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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka, Judge
Judge Sylvia Steiner, Judge

SITUATION IN DARFUR, THE SUDAN

Public

**Public Redacted Version of Prosecutor's Application under Article 58 filed on 20
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I. Summary of the case

1. The Office of the Prosecutor (hereafter the “Prosecution”) requests the issuance of warrants of arrest against the individuals mentioned in this Application for the war crimes of violence to life (murder and causing severe injury to peacekeepers) under Art. 8 (2) (c) (i), intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission under Art. 8(2) (e) (iii), and pillaging under Art. 8(2) (e) (v) of the Rome Statute (“Statute”), committed in Darfur on 29 September 2007.

The context

2. The crimes charged in this Application were committed in the context of and associated with an armed conflict of a non international character which has existed in Darfur between the Government of the Sudan and rebel forces from about August 2002 up to the date of the filing of this Application.

The crimes

3. The crimes charged in this Application focus on an unlawful attack carried out on 29 September 2007 by rebel commanders and their forces in Darfur, the Sudan against the African Union Mission in Sudan (hereafter “AMIS”) peacekeeping personnel, installations, material, units and vehicles which were stationed at the Military Group Site (MGS) Haskanita (Sector 8) (hereafter “MGS Haskanita” or “the Camp”), Umm Kadada Locality, North Darfur.

The alleged perpetrators

4. The individuals against whom the arrest warrants are sought were commanders of rebel groups in Darfur that carried out the attack charged in this Application. As commanders, they planned and directed the attack. They commanded forces of around 1,000¹ men in a convoy of approximately 30 vehicles mounted with heavy weapons to attack AMIS peacekeepers at the MGS Haskanita. The attackers killed twelve (12) peacekeepers and severely wounded eight (8) others. In addition, they destroyed the communications installations, dormitories, vehicles and other materials belonging to AMIS. After the attack, the three commanders personally participated, alongside the joint rebel forces, in pillaging the Camp, and removing property

¹ Public Source, DAR-OTP-0154-0329 at 0329; Public Source, DAR-OTP-0154-0292 at 0292, Public Source, DAR-OTP-0154-0349 at 0349, Public Source, DAR-OTP-0154-0362 at 0362.

belonging to AMIS including approximately seventeen (17) vehicles, as well as refrigerators, computers, cellular phones, military boots and uniforms, fuel, ammunition and money.

The personnel and property attacked

5. Under the Statute, intentionally directing attacks against personnel and property involved in a peacekeeping mission in accordance with the United Nations Charter and killing of peacekeeping personnel taking no active part in hostilities are war crimes, as long as the personnel and property are entitled to the protection given to civilians and civilian objects under international humanitarian law. AMIS was a peacekeeping mission authorized in accordance with the United Nations Charter, first through UN Security Council Resolution (“UNSCR”) 1556 of 30 July 2004 and then through subsequent resolutions. The mandate of AMIS was “to monitor and observe compliance with the Humanitarian Ceasefire Agreement of April 8, 2004 and all such agreements in the future, to assist in the process of confidence building, and 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.”² AMIS personnel were not taking any active part in hostilities before, or at the time of the attack.

The admissibility of the case

6. The Appeals Chamber has ruled that that “[a]n initial determination on the admissibility of a case cannot be made an integral part of the decision on an application for a warrant of arrest for the reason that article 58 (1) of the Statute lists the substantive prerequisites for the issuance of a

² The AMIS mandate further indicates: “In order to meet these objectives, the following tasks were delineated...to monitor and verify the provision of security for returning IDPs and in the vicinity of existing IDP camps; to monitor and verify the cessation of all hostile acts by all the Parties; to monitor and verify hostile militia activities against the population; to monitor and verify efforts of the GoS to disarm Government controlled militias; to investigate and report about allegations of violations of the Humanitarian Ceasefire Agreement; to protect civilians whom it encounters under imminent threat and in the Immediate vicinity, within resources and capability, it being understood that the protection of the civilian population is the responsibility of the GoS; to protect both static and mobile humanitarian operations under imminent threat and in the immediate vicinity, within capabilities; to provide visible military presence by patrolling and by the establishment of temporary outposts in order to deter uncontrolled armed groups from committing hostile acts against the population; to assist in the development of proactive public confidence-building measures; to establish and maintain contact with the Sudanese police authorities; to establish and maintain contact with community leaders to receive complaints or seek advice on the issues of concerns; to observe, monitor and report the effective service delivery of the local police; and to investigate and report all matters of police non-compliance with the Humanitarian Ceasefire Agreement.” See DAR-OTP-0021-0158 at 0160.

warrant of arrest exhaustively...”³ Nonetheless and without prejudice to the above, the Prosecution submits the following observations on both the gravity and complementarity thresholds under the Statute..

7. In assessing the gravity of the crimes charged in this Application, and consistent with the Appeals Chamber ruling that Article 8 Chapeau requirement “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” should not be construed narrowly,⁴ the issues of the nature, manner and impact of the attack are critical. In the present case, an attack was intentionally directed at international peacekeepers, 12 of whom were killed, 8 of whom were severely wounded, AMIS facilities were completely destroyed and properties that were needed for effective discharge of its mandate pillaged. AMIS operations were severely disrupted, thus affecting its protective mandated roles with respect to millions of Darfurian civilians in need of humanitarian aid and security. Intentional directing attacks against peacekeeping operations constitute exceptional serious offences which “strike at the very heart of the international legal system established for the purpose of maintaining international peace and security”.⁵ Peacekeepers are mandated to protect and attacking them jeopardizes their mandate and puts at risk the very viability and continuation of their operations.⁶ The African Union (“AU”) in a statement issued soon after the attack described “the attack as heinous and cowardly act will not deter the determination and commitment of the AU in bringing about lasting peace and alleviating the suffering of the people in Darfur, including through the early deployment of the African Union- United Nations Hybrid Operation in Darfur (UNAMID) with enhanced capacity and strength, in accordance with the UNSC resolution 1769”.⁷ The UN also condemned ‘this murderous attack’ in a UNSC Presidential statement dated 2 October 2007.⁸ As noted in the Preparatory work to the Establishment of an International Criminal Court “attacks [were] committed against persons who represented the international community and protected

³ Para 42 of Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (13 July 2006), ICC-01/04-169 23-09-2008 1/49 CB PT OA.

