statement of Witness 446, DAR-OTP-0169-0808 at 0817, para. 75.

²²⁵ ICC-02/05-02/09-T-16-Conf-ENG ET 23-10-2009, pp. 30-31 lines 14-18 and lines 6-14:

"Q. When Captain Bashir left, another Government of Sudan representative arrived, didn't he?

that Major Abdul Malik had been alternating with Captain Bashir for many months. However, this information is not consistent with the statement of Witness 419, who states that there were two representatives of the GoS who resided at the MGS, namely Captain Bashir and Captain Yassir.²²⁶ Witness 419 further states that, when Captain Bashir left, Captain Yassir was on leave.²²⁷ This information is further corroborated by the statement of Witness 420, who states that the "other representative went on official leave long before the attack", and that there was no GoS representative present at the time of the relevant attack.²²⁸

145. The Majority further underlines the inconsistency between the statement²²⁹ and the *viva voce* testimony²³⁰ of Witness 446 with respect to whether or not Captain Bashir was eventually replaced.

A. As I said in my statement, the government has more than one representative, and so I cannot remember any government representative as a replacement for Captain Bashir."

Q. Witness, I'm going to read a line of your statement, in the hope that it refreshes your memory. And you say that after Captain Bashir leaves, "Bashir was replaced by another GoS representative." Do you remember saying that to the Prosecution?

A. Correct.

Q. Thank you. Do you remember that person's name?

A. As far as I can remember, we have Major Abdul Malik in the camp.

Q. And that major had been in the camp alternating with Captain Bashir for many months; is that right?

A. Correct."

Statement of Witness 446, DAR-OTP-0169-0808 at 0813, para. 29 and at 0814, para. 47.

²²⁶ Statement of Witness 419, DAR-OTP-0165-0489 at 0496, para. 32.

²²⁷ *Ibid.*, para. 46.

²²⁸ Statement of Witness 420, DAR-OTP-0165-0521 at 0537, para. 94: "GoS representatives were not present in the camp during the attack"; and "The other representative went on official leave long before the attack".

²²⁹ Statement of Witness 446, DAR-OTP-0169-0808 at 0817, para. 76: "BASHIR was replaced by another GoS representative."

²³⁰ *Viva voce* testimony of Witness 446, ICC-02/05-02/09-T-16-Conf-ENG, pp. 30-32: "As I said in my statement, the government have more than one representative and so I cannot remember any government representative as a replacement for Captain Bashir." The Defence having read out to the witness an excerpt from his statement, where he declared that the GoS representative was

146. The Majority recalls that the presence of GoS representatives, as well as of rebel representatives, within the compound was permitted.²³¹ Therefore, the mere presence of GoS representatives, or of rebel representatives, within the MGS compound does not *per se* render AMIS' installations, material, units or vehicles legitimate military targets.

147. The Majority further notes that there is some indirect evidence which suggests that Captain Bashir was using the Thuraya phone in the AMIS communication room within the MGS Haskanita to relay the coordinates of the position of the armed rebel groups to the GoS.²³² Without prejudice to the issue of whether this evidence is reliable or not, the Majority notes that, even if it were to be accepted that Captain Bashir relayed information to the GoS, the evidence in any event shows that he was removed well before the attack of 29 September 2007 and there is nothing concrete²³³ to suggest that after his removal information continued to be relayed to the GoS.

148. In addition, as discussed above, the evidence suggests that there was no representative of the GoS at the MGS Haskanita after the removal of Captain Bashir and at the time of the attack of 29 September 2007. The information about him being replaced has only been supported by one witness, whose testimony is inconsistent in that respect and contradicted by other witnesses. As a result, the

replaced, asked him whether he remembered saying that to the Prosecution. Witness 446 answered "Correct."

²³¹ See above para. 100.

²³² Statement of Witness 446, DAR-OTP-0169-0808 at 0813, para. 31: "Bashir had access to a Thuraya satellite phone. I believe he was in contact with the GoS"; Statement of Witness 419, DAR-OTP-0168-0168 at 0171, paras. 10-12.

²³³ In response to the question whether, after Captain Bashir had left, the "rebels thought that Government of Sudan representatives were still using the base to attack them," Witness 446 stated that "those are some of the concerns we hear from the rebels", *Viva voce* testimony of Witness 446, ICC-02/05-02/09-T-16-Conf-ENG, p. 32, lines 20-25.

Majority cannot accept the Defence allegation that Captain Bashir was replaced, and that his replacement continued to give information to the GoS.

149. In light of the above, the Majority finds that the Prosecution provided sufficient evidence to establish substantial grounds to believe that, at the time of the attack of 29 September 2007, AMIS installations, material, units and vehicles stationed at the MGS Haskanita were entitled to the protection afforded to civilian objects.

150. In conclusion, the Majority finds that there is sufficient evidence to establish substantial grounds to believe that AMIS was established as a peacekeeping mission in accordance with the Charter of the United Nations. The Majority further finds that there is sufficient evidence to establish substantial grounds to believe that the personnel and the installations, material, units and vehicles involved in this peacekeeping mission at the MGS Haskanita retained their protected status at the time of the attack of 29 September 2007, which is the subject of the Prosecution's charges. Therefore, the objective elements of the offence as analysed above are fulfilled.

151. Before turning to the analysis of the subjective elements of the crime charged under article 8(2)(e)(iii) of the Statute, the Majority deems it necessary to assess whether there is sufficient evidence to establish substantial grounds to believe that Mr Abu Garda is the perpetrator of such alleged offence, under article 25(3)(a) of the Statute and as charged by the Prosecution.

V. INDIVIDUAL CRIMINAL RESPONSIBILITY

A. Modes of liability

152. In the DCC, the Prosecution charges Mr Abu Garda with criminal responsibility as co-perpetrator, or indirect co-perpetrator, under article 25(3)(a) of the Statute.²³⁴ As this Chamber has already found, “the criminal responsibility of a person – whether as an individual, jointly with another or through another person – must be determined under the control over the crime approach to distinguishing between principals and accessories”.²³⁵ According to this approach:

[P]rincipals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.²³⁶

153. The Chamber emphasises that, in distinguishing the forms of principal liability provided for in article 25(3)(a) of the Statute in accordance with the notion of control over the crime, a person is a principal to the commission of a crime where he or she:

- (a) physically carries out the objective elements of the offence (commission of the crime in person, or direct perpetration);
- (b) has, along with others, control over the offence by reason of the essential tasks assigned to him or her (commission of the crime jointly with others, or co-perpetration); or

²³⁴ ICC-02/05-02/09-91-Red, para. 117.

²³⁵ ICC-01/04-01/07-717, para. 486.

²³⁶ ICC-01/04-01/06-803-tEN, para. 330; ICC-01/04-01/07-717, para. 485.

(c) controls the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration).²³⁷

154. Further, this Chamber has already found that a person can also be held criminally responsible as an indirect co-perpetrator (commission of a crime jointly with others, through one or more persons) as a mode of liability encompassed by the Statute.²³⁸

155. In this respect, the Chamber notes the submissions of the Defence during the confirmation hearing, in particular its arguments that under article 25(3)(a) of the Statute "the three modes or forms of that mode [of liability] are disjunctive",²³⁹ and that, "had the drafters of the Rome Statute wanted to include a fourth mode of individual criminal responsibility, they would have done so explicitly".²⁴⁰

156. Contrary to the position of the Defence, in its Decision on the confirmation of charges in the *Katanga and Ngudjolo* case, the Chamber found that "to interpret the disjunction in article 25(3)(a) of the Statute as either 'inclusive' or 'exclusive' is possible from a strict textualist interpretation"²⁴¹ and that:

[T]here are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it. Rather, through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability

²³⁷ ICC-01/04-01/06-803-tEN, para. 332; also ICC-01/04-01/07-717, para. 488.