⁴ Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (13 July 2006), ICC-01/04-169 23-09-2008 1/49 CB PT OA. paras 69-71

⁵ A/51/10 (1996), ILC Commentary to Art. 19, Draft Code of Crimes.

⁶ ILC Commentary.

⁷ Public Source, DAR-OTP-0158-0009; Public Source, DAR-OTP-0158-0010; Public Source, DAR-OTP-0158-0011; Public Source, DAR-OTP-0158-0012.

⁸ Public Source DAR-OTP-0161-0073

its interests; [the] attacks [were] in effect directed or committed against the international community....and the international community had a special responsibility to ensure the prosecution and punishment of these crimes.”⁹ Moreover, as the International Law Commission commented in relation to such attacks in the context of the 1996 Draft Code of Crimes, such attacks “constitute violent crimes of *exceptionally serious gravity* which have serious consequences not only for the victims, but also for the international community”.¹⁰

8. With regards to complementarity, there are no national proceedings in relation to the case.

The protection of witnesses

9. Victim and witness protection considerations apply to this Application. In fulfillment of its statutory responsibilities, the Office of the Prosecutor has continuously monitored the security of witnesses, and appropriate protective measures have been taken. Both the Prosecution and the Victims and Witnesses Unit will continue to monitor and assess the risk to witnesses.

The relief sought

10. In view of the above, and in accordance with Art. 58(1) (b), the Prosecution respectfully requests the issuance of warrants of arrest. However, as there has been public notice of this Application, all concerned commanders of rebel forces in Darfur have the opportunity to express their willingness to voluntarily appear before the Court. Subject to the Pre-Trial Chamber’s determination, the Prosecution submits that a summons to appear could be an alternative pursued by the Court if the Court receives information as to the possible voluntary appearance of the individuals.

11. Taking into account the sensitive nature of the information cited herein, the Prosecution has filed the summary of this application as the public version of this document. The Prosecution hereby files confidentially an unredacted version for the Chamber’s review.

II. Identification of the persons against whom the warrants of arrest are being sought pursuant to Art. 58(2) (a)

A. BAHR IDRIS ABU GARDA

⁹ Summary of the Proceedings of the Preparatory Committee, A/AC.249/1, 7 May 1996.

¹⁰ A/51/10 (1996), ILC Commentary to Art. 19, Draft Code of Crimes.

12. **Bahr Idris ABU GARDA** (“**ABU GARDA**”) is a Zaghawa in his early forties and was born in Nana, about 12 kilometres north of Tina, North Darfur, the Sudan. **ABU GARDA** attended Bassao Primary School east of Tina and later moved on to Al Fashir, North Darfur for his secondary school education. He then attended the then Technical Institute College (renamed Sudan University), where he completed a 3-year course in Secretarial Studies and obtained a diploma.

13. While in college, **ABU GARDA** joined the “Muslim Brotherhood” (National Islamic Front (“NIF”)), which later, under the leadership of Al Bashir¹¹ and Dr. Hassan Turabi, overthrew the government of Sadiq el Mahdi. After his graduation, **ABU GARDA** joined the Security Organization of NIF and worked at the Government of the Sudan (“GoS”) Strategic Planning Centre. In 1999, he was appointed to manage the N’djamena branch of the Gum Arabic Company in Chad, a position he held until 2002.

14. In or around 2002, **ABU GARDA** joined Justice and Equality Movement (hereafter “JEM”) [Redacted]. He remained in this post until mid-2004 [Redacted]. He returned to Darfur and became the Secretary of JEM Western Sector. On 3 January 2005, **ABU GARDA** became JEM Vice President¹² which effectively made him the second highest ranking official in the group.

15. Between July and September 2007, following disputes amongst JEM leaders, **ABU GARDA** and **ABDALLAH BANDA** attempted to remove Khalil Ibrahim from his position as chairman of JEM.¹³ Their efforts failed.

16. On 26 September 2007, Khalil Ibrahim issued a decree (Decree No. 28 of 2007) terminating the appointment of **ABU GARDA** as Head of JEM Western Sector and as Vice President of JEM.¹⁴

17. A few days after the Haskanita attack, on 4 October 2007, **ABU GARDA** declared the formation of a new rebel faction called JEM Collective Leadership (“JEM-CL”). For ease of reference, and although the movement was only formalized after the attack, the splinter forces of JEM under **ABU GARDA**’s command which participated in the attack are referred to hereafter as JEM-CL.

18. **ABU GARDA** became chairman of this movement from its inception. [Redacted]¹⁵ **ABU GARDA** became its Chairman and General Coordinator of Military Operations.

¹¹ Current President of the Sudan.

¹² Public Source, DAR-OTP-0156-0031 at 0034 (Translation).

¹³ Public Source, DAR-OTP-0158-0511(Translation) DAR-OTP-0157-1090 (Arabic)

¹⁴ Public source, DAR-OTP- 0154-0205 at 0205.

B. ABDALLAH BANDA ABAKAER NOURAIN¹⁶

19. **ABDALLAH BANDA Abakaer Nourain** (“**BANDA**”) is of Zaghawa ethnicity and was born in or around 1963 in Wai, Dar Kobe, North Darfur, the Sudan. He has no formal education and spent the early part of his life in Al Geneina, West Darfur before moving on to Al Fashir in North Darfur where he worked as a merchant. He is married and has three (3) wives.

20. When he left Al Fashir, he traveled to Libya and later on to Iraq. He returned to the Sudan again and stayed first in Port Sudan and later moved to Tina in North Darfur where he carried on his trade as a merchant, running a small business and a shop.

21. With the emergence of JEM in 2001, **BANDA** left his business in Tina to join the movement. He was appointed Commander in Chief of JEM in 2004 and later as Commander General. Upon the establishment of JEM-CL, **BANDA** became its Commander in Chief. He is currently the Deputy Chairman of the URF, and general supervisor of military operations.¹⁷

C. SALEH MOHAMMED JERBO JAMUS¹⁸

22. **Saleh Mohammed JERBO Jamus** (“**JERBO**”) is approximately 35 years old¹⁹. He is a Zaghawa and was born in Shegag Karo village, North Darfur. He is reported to have a Chadian military background. He is also reported to have participated in many campaigns against the GoS. **JERBO** was a member of SLA/MM before he joined SLA-Unity (see paragraph 62, below) at its inception. He was appointed Chief of Staff when SLA-Unity was established at a conference in Um Rai, North Darfur in February 2007.

23. **JERBO** is reported to have been involved in a battle with GoS troops in Haskanita a few weeks before the incident alleged in this Application.²⁰

III. Crimes within the jurisdiction of the court committed by the persons against whom warrants are being sought pursuant to Art. 58(2) (b) of the Statute

¹⁵ Public Source, DAR-OTP-0156-0051 (Translation) DAR-OTP-0154-0212 at 0213 (Arabic)

¹⁶ Also known as Abdallah Bandah Abkar; Abdallah Banda; Abdallah Bandah Abkar Norein

¹⁷ Public source; DAR-OTP-0156-0051 (Translation) DAR-OTP-0154-0212 at 0213 (Arabic)

¹⁸ DAR-OTP-0157-0231 at 0244-0245.

¹⁹ ICC Statement - DAR-OTP-0157-0231 at 0244.

²⁰ ICC Statement - DAR-OTP-0157-0231 at 0245.

24. Pursuant to Art. 58(2) of the Statute, the Office of the Prosecutor has concluded that there are reasonable grounds to believe that **ABU GARDA, BANDA** and **JERBO** bear criminal responsibility under Art. 25(3)(a) of the Statute for the following crimes:

Count 1

Violence to Life (Art. 8 (2) (c) (i))

On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada Locality in North Darfur, the Sudan, **ABU GARDA, BANDA** and **JERBO** jointly, and with other forces from JEM-CL and SLA-Unity, killed twelve (12) and caused severe injuries to eight (8) AMIS peacekeeping personnel and with the knowledge that they were personnel involved in a peacekeeping mission established in accordance with the UN Charter and were not taking any active part in hostilities and thus entitled to the protection given to civilians under the international law of armed conflict, thereby committing a crime in violation of Arts 8(2)(c)(i) and 25(3)(a) of the Rome Statute.

Count 2

Intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission

(Art. 8(2)(e)(iii))

On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada Locality in North Darfur, the Sudan, **ABU GARDA, BANDA** and **JERBO** jointly, and with other forces from JEM-CL and SLA-Unity intentionally directed attacks against AMIS peacekeeping personnel and AMIS installations, materials, units and vehicles involved in a peacekeeping mission established in accordance with the UN Charter, which were entitled to the protection given to civilians under the international law of armed conflict, severely injuring eight (8) peacekeepers with the knowledge of the factual circumstances that established that protection, thereby committing a crime in violation of Arts 8 (2)(e)(iii) and 25(3)(a) of the Rome Statute.

Count 3

Pillaging (Art. 8(2) (e) (v))

On 29 September 2007, at the MGS Haskanita in Haskanita Village, Um Kadada Locality in North Darfur, the Sudan, **ABU GARDA, BANDA** and **JERBO** jointly, and with other forces

from JEM-CL and SLA-Unity, pillaged the MGS Haskanita, removing property belonging to AMIS and its peacekeeping personnel including vehicles, refrigerators, computers, cellular phones, military boots and uniforms, fuel, ammunition and money, thereby committing a crime in violation of Arts 8(2)(e)(v) and 25(3)(a) of the Rome Statute.

IV. Background of the investigation

25. The Darfur Situation was referred to the Prosecutor of the International Criminal Court (hereafter the “Court” or “ICC”) by Resolution 1593 adopted on 31 March 2005 by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations (UN), thereby conferring jurisdiction upon the Court over crimes committed in the Darfur region since 1 July 2002.

26. In accordance with Art. 53(1) of the Statute, the Prosecutor communicated his decision to commence an investigation into the Darfur Situation to the President of the Court by letter dated 1 June 2005. The Prosecutor publicly announced the commencement of the investigation on 6 June 2005.

27. Since the commencement of investigations into the Darfur Situation, the Prosecutor has filed two cases before PTC I of the Court. The first case was filed on 27 February 2007 against Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman²¹ for their responsibility for crimes against humanity and war crimes committed in Darfur in 2003 and 2004. The Pre-Trial Chamber issued warrants of arrest for both of these individuals on 27 April 2007.²² These warrants are yet to be executed. On 14 July 2008, the Prosecutor filed his second case in the Darfur Situation before PTC I requesting a warrant of arrest for Omar Hassan Ahmad Al Bashir (hereafter “Al Bashir”).²³ The application is pending as of the date of this filing.

28. The case proposed by the Prosecution in this Application is the third case in the Darfur Situation. Pursuant to Art. 53(2) of the Statute, the Prosecutor has reviewed all the relevant information and evidence pertaining to this case.

²¹ See Situation in Darfur, the Sudan, ICC-02/05-55-US-Exp, Prosecutor’s Application Under Art. 58(7), 27 February 2007.

²² See the case Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-al Rahman (“Ali Kushayb”), ICC-02/05-01/07-2-Corr, Warrant of Arrest for Ahmad Harun, 15 May 2007 and ICC-02/05-01/07-3-Corr, Warrant of Arrest for Ali Kushayb, 15 May 2007.

²³ Prosecutor’s Application Under Article 58, 14 July 2008, ICC-02/05-157.

29. According to the latest update on Sudanese national proceedings, provided by the GoS to the AU on 19 September 2008, and through the AU, to the UN on 25 September 2008,²⁴ this case is not being investigated or prosecuted by the GoS. The Prosecution has arrived at the conclusion that the case is admissible. The issue of admissibility is further addressed in Section X of this Application.

V. Categories of evidence and information relied upon, protection of victims and witnesses

a. Categories of evidence and information

30. Consistent with the requirements of Art. 58(2) (d), the Prosecution furnishes in this Application a summary of evidence and other information sufficient to establish reasonable grounds to believe that **ABU GARDA, BANDA** and **JERBO** committed crimes within the jurisdiction of the Court.

31. In support of this Application the Prosecution relies mainly on the following categories of evidence or information:

- (i) [Redacted];
- (ii) [Redacted];
- (iii) [Redacted];
- (v) [Redacted];
- (vi) [Redacted];
- (ix) [Redacted];and
- (xi) [Redacted];.

32. In accordance with its obligations under Art. 54(1) of the Statute the Prosecution has investigated incriminating and exonerating circumstances equally.