²³⁸ ICC-01/04-01/07-717, para. 491. See also PTCII, ICC-01/05-01/08-424, paras. 347-348.

²³⁹ ICC-02/05-02/09-T-19-ENG, p. 50, line 17.

²⁴⁰ *Ibid.*, p. 50, lines 22-24.

²⁴¹ ICC-01/04-01/07-717, para. 491.

arises which allows the Court to assess the blameworthiness of "senior leader" adequately.²⁴²

157. Consequently, the Chamber deems it necessary, in order to determine whether there are substantial grounds to believe that Mr Abu Garda committed the crime as charged in Count 2 of the DCC, to turn its analysis to the evidence submitted in relation to his purported involvement – as a direct or indirect co-perpetrator – as provided for in article 25(3)(a) of the Statute.²⁴³

B. Whether there is sufficient evidence to establish substantial grounds to believe that Mr Abu Garda is criminally responsible as a co-perpetrator or as an indirect co-perpatrator within the meaning of article 25(3)(a) of the Statute for the attack on THE MGS Haskanita

158. At the outset, the Chamber notes that, while charging Mr Abu Garda with criminal responsibility as a co-perpetrator or as an indirect co-perpetrator, the Prosecution in the DCC does not exclude any other applicable mode of liability.²⁴⁴ The Chamber recalls, however, that in accordance with article 67(1)(a) of the Statute and rule 121(1) of the Rules, Mr Abu Garda must be informed in detail of the nature, cause and content of the charges brought against him. In addition, regulation 52(c) of the Regulations of the Court requires the Prosecution to indicate in its document containing the charges the precise form of participation. Therefore, the Chamber will restrict its subsequent analysis to

²⁴² Ibid., para. 492.

²⁴³ The Chamber notes that, in defining the "facts of the case", the Appeals Chamber held the following: "In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged." See, ICC-01/04-01/06-2205, footnote 163.

²⁴⁴ ICC-02/05-02/09-91-Red, para. 117.

the modes of liability with which the Prosecution specifically charges the alleged perpetrator.

159. The Chamber has already established that the concept of co-perpetration based on the joint control over the crime involves:

[T]he division of essential tasks between two or more persons, acting in a concerted manner, for the purposes of committing that crime. [...] [T]he fulfilment of the essential task(s) can be carried out by the co-perpetrators physically or they may be executed through another person.²⁴⁵

160. In the view of the Chamber, the objective requirements common to both co-perpetration (or "direct" co-perpetration) and indirect co-perpetration²⁴⁶ based on the notion of joint control over the crime are: (a) the existence of an agreement or common plan between two or more persons; and (b) the co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime.²⁴⁷

161. As regards the subjective requirements, both forms of liability require that (i) the suspect fulfils the subjective elements of the crime in question; (ii) the suspect and the other co-perpetrators are all mutually aware and mutually accept that implementing their common plan may result in the realisation of the

²⁴⁵ ICC-01/04-01/07-717, para. 521.

²⁴⁶ The Chamber recalls that the objective requirements of indirect co-perpetration also include (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. See ICC-01/04-01/07-717, paras. 500-518.

²⁴⁷ ICC-01/04-01/06-803-tEN, paras. 343-348; also ICC-01/04-01/07-717, paras. 522-526. See also PTCII, ICC-01/05-01/08-424, para. 350.

objective elements of the crime; and (iii) the suspect is aware of the factual circumstances enabling him or her to jointly control the crime.²⁴⁸

162. In this respect, the Chamber recalls that the Prosecution set out in its DCC the precise elements of co-perpetration based on control over the crime which, as noted, must be proven for both modes of liability invoked. The Chamber will therefore first restrict its examination to determining whether there was a common plan as alleged by the Prosecution. Only if the evidence is sufficient to establish substantial grounds to believe that a common plan existed will the Chamber proceed to conduct an analysis of the other objective elements of co-perpetration and/or of indirect co-perpetration, as well as of their subjective elements.

1. Whether there are substantial grounds to believe that there was an agreement or common plan among Mr Abu Garda and other senior commanders to attack the MGS Haskanita

163. Both in the DCC²⁴⁹ and in its submissions during the confirmation hearing,²⁵⁰ the Prosecution alleged that a common plan to attack the MGS Haskanita was agreed upon by Mr Abu Garda and other senior commanders of armed rebel groups in the course of two meetings on 29 September 2007.

²⁴⁸ ICC-01/04-01/06-803-tEN, paras. 349-367; also ICC-01/04-01/07-717, paras. 527-539. See also PTCII, ICC-01/05-01/08-424, para. 351.

²⁴⁹ ICC-02/05-02/09-91-Red, paras. 55-61 and 118-130.

²⁵⁰ ICC-02/05-02/09-T-13-ENG, pp. 44-49.

164. According to the DCC, the first of such meetings (“the First Meeting”) occurred “shortly after the attack on the rebel forces in Dalil Babiker”, which had allegedly been carried out by the GoS around midday on 29 September 2007.²⁵¹ At the location where “the JEM and combined SLA-Unity and SLA Abdul Shafie forces had retreated, near Dalil Babiker”, Mr Abu Garda allegedly “met with JEM and SLA-Unity commanders” and “at the meeting these commanders agreed among themselves to attack the MGS Haskanita”.²⁵²

165. The DCC further alleges that, on their way to Haskanita, the rebel forces stopped “in a forest” near the MGS Haskanita, where Mr Abu Garda and the other commanders held another meeting (“the Second Meeting”), after which “they directed their respective troops to move behind them and distributed their troops in various vehicles”.²⁵³

166. The Prosecution submitted evidence purporting to demonstrate that: (i) the First and the Second Meetings took place; (ii) Mr Abu Garda participated in both meetings; and (iii) the subject matter of the meetings was the planning and organising of the attack on the MGS Haskanita, as actually carried out within hours of the conclusion of both meetings.

167. The Chamber will therefore analyse the evidence presented by the Prosecution with respect to these three main allegations.

²⁵¹ ICC-02/05-02/09-91-Red, paras. 54-55.

²⁵² *Ibid.*, paras. 55-56.

²⁵³ *Ibid.*, para. 126.

The First Meeting

168. The occurrence of the First Meeting is mentioned by Prosecution Witnesses 304,²⁵⁴ 305,²⁵⁵ 306,²⁵⁶ 307,²⁵⁷ 312,²⁵⁸ 433²⁵⁹ and 442,²⁶⁰ albeit to different degrees of certainty and detail. In particular, none of these witnesses provides any first-hand information regarding this First Meeting, since none of them claims either to have participated in it or to be aware of the discussions at the meeting.²⁶¹

169. In spite of the indirect nature of the allegations made by all of the witnesses mentioned above, the Chamber is of the view that, in light of the

²⁵⁴ Summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0276, paras. 135-136.

²⁵⁵ Summary of interview transcript of Witness 305, DAR-OTP-0171-0290 at 0293, paras. 24-25.

²⁵⁶ Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0302, para. 28.

²⁵⁷ Summary of interview transcript of Witness 307, DAR-OTP-0171-0308 at 0312, para. 36; at 0320, para. 93.

²⁵⁸ Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0347-0348, paras. 72-74; at 0352, para. 97.

²⁵⁹ Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0441, paras. 38 and 43; at 0442, paras. 46 and 48-49.

²⁶⁰ Summary of interview transcript of Witness 442, DAR-OTP-0171-0002 at 0009, para. 35.