33. In support of this Application, the Prosecution herewith provides in Annex 5 additional material referenced throughout the Application.

VI. Summary of the evidence and other information establishing reasonable grounds to believe that the persons against whom warrants of arrest are being sought committed crimes within the jurisdiction of the court pursuant to Art. 58(2) (d)

²⁴ Public Source, DAR-OTP-0157-1344 at 1358-1359 and 1365-1368.

A. Background to the Armed Conflict in Darfur 2003-2008

34. From about August 2002 to the date of filing this Application, and thus at all times relevant to the charges alleged in this Application, there has been an armed conflict of a non-international character in Darfur, the Sudan, between the GoS and various armed rebel groups including the Justice and Equality Movement, JEM and the Sudan Liberation Army/Movement, SLA/M.²⁵

(i) The Armed conflict

35. The Darfur region where the armed conflict is being waged is located at the western border of Sudan and is comprised of the three Sudanese States: North Darfur, West Darfur and South Darfur (see map attached as Annex 1 to this Application).

36. Since the Sudan became independent from Egypt and Great Britain in 1956, there have been tensions between groups from the north of the country that have dominated the central government based in Khartoum²⁶ and groups from other parts of the Sudan. In Darfur, the Fur, Zaghawa and Masalit ethnic groups in particular challenged the economic and political marginalization of their region. These tribes are traditionally dominant in Darfur, where they constitute the three largest tribes, with strong links to the land.

37. From at least 1989 to 2002, the GoS pursued policies aimed at further control of Darfurian tribes, in particular the Fur, Zaghawa and Masalit. During those years, members of these groups engaged in different armed rebellions.²⁷

38. One such rebellion in Darfur started in or around August 2000 when young men from the Fur and Zaghawa ethnic groups, later joined by some Masalit, organized an armed group called the Darfur Liberation Army/Front (“DLA”). The DLA launched attacks against GoS facilities

²⁵ Public Source, DAR-OTP-0116-0433 at 0434 (Translation) Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3-4 September 2003, (the parties refer to the “war” in Darfur); N’djamena Humanitarian Ceasefire Agreement on the Conflict in Darfur (signed by the GoS, SLA/M and JEM), 8 April 2004, UNCOI Material DAR-OTP-0043-0045 (in French); Protocol on the Establishment of Humanitarian Assistance in Darfur (signed by the GoS, the SLA/M and JEM), 8 April 2004, DAR-OTP-0043-0029 (French); Agreement with the Sudanese parties on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in the Darfur, 28 May 2004, DAR-OTP-0005-0308; Comprehensive Peace Agreement (signed by the GoS and SLA/M), 5 May 2006, DAR-OTP-0115-0563.

²⁶ Report of the International Commission of Inquiry, DAR-OTP-0018-0010 at 0020-0021, paras. 40-49.

²⁷ One example is the rebellion led by a Fur named Daud Bolad in 1991.

and outposts.²⁸ The DLA later evolved into the Sudan Liberation Army/Movement (‘SLA/M’) under the leadership of Abdul Wahid El Nour.²⁹

39. The SLA/M forces are drawn almost exclusively from the Zaghawa, Fur and Masalit ethnic groups – ethnic groups indigenous to the Darfur region. The SLA/M was established in or around August 2002 and it had declared its aim to be the creation of a “*united democratic Sudan on the basis of equality, complete restructuring of power, cultural and political pluralism, and prosperity for all Sudanese*”.³⁰

40. The other rebel group, JEM, a predominantly Zaghawa group, was established in or about August 2001 as a political movement under the chairmanship of Khalil Ibrahim. It later established a military wing. The declared aims of the JEM were to fight against marginalisation and for political change in Darfur.³¹

41. The regular army/air force of the Sudanese Government is the Sudanese People’s Armed Forces (hereafter “Armed Forces”) supplemented by Militia Janjaweed integrated into the Popular Defence Force (PDF)³², the Popular Police Force (PPF) and Border Intelligence Unit (BIU).

42. From August 2002, the GoS engaged in negotiations with the SLA/M and the JEM as its armed forces attempted in parallel to end the rebellion militarily. The campaign of the Armed Forces was unsuccessful and the rebels continued to launch attacks against GoS military installations, including police stations and garrisons. The negotiations broke down in March 2003³³ and the parties continued to pursue military action.

43. On 8 April 2004 the GoS, JEM and SLA/M signed the Humanitarian Ceasefire Agreement (HCA) and on 28 May 2004 an Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur. This agreement led to the deployment of AMIS which was given the responsibility for monitoring the implementation of the HCA. Subsequently, AMIS was mandated to also monitor the Darfur Peace Agreement (see paragraph 112, below).

²⁸ [Redacted].

²⁹ Public source, DAR-OTP-0143-0313 at 0314-0315.

³⁰ Report of the International Commission of Inquiry, DAR-OTP-0018-0010 at 0040-0041, para. 127-132. Public source, DAR-OTP-0154-0413 at 0413.

³¹ Report of the International Commission of Inquiry, DAR-OTP-0018-0010 at 0042, para. 133-137. Public source, DAR-OTP-0154-0398 at 0399-0400.

³² A reservist force created by the Popular Defence Force Act of 1989.

³³ [Redacted].

44. During a conference in Haskanita around November/December 2005, the original 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.

45. After a protracted period of negotiations, the GoS signed a peace agreement called the Darfur Peace Agreement (“DPA”) with SLA/MM in Abuja, Nigeria on 5 May 2006. After signing the DPA, SLA/MM aligned with the GoS and Minawi was appointed Senior Assistant to the President and Chairman of the Transitional Darfur Regional Authority.³⁴

46. Fighting continued between the GoS and SLA/MM on one hand, and the other non-signatory rebel forces on the other. The fighting continues to the date of this Application.

(ii) The Rebel Groups

(a) Justice and Equality Movement (JEM)

47. As mentioned in paragraph 40, above, JEM was created in 2001 by Khalil Ibrahim (who was at the time based in the Netherlands) as a political movement opposed to the GoS in Khartoum. Khalil Ibrahim became its Chairman³⁵, a position he holds up to the date of this filing.

48. JEM later created a military wing which initially recruited its fighters mainly from the Zaghawa from West Darfur. JEM [Redacted]³⁶ and has an elaborate and organized military structure (see Annex 2). For the purposes of its military operations, JEM divided Darfur into sectors and had commanders and troops stationed in each sector.

49. From 3 January 2005, **ABU GARDA** became the second in command in JEM and its Secretary General with responsibility for the Western Sector and Vice President. Sometime before June 2006, **BANDA** became the Commander-General of JEM.

50. Between May 2004 and May 2007, several top JEM officials left JEM and established their own rebel factions. [Redacted]³⁷ [Redacted]³⁸ [Redacted];³⁹ [Redacted];

51. On 21 June 2006, **BANDA**, as Commander in Chief of JEM, together with seven other JEM officers and with representatives of SLA Adam Bakheit (a breakaway faction from SLA/AW)

³⁴ Public Source, DAR-OTP-0147-01228 at 1240, para 17.

³⁵ Public Source, DAR-OTP-0156-0031 at 0034 (Translation); DAR-OTP-0154-0228 at 0230 (Arabic).

³⁶ [Redacted]

³⁷ [Redacted], DAR-OTP-0096-0186, at 0205, para 108; Public Source, DAR-OTP-0120-0678, at 0781

³⁸ Public Source, DAR-OTP-0120-0678, at 0782.

³⁹ Public Source, DAR-OTP-0154-0418 at 0436, Footnote 16.

signed an accord for coordination of military operations⁴⁰. During this time, **BANDA** had effective command and control over the JEM forces. However, in June 2007, Khalil Ibrahim returned to Darfur to reassert his authority over the JEM forces.

52. On 1 July 2007, Khalil Ibrahim issued a presidential decree (No. 27 of 2007) removing **BANDA** from his position as Commander General of JEM forces⁴¹. The sacking of **BANDA** from JEM was not recognised by all. On 29 July 2007, JEM Eastern Sector Command issued a statement signed by 10 commanders (i) denouncing the dictatorial leadership of Khalil Ibrahim; and (ii) contesting the removal of **BANDA** as Commander General. The spokesperson of the group in turn announced the sacking of Khalil Ibrahim from his position as President of JEM.⁴² A power struggle ensued over the leadership of JEM.

53. **BANDA** continued to carry on with his functions purportedly as Commander General of JEM. **ABU GARDA**, who at this time was still second highest ranking official in JEM, sided with **BANDA** and decried Khalil Ibrahim's attempt to remove **BANDA** from JEM.

54. Sometime in September 2007, Khalil Ibrahim went to Um Durab, North Darfur where some of the JEM forces were based and sought to remove all the JEM troops there and to take them to his bases in the North. Some of the troops who were loyal to **BANDA** refused to join him.⁴³

55. On 26 September 2007, Khalil Ibrahim issued another decree (Decree No. 28 of 2007) terminating the appointment of **ABU GARDA** as Head of JEM Western Sector and as Vice President of JEM.⁴⁴

56. Both **BANDA** and **ABU GARDA** have since continued to claim to have sacked Khalil Ibrahim from JEM and have continued to carry on military operations using JEM troops loyal to them as well as JEM vehicles and equipment. This was the case when they attacked Haskanita on 29 September 2007.

57. One of the motives of **ABU GARDA** and **BANDA** for attacking Haskanita was to assert and increase their military and political power.

58. On 4 October 2007, they declared their own group called JEM Collective Leadership under the chairmanship of **ABU GARDA** with **BANDA** as its military leader.⁴⁵

⁴⁰ Public SOURCE, DAR-OTP-0156-0046 at 0047 (Translation), DAR-OTP-0155-0026 (Original Arabic).

⁴¹ DAR-OTP- 0156-0102 (Translation), DAR-OTP- 0154-0201 (Arabic).

⁴² Public Source DAR-OTP-0157-1090 (Arabic) (Translation DAR-OTP-0158-0511)

⁴³ [Redacted].

⁴⁴ Public Source, DAR-OTP- 0154-0205 at 0205.

⁴⁵ Public Source, DAR-OTP- 0156-0097 at 0099 (Translation), DAR-OTP- 0154-0197 (Arabic).

(b) Sudan Liberation Army (Unity Faction) - SLA Unity

59. [Redacted]⁴⁶; [Redacted];⁴⁷ [Redacted];⁴⁸ [Redacted].

60. [Redacted].

61. [Redacted].⁴⁹

62. [Redacted]⁵⁰ [Redacted].

(c) Coordination and Joint Operations (JEM and SLA-Unity)

63. Since its creation, SLA-Unity collaborated with JEM in carrying out joint military operations. On 30 July 2007, JEM and SLA-Unity signed an agreement on political cooperation called the Tripoli Agreement.⁵¹ JEM and SLA-Unity also carried out joint military operations in Wadbanda in Kordofan on 29 August 2007,⁵² and Haskanita (North Darfur), among others.⁵³

B. The Attack

64. The day before the attack on the MGS Haskanita, carried out on 29 September 2007, about 200 troops belonging to SLA- Abdul Shafie Bassey arrived in the nearby town of Dar es Salaam with **JERBO**.⁵⁴ At Dar es Salaam, they met a group of rebels from JEM led by **ABU GARDA** and **BANDA**. These three commanders held a meeting, after which they ordered the rest of their forces to follow them.⁵⁵ They took some of their troops to Haskanita and sent the others with their trucks to their nearby camp in Dalil Babiker just an hour's drive from Haskanita. The three commanders remained in Haskanita.⁵⁶

65. The next morning, GoS forces attacked the rebel forces near their camp in Dalil Babiker as they were about to leave the area, killing at least three of them. The attack forced the rebel group

⁴⁶ Public Source, DAR-OTP- 0158-0450.

⁴⁷ Public Source, DAR-OTP- 0158-0462.

⁴⁸ Public Source, DAR-OTP- 0158-0457.

⁴⁹ [Redacted].

⁵⁰ DAR-OTP-0158-0222 at 158-0237 at line 498.

⁵¹ Public Source, DAR-OTP- 0156-0046 at 0047 (Translation), DAR-OTP- 0155-0026 (Arabic)

⁵² Public Source, DAR-OTP- 0156-0066 (Translation), DAR-OTP- 0154-0393 (Arabic)

⁵³ Public Source DAR-OTP- 0156-0024 at 0024 (Translation) , DAR-OTP- 0154-0209 (Arabic)

⁵⁴ [Redacted].