²⁶¹ Summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0276, para. 135: "I was not present during the meeting"; Summary of interview transcript of Witness 305, DAR-OTP-0171-0290 at 0293, para. 24: "I didn't go to their meeting venue"; Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0302, para. 28: "there was a meeting [...] We did not know what they discussed"; Summary of interview transcript of Witness 307, DAR-OTP-0171-0308 at 0312, para. 31: "the SLA Unity people went and had a meeting with Garda and the others. I do not know what they discussed"; Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0347, para. 71: "[...] I don't know who commanded the operation. [...] If I were at the meeting which they had and decided to attack the African Union, I would have known but I wasn't there"; Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0442, para. 49: "I don't know where Abu Garda was during the time that all the vehicles gathered at a place and some of the commanders were also present at a place where the vehicles were gathered [...] I didn't see him personally, but he was probably with the other commanders"; Summary of interview transcript of Witness 442, DAR-OTP-0171-0002 at 0009, para. 35: "their meeting took a very long time. I don't know if Abu Garda was in the meeting, but he went on that side anyway". See also Witness 312, who, when asked how he would know about the occurrence of the First Meeting, stated that "it is impossible to launch an attack or an operation without holding a meeting especially when you are from different factions", Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0347, para. 72.

number of witnesses referring to this meeting, and the reasonable degree of consistency among their respective statements, there is sufficient evidence to establish substantial grounds to believe that a number of rebel commanders met near Dalil Babiker in the immediate aftermath of the attack allegedly carried out by the GoS on armed rebel groups in Dalil Babiker on 29 September 2007.

170. For the purposes of the present Decision, however, the Chamber has to determine whether there is sufficient evidence to establish substantial grounds to believe that Mr Abu Garda was among the participants at this First Meeting. In the view of the Prosecution, as expressed in its final written observations, “[r]eading together the evidence of witnesses (304, 305, 306 and 307) who saw Mr Abu Garda participating in the meeting and that of Witnesses 312 and 442 who saw him at the place of the meeting, is sufficient to establish that Mr Abu Garda was at the meeting”.²⁶²

171. Contrary to the Prosecution’s allegations, Witness 306,²⁶³ while mentioning that Mr Abu Garda took part in the First Meeting, did not make it clear whether he actually saw him at the meeting. On the other hand, Witness 304 stated that he saw a group of high-ranking officials, including Mr Abu Garda, sitting together at the time and venue of the First Meeting.²⁶⁴ However, the witness further stated that he “heard there was a meeting”,²⁶⁵ thus making it unclear whether he only heard about the meeting or actually saw it. Similarly, Witness 307 states that he “did not see” Mr Abu Garda,²⁶⁶ while also affirming that he “was there”.²⁶⁷

²⁶² ICC-02/05-02/09-229-Conf-AnxA, para. 44.

²⁶³ Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0302, para. 28.

²⁶⁴ Summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0276, paras. 135-137.

²⁶⁵ *Ibid.*, at 0274, para. 120.

²⁶⁶ Summary of interview transcript of Witness 307, DAR-OTP-0171-0308 at 0320, para. 93.

172. Other Prosecution witnesses addressing the issue of Mr Abu Garda's participation in the First Meeting either deny seeing him among the other participants, or concede that they were not aware of his presence there. Witness 442 denies knowing whether Mr Abu Garda participated in the meeting.²⁶⁸ Witness 312 states that Mr Abu Garda "would have been part of this meeting", after having admitted knowing "nothing" about such meeting "apart from its outcome".²⁶⁹ The same witness affirms that Mr Abu Garda, being "a leader of a faction", was "supposed to be part of these meetings and decision-taking group", despite admitting not knowing anything about the role of Mr Abu Garda.²⁷⁰ Finally, Witness 433 stated that he had seen Mr Abu Garda at the First Meeting.²⁷¹ However, this witness later denied having seen Mr Abu Garda.²⁷²

173. The Chamber is therefore of the view that the evidence presented by the Prosecution in respect of Mr Abu Garda's participation in the First Meeting is weak and unreliable due to the many inconsistencies exposed above. In addition, the Chamber notes that all statements relied upon by the Prosecution, apart from that of Witness 442, were given by witnesses whose identity is unknown to the Defence and have been presented in the form of summaries of interview transcripts. As stated in the previous section of this Decision, both of these aspects lower the probative value of those statements at issue.²⁷³ Accordingly, the Chamber concludes that the evidence presented by the Prosecution does not

²⁶⁷ Ibid.

²⁶⁸ Summary of interview transcript of Witness 442, DAR-OTP-0171-0002 at 0009, para. 35.

²⁶⁹ Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0347, para. 72.

²⁷⁰ Ibid., at 0348, para. 74.

²⁷¹ Summary of interview transcript of Witness 433, DAR-OTP-0170-0435 at 0441, para. 38.

²⁷² Ibid.

²⁷³ See above paras. 49-52.

provide substantial grounds to believe that Mr Abu Garda participated in the First Meeting.

174. In view of the foregoing, it is unnecessary to determine whether the Prosecution's allegations regarding the subject-matter of the meeting are supported by sufficient evidence.

The Second Meeting

175. The Chamber will now proceed to analyse the Prosecution's allegations regarding the Second Meeting. The Chamber will first examine whether there is sufficient evidence to establish substantial grounds to believe that the Second Meeting took place, at the time and place alleged by the Prosecution.

176. The summary of the interview of anonymous Witness 307 is the only piece of evidence which refers to the actual occurrence of the Second Meeting and to the participation of Mr Abu Garda in it.²⁷⁴

177. In this respect, the Chamber notes that such information, contained in a summary of the interview transcripts of a witness whose identity is unknown to the Defence, is not corroborated or supported by any other evidence, including the statements of those witnesses who allegedly participated in the attack. In particular, none of these witnesses refers to the fact that they stopped on their way towards the MGS Haskanita after the First Meeting had taken place.²⁷⁵

²⁷⁴ Summary of interview transcript of Witness 307, DAR-OTP-0171-0308 at 0313, paras. 36-38.

²⁷⁵ Summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0274, para. 120: "[i]mmediately after [the] meeting they came and told us that there was a mission, that we should board vehicles. [...] And the convoy moved. We moved all together. Half an hour later we

178. For these reasons, the Chamber is not satisfied that there is sufficient evidence to establish substantial grounds to believe that the Second Meeting took place as alleged by the Prosecution.

179. In view of the foregoing, the Chamber finds that the evidence tendered by the Prosecution in support of its allegations is so scant and unreliable that the Chamber is unable to be satisfied that there are substantial grounds to believe that Mr Abu Garda participated in any meeting in which a common plan to attack the MGS Haskanita was agreed upon.

2. Whether the existence of a common plan can be inferred from the alleged co-ordinated essential contribution of Mr Abu Garda, resulting in the realisation of the objective elements of the crime

180. The Chamber recalls that the existence of an agreement or common plan needs not to be explicit and "can be inferred from the subsequent concerted action of the co-perpetrators".²⁷⁶ The Chamber will therefore proceed to analyse the evidence presented by the Prosecution with respect to what it alleges to be the essential contribution provided by Mr Abu Garda for the realisation of the common plan to attack the MGS Haskanita, with a view to establishing whether the existence of such common plan can be inferred from his alleged conduct(s).

arrived in Haskanita"; Summary of interview transcript of Witness 305, DAR-OTP-0171-0290 at 0293, para. 27: "[w]e did not go through the village before we arrived at the AU compound. We bypassed it and attacked from the west of the village. It took us about 15 minutes to drive to the AU compound"; Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0302, para. 28: "[after the commanders' meeting] we prepared ourselves for the mission and then we left. Nothing else was explained to us and we went and attacked the African Union".

²⁷⁶ ICC-01/04-01/06-803-tEN, para. 345.

181. In the DCC, the Prosecution alleges that the co-ordinated essential contribution for the realisation of the common plan was provided by Mr Abu Garda through the following means:

- (i) By organising and participating in the meetings with the other commanders, at which the plan to attack the MGS Haskanita was agreed upon and communicated to the unit commanders and troops;
- (ii) By directly issuing orders to the combined forces and through other unit commanders to attack Haskanita; and
- (iii) By personally leading and directly participating in the attack.²⁷⁷

182. At the outset, the Chamber notes that, in the previous section, in light of the insufficiency of the evidence submitted by the Prosecution, it has already rejected the allegation that Mr Abu Garda participated in the meetings at which a common plan to attack the MGS Haskanita was allegedly agreed upon.