⁵⁵ [Redacted].

⁵⁶ [Redacted].

to withdraw to their Camp in Dalil Babiker. Soon after they arrived at the camp, GoS aircraft bombed their locations. Soon after this attack, **BANDA** and **JERBO** arrived in Dalil Babiker and summoned their unit commanders to a meeting in the camp.⁵⁷ **ABU GARDA** later arrived in the camp and joined the meeting.⁵⁸ Approximately 20 Unit commanders [Redacted], participated in the meeting.⁵⁹ The commanders agreed among themselves to attack the MGS Haskanita.

66. Immediately after the meeting, **ABU GARDA**, **BANDA** and **JERBO** ordered their troops to board their vehicles. At around 16:30 hours,⁶⁰ the combined JEM and SLA-Unity forces arrived in a forest about 15 minutes drive away from the MGS Haskanita. **ABU GARDA**, **BANDA** and **JERBO** held another meeting. After this meeting, they addressed their respective troops⁶¹.

67. **BANDA**, **ABU GARDA**⁶² and **JERBO** were all armed with *dushkas*, while the other Unit commanders [Redacted], had a “Sol Sol” weapon (a multiple rocket launcher); [Redacted] had an anti-aircraft machine gun;⁶³ [Redacted]⁶⁴ had a 106-calibre weapon; and [Redacted] had a 106-calibre weapon⁶⁵

68. At about 19:30 hours⁶⁶ approximately 1,000 joint JEM and SLA-Unity forces in a convoy of approximately 30 vehicles⁶⁷ mounted with heavy weapons⁶⁸ approached the Camp from the direction of Haskanita village. The timing (19:30 hours) of the attack on the MGS Haskanita coincided according to the AU report with the rites of breaking the Ramadan Fast. Therefore many of the AU personnel would have been unarmed and in or around the Mosque.

69. When they arrived near the electric wire fence surrounding the Camp, the commanders ordered the combined rebel force to attack the premises and the commanders in the lead vehicles, including **ABU GARDA**⁶⁹, **BANDA** and **JERBO**, directed the assault on the Camp.⁷⁰

⁵⁷ [Redacted].

⁵⁸ [Redacted].

⁵⁹ [Redacted].

⁶⁰ [Redacted].

⁶¹ [Redacted].

⁶² [Redacted].

⁶³ [Redacted].

⁶⁴ [Redacted]

⁶⁵ [Redacted].

⁶⁶ [Redacted].

⁶⁷ [Redacted].

⁶⁸ [Redacted].

⁶⁹ [Redacted].

⁷⁰ [Redacted].

The combined rebel force first attacked the communication installations of the AMIS forces and then the guards. [Redacted], who was a member of SLA-Unity [Redacted], related that the AMIS forces managed to resist the attack briefly by manoeuvring an armoured personnel carrier (“APC”) towards the attackers. However the attacking rebel forces fired their heavy weapons and destroyed the APC. Once the APC was destroyed there was very little resistance from the AMIS forces as many of them were in the mosque and unarmed. After the destruction of the APC there was only sporadic shooting as the attackers quickly gained access into and took control of the Camp.⁷¹

70. [Redacted] the AU soldiers were hiding in trenches around the perimeter of the Camp while others were in various locations within the Camp. [Redacted] the soldiers were unarmed and some of them were crying. They did not speak Arabic and were attempting to communicate with the attackers through hand gestures.⁷²

71. The attack continued until approximately 20:00 hours during which time the attackers shot and killed 10 AMIS peacekeepers.⁷³ Two (2) other peacekeepers later died from injuries sustained during the attack⁷⁴ and eight (8) others were severely wounded.

72. After the attack, the rebel forces engaged in large-scale pillaging of the Camp. [Redacted] **BANDA, JERBO** and some of the rebel troops enter the Camp and emerge shortly afterwards with refrigerators, computers, mobile phones, boots, uniforms, fuel and money. [Redacted] vehicles being looted from the Camp.⁷⁵ [Redacted] the rebel troops looted vehicles as well as light weapons from the Camp. [Redacted] the vehicles were subsequently shared between the two rebel groups.⁷⁶

73. In addition to the destruction of the APC, the attackers vandalised equipment and property they found and then set fire to some of the installations in the Camp, destroying them completely. An AMIS News Bulletin contains photographs taken the day after the attack. One of the pictures depicts a burnt-out AMIS APC still smoldering. Another shows a completely burnt-out dormitory within the Camp. Other pictures depict wounded soldiers being treated or

⁷¹ [Redacted].

⁷² [Redacted].

⁷³ Public Source, DAR-OTP-0152-0230 at 0231.

⁷⁴ Public Source, DAR-OTP-0154-0148 at 0148.

⁷⁵ [Redacted].

⁷⁶ [Redacted].

transported from the scene in the aftermath of the attack and an APC which had been hit by a rocket propelled grenade⁷⁷.

74. A few days after the attack, the AU launched an investigation into the incident at Haskanita and on 9 October 2007 published an Investigation Report.⁷⁸ The Report stated that the attackers “targeted all known gun positions, radio room, APCs and areas like the mosque where the MGS personnel were likely to concentrate. The radio room was completely destroyed with a 106mm projectile in the first few minutes of the attack. One out of the 2 radio men was instantly killed and communication via the HF sets was severed. (...) having subdued the resistance of the Protection Force (PF) the attackers employed the services of some allied staff to either identify a key officer, or aid the removal of vital material/equipment”.⁷⁹ Photographs of a burnt-out mosque and radio equipment were annexed to the AU Report.

75. The Prosecution is in possession of satellite imagery showing the MGS Haskanita before and after the attack. The imagery taken after the attack shows the extent of the destruction of the camp⁸⁰.

76. AMIS returned the bodies of the peacekeepers killed during the attack to their respective countries after a funeral service held in Al Fashir, North Darfur, on 8 October 2007.⁸¹
[Redacted]

C. Context in which the crimes alleged in this Application were committed

77. In accordance with Art. 8 of the Statute, the Prosecution has to prove that (i) the conduct took place “in the context of” an armed conflict not of an international character; and (ii) was “associated with” such a conflict; and (iii) the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

(i) Conduct took place “in the context of” an armed conflict not of an international character

78. In assessing whether the conduct took place “in the context of” an armed conflict of a non-international character, the Prosecutor has to address the following elements: (a) existence of an

⁷⁷ Public source, DAR-OTP-0153-1860 at 1862.