183. With regard to the purported role of Mr Abu Garda in the organisation of the above-mentioned meetings – at a time when they had yet to be held – the Chamber notes that, even if such role were to be proven, it would be of no relevance for purposes of inferring the existence of a common plan to attack the MGS Haskanita.

184. On the other hand, the Chamber is of the view that the existence of a common plan might be inferred from Mr Abu Garda's issuance of orders to the

²⁷⁷ ICC-02/05-02/09-91-Red, para. 132.

combined forces, and/or from his direct participation in the attack, if proven with the required threshold.

185. The Chamber will therefore first analyse whether there is sufficient evidence to establish substantial grounds to believe that Mr Abu Garda issued orders and/or participated directly in the attack. Should the answer of at least one of such questions be in the affirmative, the Chamber will assess whether the existence of a common plan might be inferred from such conduct(s).

Whether Mr Abu Garda directly issued orders to the combined forces and through other unit commanders to attack the MGS Haskanita

186. The Prosecution alleges that Mr Abu Garda directly issued orders "to the combined forces and through other unit commanders to attack the MGS Haskanita"²⁷⁸

187. At the outset, the Chamber notes that, despite the reference to the alleged orders issued by Mr Abu Garda to the "combined forces", throughout the DCC,²⁷⁹ in its submissions during the confirmation hearing,²⁸⁰ as well as in its final written observations,²⁸¹ the Prosecution links Mr Abu Garda's contribution to one JEM splinter group and not to any "combined" rebel forces. The Chamber will therefore analyse the evidence presented in light of this understanding of the Prosecution's claim.

²⁷⁸ Ibid., para. 132(ii).

²⁷⁹ Ibid., paras. 28, 30, 31, 135-137.

²⁸⁰ ICC-02/05-02/09-T-13-ENG, p. 38, line 3 to p. 41, line 15.

²⁸¹ ICC-02/05-02/09-229-Conf-AnxA, paras. 2 to 6.

188. The Prosecution contended that the attack on the MGS Haskanita was carried out, *inter alia*, by JEM Collective Leadership ("JEM-CL") forces. According to the Prosecution, JEM-CL was the name given by Mr Abu Garda to the troops that split from the JEM due to their opposition to some decisions taken by the Chairman of JEM between June and July 2007 and which were under his control.²⁸²

189. The Prosecution alleges that, although JEM-CL announced in its "Founding Declaration" dated 4 October 2007 that it had existed as of 3 October 2007, this group had in fact existed as an organised independent rebel faction under the authority of Mr Abu Garda before that date, and, in particular, at the time of the attack on the MGS Haskanita.²⁸³

190. Having analysed the evidence submitted to it, the Chamber is satisfied that there are substantial grounds to believe that, as of 4 October 2007, that is, five days after the attack on the MGS Haskanita, Mr Abu Garda was officially in charge of an organised group.²⁸⁴

191. However, in order to determine whether Mr Abu Garda ordered these forces to attack the MGS Haskanita, the Chamber must examine the evidence regarding the situation on the day of the attack and in the weeks directly preceding it. In particular, the Chamber will analyse the Prosecution's allegations that: (i) prior to the attack on the MGS Haskanita, Mr Abu Garda had split from

²⁸² ICC-02/05-02/09-91-Red, paras. 23-28.

²⁸³ *Ibid.*, paras. 31-32.

²⁸⁴ DAR-OTP-0156-0096 at 0100. See also Statement of Witness DCW1, DAR-D05-0001-0019 at 0023, para. 23; Statement of Witness DCW2, DAR-D05-0001-0003 at 0004; Statement of Witness DCW3, DAR-D05-0001-0008 at 0009; Statement of Witness DCW4, DAR-D05-0001-0011 at 0013; Summary of interview transcript of Witness 442, DAR-OTP-0171-0002 at 0011, para. 40.

the main JEM movement; (ii) following this split, Mr Abu Garda gained control of an organised group; and (iii) this group under Mr Abu Garda's control attacked the MGS Haskanita on 29 September 2007.²⁸⁵

192. In relation to the first allegation, that is, that Mr Abu Garda had split from the main JEM movement prior to the attack on Haskanita, the Chamber notes that Witness 304 placed the time of Mr Abu Garda's split from the main JEM as August 2007, although he stated that he did not remember the exact date.²⁸⁶

193. Witness 305 testified that Mr Abu Garda split from JEM "at the beginning of the Ramadan in 2007".²⁸⁷ Witness 306 also stated that Mr Abu Garda split from JEM in "Ramadan 2007".²⁸⁸ The statement of Witness 312 suggests that, by the morning of 29 September 2007, the split had already occurred.²⁸⁹

194. Witness 307, whilst stating that Mr Abu Garda split from JEM, does not provide details of when the split took place.²⁹⁰ It is therefore not clear whether Witness 307 is referring to the formal establishment of JEM-CL in early October 2007, or whether he is saying that a split occurred before the attack. For this reason, the statement of Witness 307 cannot be of any assistance to the Chamber in its determination of whether Mr Abu Garda's split from the main JEM had already taken place at the time of the attack.

²⁸⁵ ICC-02/05-02/09-91-Red, paras. 48, 144-148.

²⁸⁶ Summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0266, para. 68; also at 0265, paras. 55-59.

²⁸⁷ Summary of interview transcript of Witness 305, DAR-OTP-0171-0290 at 0292, para. 15. According to the calendar provided by the Defence (Document DAR-D05-0002-0009), Ramadan lasted from 13 September to 12 October 2007.

²⁸⁸ Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0300, para. 13.

²⁸⁹ Summary of interview transcript of Witness 312, DAR-OTP-0171-0335 at 0345-0346, paras. 62-63.

²⁹⁰ Summary of interview transcript of Witness 307, DAR-OTP-0171-0308 at 0331, para. 169.

195. Witness 442 stated that he learnt "that the split had happened" in Haskanita.²⁹¹ Further, he stated that he did not have first-hand knowledge about the structure of JEM after the split.²⁹²

196. Considered as a whole, the summaries of interviews of anonymous witnesses lack 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 organised armed group.

197. Other evidence tendered by the Prosecution in support of the allegation that Mr Abu Garda exercised effective control over an organised armed group prior to and at the time of the attack on Haskanita includes a July 2007 statement of the "Interim Military Council".²⁹³ Whilst this document might indeed serve as evidence of a split in JEM as early as July 2007, the Chamber notes that Mr Abu Garda's name does not appear among the 72 individuals who signed the document. Therefore, the document is of little relevance to the present issue.

198. Likewise, Mr Abu Garda's name does not appear on the statement issued in the name of the "Sudanese Justice and Equality Movement (the Military Council)" and SLA-Unity after the clash between armed rebel groups and troops of the Government of Sudan on 10 September 2007.²⁹⁴ This document only mentions "a joint force from the Sudanese Justice and Equality Movement (the Military Council) [...] and the Sudan Liberation Movement (Unity)" as targets of

²⁹¹ Summary of interview transcript of Witness 442, DAR-OTP-0171-0002 at 0026, para. 100.

²⁹² *Ibid.*, at 0036, paras. 138-140.

²⁹³ Statement of the Official Spokesman for the Interim Military Council, National Salvation Front- JEM Headquarters, DAR-OTP-0158-0511.

²⁹⁴ Press article dated 10 September 2007, DAR-OTP-0156-0113.

an attack carried out by Government troops. It does not mention Mr Abu Garda as being connected with this joint force in any way. Accordingly, the Chamber will not proceed to examine whether the JEM mentioned in the document is indeed the faction having split from the "main" JEM earlier in the summer of 2007.

199. The Chamber will now examine the Prosecution's allegation that "on the operational level, Abu Garda exercised military command over the forces through [REDACTED] who was subordinated to him".²⁹⁵ Indeed, the Prosecution seems to claim the existence of a link between Mr Abu Garda and [REDACTED], by virtue of which troops loyal to and acting under the authority of the latter could be attributed to the former for the purposes of establishing Mr Abu Garda's effective control over an organised armed group at the time of the attack on the MGS Haskanita.

200. For the purposes of the issue at hand, suffice it to note that no adequate evidence was tendered to substantiate the purported link between Mr Abu Garda and [REDACTED] at the time of the attack, which in itself allows the Chamber to dispense with the consideration of whether [REDACTED] led an armed group and, if so, to what extent authority over such a group was shared with Mr Abu Garda.

201. The only witnesses referring to the existence of a hierarchical relationship between the two are Witness 304 and Witness 433.²⁹⁶ Witness 304 provided a statement of a very general nature only, affirming that Mr Abu Garda "was

²⁹⁵ ICC-02/05-02/09-91-Conf, para. 139.

²⁹⁶ Summary of interview transcripts of Witness 304, DAR-OTP-0171-0258, at 0282, para. 175, Summary of interview transcripts of Witness 433, DAR-OTP-0170-0435 at 0464-0465, para. 162.

higher ranking than [REDACTED]”,²⁹⁷ while Witness 433 admitted not knowing exactly how the relationship between Mr Abu Garda and [REDACTED] was shaped.²⁹⁸ In view of the limited value of these statements and in the absence of any other corroborating evidence, the Chamber concludes that the Prosecution’s claim as to the existence of a hierarchical link between Mr Abu Garda and [REDACTED] within an organised armed group is not sufficiently supported by evidence.

202. Only one of the witnesses relied upon by the Prosecution (namely, Witness 304) claims to have taken part in the attack on the MGS Haskanita as part of a faction led by or otherwise attributable to Mr Abu Garda.²⁹⁹ However, such assertion appears too scant and isolated for the Chamber to attach any meaningful relevance to it. An additional reference to “Abu Garda’s people” appears in the statement by Witness 442,³⁰⁰ although this witness did not know whether “Abu Garda’s people went on the attack”.³⁰¹

203. However, more reliable evidence regarding the various armed groups operating at and around Haskanita at the time of the attack can be found in the statements provided by AMIS personnel stationed at the MGS Haskanita during the relevant time (namely, Witness 416, Witness 417, Witness 419, Witness 446 and Witness 447).

²⁹⁷ Summary of interview transcripts of Witness 304, DAR-OTP-0171-0258, at 0282, para. 175.

²⁹⁸ Summary of interview transcripts of Witness 433, DAR-OTP-0170-0435 at 0464-0465, para. 162.

²⁹⁹ Summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0265, para. 62.

³⁰⁰ Summary of interview transcript of Witness 442, DAR-OTP-0171-0002 at 0040, para. 155.

³⁰¹ Ibid.

204. Most statements given by Prosecution witnesses from AMIS (namely, Witness 416,³⁰² Witness 419,³⁰³ Witness 446³⁰⁴ and Witness 447³⁰⁵) only mention two armed rebel groups with whom the MGS Haskanita came into contact: SLA-Unity and JEM. None of these witnesses stated that either the "main" JEM, or a particular group of it, was operating under the authority of Mr Abu Garda. In addition, no reliable evidence was submitted to the effect that Mr Abu Garda was present in the area of the MGS Haskanita prior to 29 September 2007.

205. It is of significance that other Prosecution witnesses from AMIS (in particular, Witness 419³⁰⁶ and Witness 446³⁰⁷) refer to other individuals who acted as representatives of the armed rebel groups or as contact persons between these groups and the MGS Haskanita, in particular Abdulaziz Osher, whom these witnesses identified as the commander of the JEM forces in the area. Further, Mr Abu Garda is not mentioned by Witness 417, who refers to the existence of a "break away faction of JEM"³⁰⁸

206. It appears significant that no reference to Mr Abu Garda, or to a group purportedly operating under his leadership, is made by those AMIS witnesses who, on account of their roles and responsibilities within the MGS Haskanita,

³⁰² Statement of Witness 416, DAR-OTP-0165-0381 at 0388, paras. 31 and 33; *viva voce* testimony of Witness 416, ICC-02/05-02/09-T-14-Red-ENG, p. 20, line 1; p. 25, lines 20-23.

³⁰³ Statement of Witness 419, DAR-OTP-0165-0489 at 0497-0499, paras. 39-47.

³⁰⁴ Statement of Witness 446, DAR-OTP-0169-0808 at 0814-0815, paras. 44-55; *viva voce* testimony of Witness 446, ICC-02/05-02/09-T-15-Conf-ENG, p. 36, lines 14-21; p. 37, lines 1-2; p. 44, lines 21-22.

³⁰⁵ Statement of Witness 447, DAR-OTP-0169-1160 at 1166-1168, paras. 28-49.

³⁰⁶ Statement of Witness 419, DAR-OTP0165-0489 at 0497, para. 40.

³⁰⁷ *Viva voce* testimony of Witness 446, ICC-02/05-02/09-T-15-Conf-ENG, p. 36, lines 12-21; Statement of Witness 446, DAR-OTP-0169-0808 at 0814-0815, paras. 47, 50 and 51.

³⁰⁸ Statement of Witness 417, DAR-OTP-0165-0424 at 0430, para 26; also at 0432, para. 34.

had access to information relating to the composition of the rebel groups active in and around Haskanita.

207. The sole Prosecution witness from AMIS who made reference to Mr Abu Garda is Witness 447. Speaking of a meeting with the rebels which allegedly took place at the MGS Haskanita "likely in the first week of August" 2007,³⁰⁹ Witness 447 stated that information as to the formation of a new movement had been given by Mr Abu Garda and by an individual called Mohammed Osman. However, he admits not knowing whether Mr Abu Garda actually attended the meeting, and he "suspects" that Mr Abu Garda might have not participated in the meeting in order not to expose himself, whilst possibly being at Haskanita "in a highly protected hideout".³¹⁰ For these reasons, the Chamber finds that the these allegations of Witness 447 should be treated with caution, due to their mere speculative character.

208. Considered as a whole, the evidence of the Prosecution witnesses from AMIS regarding the purported existence of an armed group under the command and control of Mr Abu Garda in the area of Haskanita at or around the time of the attack on the MGS Haskanita is not sufficient to support the Prosecution's allegations.

209. The same evidence appears, rather, to point to other individuals acting as commanders of rebel armed groups in the area. Indeed, the lack of reference to Mr Abu Garda appears all the more striking if assessed against the various instances where Prosecution witnesses from AMIS were able to identify other commanders in the field and to recount their actions.

³⁰⁹ Statement of Witness 447, DAR-OTP-0169-1160 at 1167, para. 42.

³¹⁰ Ibid.

210. Two military officers at the MGS Haskanita identified Abdulaziz Osher as the commander of the JEM forces in the area.³¹¹ Further, the evidence of Witnesses 305, 306 and 442 suggests that Abdulaziz Osher was loyal to Khalil Ibrahim, the Chairman of JEM.³¹² This, coupled with the evidence substantiating that the relationship between Khalil Ibrahim and Mr Abu Garda collapsed on 25 September 2007 at the latest,³¹³ precludes the Chamber from accepting that Abdulaziz Osher and Abu Garda could have been co-leaders of a single rebel faction at the time of the attack on the MGS Haskanita.