⁷⁸ Public Source, DAR-OTP-0160-0826

⁷⁹ [Redacted].

⁸⁰ [Redacted].

⁸¹ [Redacted] AMIS, in its news bulletin issued by on 9 October 2007, published pictures of the coffins of the killed soldiers being taken away after the funeral service.

armed conflict not of an international character and; (b) that the crimes occurred within the temporal and geographical scope of the conflict.

(a) Existence of an armed conflict of a non-international character

79. The Prosecution recalls that PTC I in its decision of 27 April 2007 in the case of the *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* found that:

“44. In light of the Prosecution Application and its supporting material, the Chamber finds that there are reasonable grounds to believe that the conflict in Darfur, Sudan, which started from about August 2002, was not of an international character. The conflict arose when the Government of the Sudan, in an attempt to curb the rebellion, reacted by using the Sudanese Armed Forces against the abovementioned armed rebel movements, including the SLM/A and the JEM.

45. Moreover, the Chamber notes that, while there have been attempts at peace talks and that peace agreements were signed during the period relevant to the Prosecution Application, the JEM refused to take part in some of the peace talks and that following the peace agreements, other attacks were launched by both parties.

46. Accordingly, there are reasonable grounds to believe that during the period relevant to the Prosecution Application, there was a protracted armed conflict within the meaning of Art. 8(2)(f) of the Statute between the Sudanese Armed Forces along with the Militia/Janjaweed against the organised rebel groups, including the SLM/A and the JEM.

47. On the basis of the evidence and information provided, the Chamber is of the view that there are reasonable grounds to believe that the alleged criminal acts were committed in the context of and were associated with the armed conflict in Darfur, Sudan which occurred from about August 2002 until at least the time relevant to the Prosecution Application. Indeed, there are reasonable grounds to believe that the attacks on the towns mentioned in the Prosecution Application were carried out by the Sudanese Armed Forces and the Militia/Janjaweed, acting in concert, in the context of the above-mentioned counter-insurgency campaign conducted in phases marked by rebel activity and broken peace agreements.”⁸²

⁸² Paras 44- 47 of the Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr 15-05-2007; 27 April 2007.

Based on the foregoing, the Prosecution submits that there is an armed conflict of a non-international character in the Darfur region of the Sudan at least up to the date of the decision mentioned above. The Prosecution submits further that the armed conflict between the parties mentioned in the PTC decision still subsists up to the date of filing this Application. In fact, on 12 November 2008, Al Bashir announced an “immediate ceasefire” to hostilities in Darfur after hearing the final recommendations of the Sudan People's Initiative (SPI), a government-backed plan purported to find peace for Darfur.⁸³ While the statement has been commented upon as another smokescreen tactic, it is a confirmation that hostilities continue.

(b) “In the context of” - temporal and geographical scope of the armed conflict

80. The phrase “*in the context of*” contained in the definitional elements of armed conflict not of an international character requires that in addition to proving that an armed conflict existed, the Prosecution must establish that the crimes alleged occurred within the temporal and geographical scope of the armed conflict.⁸⁴

81. The crimes alleged in this Application were committed on 29 September 2007 in Haskanita (Sector 8), Umm Kadada Locality, North Darfur. The armed conflict, as mentioned above, has been fought in the whole territory of Darfur. It started in 2002 and still continues to the date of this application. Thus the crimes occurred within the geographical and temporal scope of the armed conflict.

(ii) The crime was “associated with” the armed conflict

82. To establish a connection between the proscribed conduct and the armed conflict, meaning that the acts of the accused must be “closely related” to the hostilities⁸⁵ the Prosecution must show that the perpetrator was acting in furtherance of or at least under the guise of the armed

⁸³ Public Source, DAR-OTP-0160-0709

⁸⁴ *Prosecutor v. Tadić*, Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 70; *Tadić* Trial Judgment, para. 572; *Prosecutor v. Delalic, Mucic, Delic and Landso*, Case No. IT-96-21-T, Judgement, 16 November 1998 (*Celebici* Trial Judgment, paras 196-197) ; *Kayishema and Ruzindana* Trial Judgment, paras 182-183; *Kunarać* Appeal Judgment, paras 57 and 64.

⁸⁵ *Kunarać* Appeal Judgment, paras 58-59; *Rutaganda* Appeal Judgment, para. 569; *Strugar* Trial Judgment, para. 215, referring to *Tadić* Jurisdiction Decision, para. 70; *Naletilić* Trial Judgment, para. 225.

conflict, and was taking advantage of the situation created by the fighting.⁸⁶ This element will be proved if the Prosecution is able to establish that the conflict played a substantial part in the perpetrator(s)' ability to commit the crime, the manner in which and the purpose for which it was committed.⁸⁷

83. The illustrative factors normally relied on to inform the finding on the test in question include: (a) whether the perpetrator is a commander or combatant; (b) whether the victim is a non-combatant; and (c) whether the crime was committed within the context of the perpetrator's official duties.⁸⁸

84. In the instant case, the three persons identified are commanders, they directed the attack as part of their military campaign and in the context of their roles as commanders as described in paragraphs 12 to 23, above.

85. As mentioned in paragraphs. 5, above, and 108 to 116, below, AMIS personnel, installations, material, units and vehicles were entitled to the protection given to civilians and civilian objects under the international law of armed conflict at the time of the attack.

86. From the above, it is clear that the three relevant factors are established in this case.

(iii) The perpetrator was aware of the factual circumstances that establish the existence of the armed conflict

87. **ABU GARDA, BANDA** and **JERBO** were well aware of the existence of an armed conflict in Darfur at the time they attacked the MGS Haskanita. All these three individuals were not only commanders of the actual groups they led when they attacked the MGS Haskanita, they were also (or very recently were) senior commanders in rebel groups that were and still are parties to the armed conflict. They have all worked in top positions in their respective rebel groups for years and have carried out such important functions which necessarily required that they were aware of the existence of the armed conflict. For instance, on 21 June 2006, JEM and SLA signed a military and political agreement which implicitly recognises that they were fighting a war against the GoS. **BANDA** signed the agreement on behalf of the JEM.⁸⁹ Soon after the

⁸⁶ *Kunarać* Appeal Judgment, para. 58; *Kunarać* Trial Judgment, para. 568; *Vasilević* Trial Judgment, para. 25.