211. The Chamber recalls that key Prosecution witnesses from AMIS also gave evidence of threats to the MGS Haskanita prior to the actual attack on 29 September 2007. Witness 419, [REDACTED], mentioned that, on two occasions around the end of July, Mohammed Osman from SLA-Unity threatened to attack AMIS if the Government of Sudan continued to bomb the rebels and the local population in the area.³¹⁴ He stated that Abdulaziz Osher from JEM also came to the MGS Haskanita, warned the AMIS personnel, and told them to ask the Government of Sudan to stop the attacks against the rebels.³¹⁵ Witness 446³¹⁶ and Witness 447³¹⁷ stated that Mohammed Osman and some of his junior commanders in SLA-Unity came to the MGS Haskanita in mid-September 2007

³¹¹ See above, footnote 306 and Statement of Witness 446, DAR-OTP-0169-0808 at 0815, para. 51.

³¹² Summary of interview transcript of Witness 305, DAR-OTP-0171-0290 at 0295, para. 46; Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0304, para. 43; Summary of interview transcript of Witness 442, DAR-OTP-0171-0002 at 0040, para. 155; DAR-OTP-0156-0096 at 0098, para. 10.

³¹³ DAR-OTP-0154-0205.

³¹⁴ Statement of Witness 419, DAR-OTP-0165-0489 at 0500, paras. 54-55; Second statement of the same witness, DAR-OTP-0168-0168 at 0168-0171, para. 15.

³¹⁵ Statement of Witness 419, DAR-OTP-0165-0489 at 0498, para. 43.

³¹⁶ Statement of Witness 446, DAR-OTP-0169-0808 at 0817, para. 75.

³¹⁷ Statement of Witness 447, DAR-OTP-0169-1160 at 1169, para. 55.

and threatened to attack the MGS Haskanita if the Government of Sudan attacked them again.

212. Further, the Prosecution witnesses from AMIS who gave *viva voce* evidence denied personal knowledge of Mr Abu Garda and did not provide any information with respect to his alleged role among the rebel factions. Witness 446 stated both at the confirmation hearing³¹⁸ and in his written statement³¹⁹ that he did not know Mr Abu Garda and that his name “[did] not mean anything to [him]”. Witness⁴¹⁶ also stated at the confirmation hearing that he did not know Mr Abu Garda.³²⁰

213. As a whole, the evidence before the Chamber suggests that Mr Abu Garda was not part of the various delegations representing the armed rebel groups at various meetings held at the MGS Haskanita, whether with an intent to negotiate, inform or threaten.

214. Furthermore, Mr Abu Garda himself, in his unsworn statement at the confirmation hearing, provided an account of his activities in September 2007³²¹ which is, to a large extent, inconsistent with the Prosecution’s allegations.³²² His statement is supported by Defence Witnesses DCW2,³²³ DCW3³²⁴ and DCW4.³²⁵ Prosecution Witness 442 also confirms certain portions of Mr Abu Garda’s

³¹⁸ *Viva voce* testimony of Witness 446, ICC-02/05-02/09-T-16-Conf-ENG, from p. 48, line 22 to p. 49, line 11.

³¹⁹ Statement of Witness 446, DAR-OTP-0169-0808 at 0827, paras. 173, 177.

³²⁰ *Viva voce* testimony of Witness 416, ICC-02/05-02/09-T-14-Red-ENG, p. 44, lines 17-20.

³²¹ ICC-02/05-02/09-T-12-Red-ENG, pp. 48-50.

³²² As previously found by the Chamber, Mr Abu Garda’s unsworn statement is considered as part of the Defence’s submissions. See above, paras. 53-55.

³²³ Statement of Witness DCW2, DAR-D05-0001-0003 at 0003-0004.

³²⁴ Statement of Witness DCW3, DAR-D05-0001-0008 at 0008-0009.

³²⁵ Statement of Witness DCW4, DAR-D05-0001-0011 at 0012-0013.

statement, in particular his absence from the field in the months prior to 29 September 2007³²⁶ and the fact that, during his absence, Mr Abu Garda was still a member of JEM.³²⁷

215. In light of the foregoing, the Chamber is not satisfied that there are substantial grounds to believe that, at the time of the attack on the MGS Haskanita, Mr Abu Garda exercised control over at least one of the organised rebel groups which are alleged to have carried out the attack.

216. Accordingly, the Chamber finds that the existence of a common plan cannot be inferred from the alleged issuance of orders to the troops under Mr Abu Garda's control, either directly or through other unit commanders, as alleged by the Prosecution.

Whether Mr Abu Garda personally led and directly participated in the attack.

217. The Chamber will now proceed to analyse whether Mr Abu Garda personally led and directly participated in the attack on the MGS Haskanita. If so, the Chamber will proceed to analyse whether the existence of a common plan might be inferred from such conduct.

218. As a preliminary observation, the Chamber notes that, because of the inconsistencies in the allegations contained in the DCC, it is unclear whether or not the Prosecution is claiming that Mr Abu Garda directly participated in the

³²⁶ Summary of interview transcript of Witness 442, DAR-OTP-0171-0002 at 0029, para. 112.

³²⁷ Ibid.

attack on the MGS Haskanita. The DCC states that, as part of the coordinated and essential contribution which Mr Abu Garda allegedly made to the implementation of the common plan, he “personally led and directly participated in the attack”,³²⁸ and that “on 29 September 2007, Mr Abu Garda, together with other senior commanders of JEM and SLA-Unity planned and *carried out* the attack” (emphasis added).³²⁹

219. However, in the discussion of the purported “agreement and common plan” among the commanders involved, there is no mention of such personal leadership of and/or participation in the attack.³³⁰ Nor is there any such reference in the narrative of the facts.³³¹ It is only stated that attacking forces were “under the command of Abu Garda” and others³³² and that, “after the attack ended”, Mr Abu Garda joined the JEM troops at the location near Haskanita where the JEM and SLA-Unity forces had converged in the meantime.³³³

220. At the confirmation hearing, the Prosecution continued to claim both that Mr Abu Garda directly participated in the attack³³⁴ and that he did not.³³⁵ The same inconsistency again appears in its final observations,³³⁶ as is indeed noted by the Defence in its final written observations.³³⁷

³²⁸ ICC-02/05-02/09-91-Red, para. 132.

³²⁹ *Ibid.*, para. 94.

³³⁰ *Ibid.*, paras. 118-130.

³³¹ *Ibid.*, paras. 62-84.

³³² *Ibid.*, para. 79.

³³³ *Ibid.*, para. 82.

³³⁴ ICC-02/05-02/09-T-13-ENG, p. 53, lines 1-4; p. 73, lines 1-13.

³³⁵ ICC-02/05-02/09-T-12-Red-ENG, p. 25, lines 20-24; p. 26, lines 4-5; ICC-02/05-02/09-T-21-Red-ENG, p. 3, lines 11-14; pp. 24-25.

³³⁶ ICC-02/05-02/09-229-Conf-AnxA, paras. 11, 14.

³³⁷ ICC-02/05-02/09-237-Conf-AnxA, paras. 81-83.

221. In spite of these inconsistencies, the Chamber will nevertheless proceed to examine whether there is sufficient evidence to establish substantial grounds to believe that Mr Abu Garda personally led and directly participated in the attack.

222. Witness 305 stated that Mr Abu Garda directly participated in the attack:

There were three vehicles in the front line of our convoy. [...] The three front vehicles were those of the commanders, who were in charge of the whole vehicles. [...] Bahr Idris Abu Garda had a dushka. [...] When we approached the compound, Abu Garda, [...] who were all in the lead vehicles, opened fire and started shooting into the compound.³³⁸

223. However, in his statement, this witness also said that “[he did] not know who fired their weapons during the attack because by the time [he] arrived the attack had already started”.³³⁹ This stands in contradiction with the witness’ assertion that it was Mr Abu Garda and others who opened fire.

224. Moreover, Witness 305’s statement is contradicted by Prosecution Witnesses 304³⁴⁰ and 306,³⁴¹ who stated that Mr Abu Garda did not physically participate in the attack. In addition, Witness 307, who was present during the attack, stated that he did not see Mr Abu Garda during the attack.³⁴²

³³⁸ Summary of interview transcript of Witness 305, DAR-OTP-0171-0290 at 0293-0294, paras. 28-29; also at 0294, para. 35: “I am sure that Abu Garda was in the attack. He together with [REDACTED]”; at 0295, para. 45: “I am sure that Abu Garda was in one of the front cars during the attack”.

³³⁹ *Ibid.*, at 0294, para. 30.

³⁴⁰ Summary of interview transcript of Witness 304, DAR-OTP-0171-0258 at 0282, para. 171: “As for Bahr Idris ABU GARDA, he did not come to the place where the battle was but he was a kind of commander”.

³⁴¹ Summary of interview transcript of Witness 306, DAR-OTP-0171-0298 at 0303, para. 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”.

³⁴² Summary of interview transcript of Witness 307, DAR-OTP-0171-0308 at 0322, para. 107.

225. Furthermore, Mr Abu Garda is not mentioned as participating in the attack in the various statements made by AMIS personnel in relation to the attack. None of the AMIS personnel present at the MGS Haskanita at the time of the attack and who gave evidence, whether in writing³⁴³ or *viva voce*,³⁴⁴ identified Mr Abu Garda as one of the attackers. The AMIS investigation report, drafted in the immediate aftermath of the attack, does not include Mr Abu Garda among the individuals mentioned as “suspected main actors” in the attack.³⁴⁵

226. The Chamber notes the statements of two witnesses who were members of [REDACTED]. Witness 315 stated that [REDACTED] had found that Mr Abu Garda “[was] alleged to have participated in the Haskanita attack”.³⁴⁶ Witness 355 mentioned Mr Abu Garda as one of the “perpetrators”.³⁴⁷

227. It is not clear from the two witness statements whether [REDACTED] found that Mr Abu Garda personally participated in the attack or, rather, that he was involved in it in some other way. It is to be noted that Witness 315 stated that [REDACTED] was not intended to conduct a criminal investigation,³⁴⁸ and that its report was based on facts that were not completely verified.³⁴⁹ In addition, the Chamber notes that the report was not presented by the Prosecution for the purpose of the confirmation hearing. As a result, the

³⁴³ Statement of Witness 446, DAR-OTP-0169-0808 at 0826, para. 157; Statement of Witness 416, DAR-OTP-0165-0381 at 0392, para. 52; Statement of Witness 417, DAR-OTP-0165-0424 at 0437, para. 58; Statement of Witness 419, DAR-OTP-0165-0489 at 0509, para. 106; Statement of Witness 420, DAR-OTP-0165-0521 at 0537 para. 95.

³⁴⁴ *Viva voce* testimony of Witness 446, ICC-02/05-02/09-T-16-Conf-Eng at p. 49, lines 9-11.

³⁴⁵ DAR-OTP-0160-0826 at 0832-0833.

³⁴⁶ Statement of Witness 315, DAR-OTP-0164-1159 at 1174, para. 63.

³⁴⁷ Statement of Witness 355, DAR-OTP-0165-0352 at 0359, para. 45.

³⁴⁸ Statement of Witness 315, DAR-OTP-0164-1159 at 1166, para. 28.

³⁴⁹ *Ibid.*, at 1174, para. 63.

Chamber has not had the opportunity to carefully consider and analyse the content of the report in its entirety.

228. The Chamber finds that the evidence tendered by the Prosecution, far from establishing Mr Abu Garda's participation in the attack, seems to concur with the submissions made by the Defence to the effect that Mr Abu Garda did not personally participate in the attack on Haskanita.

229. Mr Abu Garda himself provided an account of his activities and whereabouts at and around the time of the attack.³⁵⁰ The substance of this statement, in particular as regards the various movements by Mr Abu Garda preceding, during and following the attack, is consistent with the evidence presented by the Defence and included in the statements of Witnesses DCW2,³⁵¹ DCW3³⁵² and DCW4.³⁵³

230. Considering the inherent inconsistency in the statement of Witness 305; its contradiction by the statements of Witnesses 304 and 306; the striking fact that none of the Prosecution witnesses from AMIS who were present during the attack mentioned Mr Abu Garda as having participated therein; the documentary evidence from AMIS which makes no mention of him as part of the identified suspected attackers; and the fact that Witness 315 stated that the report was based on facts that were not completely verified, the Chamber comes to the conclusion that there are no substantial grounds to believe that Mr Abu Garda personally led and directly participated in the attack on the MGS Haskanita.

³⁵⁰ ICC-02/05-02/09-T-12-Red-ENG at p. 49. The chamber recalls that Mr Abu Garda's unsworn statement is considered as part of the Defence's submissions.

³⁵¹ Statement of Witness DCW2, DAR-D05-0001-0003 at 0003-0004.

³⁵² Statement of Witness DCW3, DAR-D05-0001-0008 at 0008-0009.

³⁵³ Statement of Witness DCW4, DAR-D05-0001-0011 at 0012, para. 10.

231. In light of the foregoing analysis, the Chamber concludes that the evidence brought by the Prosecution is not sufficient to establish substantial grounds to believe that the existence of a common plan to attack the MGS Haskanita can be inferred from any of the conducts listed by the Prosecution as the alleged essential contribution of Mr Abu Garda to the implementation of a common plan.

232. Therefore, the Chamber is not satisfied that there are substantial grounds to believe that Mr Abu Garda can be held criminally responsible as either a direct or indirect co-perpetrator for the commission of the crime under article 8(2)(e)(iii) of the Statute.

233. The Chamber further notes, without prejudice to what established in paragraph 158, that the above analysis and the related finding on the lack of sufficient evidence substantiating the Prosecution's allegations as to Mr Abu Garda's responsibility as a co-perpetrator or as an indirect co-perpetrator also exclude his responsibility under any other forms of liability contemplated in article 25(3)(a) of the Statute.

CONCLUSION

234. In light of the above, it is unnecessary to proceed to an analysis of whether there are substantial grounds to believe that the subjective elements of the crime charged in Count 2 are fulfilled.

235. By the same token, the conclusion that Mr Abu Garda cannot be held criminally responsible for the crime charged in Count 2 makes it unnecessary to assess whether the elements of the crimes charged in Counts 1 and 3 of the DCC

are fulfilled, as these offences were allegedly committed during and/or in the aftermath of the attack on the MGS Haskanita.

236. Accordingly, the Chamber declines to confirm the charges against Mr Abu Garda under Counts 1, 2 and 3 of the DCC, without prejudice for the Prosecution to subsequently request the confirmation of the charges against him, if such request is supported by additional evidence, in accordance with article 61(8) of the Statute.

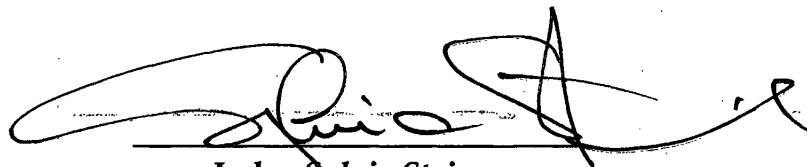
FOR THESE REASONS, THE CHAMBER

DECLINES to confirm the charges against Mr Bahar Idriss Abu Garda;

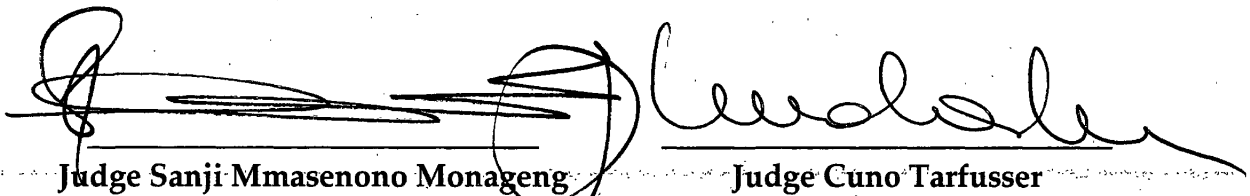
ORDERS the Registrar to notify the present Decision to (i) the UN Security Council; (ii) the Host State authorities; (iii) the Sudanese authorities and (iv) any other States or organisations which cooperated in any way for the purposes of the present proceedings;

DECIDES that the five-day period for the parties to present an application for leave to appeal in accordance with rule 155(1) of the Rules shall start to run with effect from the date of notification of the Arabic translation of this Decision.

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



Judge Sylvia Steiner
Presiding Judge



Judge Sanji Mmasenono Monageng

Judge Cuno Tarfusser

Dated this Monday, 8 February 2010
At The Hague, The Netherlands

Separate Opinion of Judge Cuno Tarfusser

1. On the basis of the hearing held between 19 and 30 October 2009, the Chamber declined to confirm the charges brought by the Prosecutor against Mr Bahar Idriss Abu Garda.

2. I fully concur with this decision. In particular, I subscribe to the analysis of the evidence from a factual standpoint as set forth in the Decision and to the conclusion that such evidence is not sufficient to establish substantial grounds to believe that Mr Abu Garda can be held criminally responsible for the crimes as charged.

3. However, I dissociate myself in several respects from the reasoning developed by the Majority to substantiate that conclusion. In my view, the lacunae and shortcomings exposed by the mere factual assessment of the evidence are so basic and fundamental that the Chamber need not conduct a detailed analysis of the legal issues pertaining to the merits of the case, in particular as to the existence of the material elements constituting any of the crimes charged.

4. The reasons justifying this Separate Opinion are rooted in fundamental principles of criminal law and procedure. The purpose of the pre-trial procedure is to determine whether one or more individuals should be committed for trial. It is critically important for such determination that the pre-trial judge be in a position to establish a link between the historical events as charged and the alleged perpetrator(s) as identified by the Prosecutor. Whenever the evidence gathered by the Prosecutor does not allow such a link to be established, because it is flimsy, inconsistent or otherwise inadequate, it is a pre-trial judge's duty to

decline to confirm the charges and to refrain from conducting a detailed legal analysis of the facts, including the correspondence between the objective features of the facts, on the one hand, and the objective and subjective elements of a given crime, on the other.

5. In other words, to establish at first the occurrence of the historical event(s) as well as a proper link between such events and the suspect as perpetrator (*imputatio facti*) is propaedeutic to any legal reasoning. Therefore, failure to demonstrate it makes it unnecessary to proceed to the legal characterisation of the historical event as a crime as well as to the determination of whether the link between such event and the suspect grounds his or her criminal responsibility (*imputatio iuris*).³⁵⁴

6. It is my firm view that the present case lacks evidence establishing a proper link between the historical events (the attack on the MGS Haskanita, the killings and the looting) and the suspect (Mr Abu Garda) in terms of either direct or indirect involvement. In this respect I do concur with the decision taken in paragraphs 163 to 233, whereby the Chamber established that the Prosecutor failed to prove his allegation as to Mr Abu Garda's involvement in the attack on the MGS Haskanita. As a direct consequence of what I said above, it is equally

³⁵⁴ See Ambos, *Toward a universal system of crime: comments on George Fletcher's Grammar of criminal law* 28 Cardozo L. review, 2664: "The doctrine of imputation in its *original* sense, related to natural law, can best be described by the opposing concepts of *imputatio facti* - *imputatio iuris* or *imputatio physica* - *imputatio moralis*. Accordingly, we are concerned first with a factual or physical imputation of an *event* controlled by (humane) will (a "natural act") to a particular *person* (the perpetrator or agent); then we have to qualify this event legally or morally in the sense of normative imputation, that is, to perform a normative evaluation of the act as wrongful or immoral and thus in need of a sanction. Thus, imputation is understood as "the establishment ... of a relationship between an event and a human being", as the "link between an event (*Seinstatbestand*) and a subject on the basis of the norm. Imputation in a *broader* sense concerns the central question of the general part of criminal law: what person shall be punished under what normative assumptions?" [emphasis in original text].

my view – and here I dissociate myself from the Majority – that, in the ascertained absence of a link between the events as charged and Mr Abu Garda, the Chamber should have refrained from legally characterising the historical events of the attack on the MGS Haskanita.

7. Several considerations support this holding:

- (i) First, the Prosecutor's failure to establish a proper connection between a given event and a given individual makes any analysis of the presence of the objective and subjective elements of criminal responsibility a matter of mere academic debate. Moreover, in the absence of imputation, the exercise of subsuming the event under the incriminating provisions of the Statute in order to determine whether any or all of the relevant elements of the crimes are present would not only have no meaningful purpose, it would also result in the Chamber exercising its powers for reasons other than those for which they were intended.
- (ii) Second, the Chamber is obliged to refrain from conducting such analysis by a fundamental principle of judicial economy: *frustra probatur quod probatum non relevat*, a principle to which most legal systems and traditions subscribe. There is no point in wasting precious judicial resources in making determinations which, however impeccable and sophisticated from a theoretical and legal standpoint, serve no purpose in properly adjudicating the case at hand.
- (iii) Third, engaging in the exercise of determining the legal characterisation of the attack on the MGS Haskanita (and even then, one may wonder why the Majority focused only on the crime of the attack charged under Count

2 and not also on the crimes charged under Count 1 and Count 3); notwithstanding the fact that this event cannot be linked to Mr Abu Garda, could cause the Chamber to pre-determine, and hence unduly prejudice, legal issues which may be of relevance for any future cases relating to the same event which might be brought before this or another Chamber. The principle of the presumption of innocence would then be compromised to the detriment of other individuals (or even of Mr Abu Garda himself, in light of article 61(8) of the Statute) in respect of whom the Prosecutor may one day be in a position to establish the above-mentioned minimal fundamental link, in the absence of which no determination of individual criminal responsibility may legitimately be made. This applies in particular to the issue of whether the MGS Haskanita had protected or non-protected status under international humanitarian law at the time of the attack.

8. In this perspective some sections of the Decision are in my view far too broad in purpose and scope. Since the first step should have consisted in determining whether the attack on the MGS Haskanita as a historical event took place, the section entitled "Material elements of the crimes" should have been factual in nature (i.e. limited to the determination of whether an attack on the MGS Haskanita took place as alleged by the Prosecutor), refraining from analysing whether one or more of the elements of the crimes charged by the Prosecutor were met. It is therefore my view that this section serves no purpose for the determination to be made by the Chamber – without prejudice to the correctness of the legal analysis contained therein.

9. By the same token, the section under the heading "Individual criminal responsibility" should have been limited to a mere factual assessment of the evidence as submitted, in order to determine whether such evidence would allow a link to be established between Mr Abu Garda and the event, without unnecessarily engaging in a detailed legal analysis of the legal requirements set forth under article 25(3) of the Statute.

10. For all these reasons, I firmly maintain that the Decision should have started with a determination as to (i) whether the events at the MGS Haskanita actually took place (and there are substantial grounds to believe that they did in fact take place as stated in paragraph 105 of the Decision) and (ii) whether these events could be properly attributed to Mr Abu Garda (as made in paragraphs 163 to 233 of the Decision). Consequently, the decision should have ended with the purely factual determination that, since the evidence brought before the Chamber is not adequate to establish any such attribution, there are no substantial grounds to believe that Mr Abu Garda committed the crimes as charged, and that, accordingly, the Chamber declines to confirm the charges.

Dated this Monday, 8 February 2010

At The Hague, The Netherlands



Judge Cuno Tarfusser