⁸⁷ Prosecutor v. *Kunarać et al*, Judgement, IT-96-23& IT-96-23/1 A, App.Ch., 12 June 2002, para 58; Prosecutor v. Rutaganda, Judgement, Case No. ICTR-96-3-A, App.Ch., 26 May 2003, paras.569-70

⁸⁸ *Kunarać* Appeal Judgment, para. 59; *Kamuhanda* Trial Judgment, para. 736.

⁸⁹ Public Source, DAR-OTP-0156-0046 (Translation), DAR-OTP-0155-0026 (Arabic)

attack on the MGS Haskanita, **ABU GARDA**, and **BANDA** as Chairman and Commander respectively of JEM-CL issued a statement which acknowledged the factual existence of the armed conflict.⁹⁰ In addition JEM-CL and SLA-Unity subsequently participated in the peace conference in Sirte, Libya on 27-30 October 2007. For these reasons, **ABU GARDA**, **BANDA** and **JERBO** were fully aware of the existence of the armed conflict.

88. In view of the foregoing, there are reasonable grounds to believe that the alleged conduct of **ABU GARDA**, **BANDA** and **JERBO** took place in the context of and was associated with an armed conflict not of an international character. Furthermore, **ABU GARDA**, **BANDA** and **JERBO** were fully aware of the existence of the armed conflict at the time relevant to the crimes alleged in this Application.

D. Prohibited acts

(a) Violence to Life - Murder and Causing Injury (Art. 8(2) (c) (i))

89. The crime alleged in Count 1 of this Application relates to the War Crime of Violence to Life. In order to prove this crime, the Prosecution must, in addition to the common elements for war crimes committed in the context of an armed conflict not of an international character, prove that (a) the perpetrators killed or caused injury to one or more peacekeepers; (b) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in hostilities; and (c) the Perpetrator was aware of the factual circumstances that establishes this status.

90. The common elements for war crimes committed in the context of an armed conflict not of an international character have already been addressed in paragraphs 77 to 88 (inclusive), above, and are referenced herein.

(a) The perpetrators killed or injured one or more peacekeepers

91. As mentioned in paragraph 71 above, **ABU GARDA**, **BANDA**, **JERBO** and their subordinates killed twelve (12) and caused severe injury to eight (8) AMIS peacekeepers in the attack on the MSG Haskanita. [Redacted]

⁹⁰ Public source, DAR-OTP-0156-0096 at 0097 (Translation), DAR-OTP-0154-0197 (Arabic).

(b) Such person or persons were either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in hostilities

92. As mentioned in paragraph 7, above, the persons killed and injured were AMIS peacekeepers. As a general rule, “protected persons” under the 1949 Geneva Conventions applies to persons not taking an active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.⁹¹ The question whether an individual qualifies for protection under the international law of armed conflict depends on whether he or she is a combatant (for international armed conflicts) or engaged in the hostilities. In relation to peacekeepers, having regard to the exclusion clause contained in Art. 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel,⁹² Commentators suggest that the personnel of peacekeeping missions are entitled to protection, *unless and for such time as they take a direct part in hostilities*, i.e. are engaged as combatants.⁹³ The protection does not cease however, if such persons use armed force merely in the exercise of their legitimate right to self-defence.⁹⁴

93. Beyond qualifying as a protected person, there is also the question whether the protection accorded to a peacekeeper is the same as that given to civilians under the international law of armed conflict. In his Report to the Security Council on the establishment of a Special Court for Sierra Leone, the UN Secretary-General distinguished between “peacekeepers as civilians” and “peacekeepers turned combatants” and identified peacekeepers as “a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection”.⁹⁵ In a similar vein, in Resolution 1769, the Security

⁹¹ See article 3 common to the four Geneva Conventions of 12 August 1949. See also Art. 8(2) (c) of the Rome Statute.

⁹² Article 2(2) reads as follows: “This Convention shall not apply to 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 the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies”; Convention on the Safety of United Nations and Associated Personnel (A/RES/49/59, 1994).

⁹³ See also Article 13(3) of Additional Protocol II, which provides for the protection of civilians in non-international armed conflicts, which ceases when, and as long as, they take active part in hostilities; See also UNSG Bulletin on Observance by UN forces of IHL (ST/SGB/1999/13).

⁹⁴ K Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003), p. 159; G. Werle, *Principles of International Criminal Law* (2005), p. 383, para. 1142. See also Convention on the Safety of UN and Associated Personnel, Article 21 (“Nothing in this Convention shall be construed so as to derogate from the right to act in self-defence.”)

⁹⁵ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 16. DAR-OTP-0154-0532 at 0535.

Council demanded an “*immediate cessation of hostilities and attacks on AMIS, civilians and humanitarian agencies, their staff and assets and relief convoys*”.⁹⁶

94. A peacekeeping mission in accordance with the UN Charter is one which has the following elements: (1) host nation consent;⁹⁷ (2) impartiality or neutrality and (3) self defensive rules of engagement.⁹⁸

95. The consent of the GoS to the deployment of AMIS is evidenced by several agreements signed between the parties to the conflict and the AU. For example, the AU signed a Status of Mission Agreement (SOMA) with the GoS on 4 June 2004 to provide, among other things, for the granting of certain privileges, immunities, facilities and concessions to the Ceasefire Commission and the use of flags, markings and other distinctive identification by the Commission.⁹⁹ In addition, on 9 November 2004, the GoS, SLA/M and JEM signed a Protocol on the Enhancement of the Security Situation in Darfur in accordance with the N’djamena Agreement.¹⁰⁰ In paragraph 2 of the Protocol, the parties agreed to extend unreserved cooperation to AMIS to enable it to discharge its mandate and operational tasks as spelt out in 20 October 2004 AU Peace and Security Council Communiqué. In the Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur of 28 May 2004¹⁰¹, the GoS, SLM/A and JEM committed themselves to ensuring the protection and safety of the AU Military Observers.

96. As a ceasefire monitoring mission, the fact that AMIS was deployed to Darfur as a neutral and impartial force is not in doubt. In a press release dated 20 August 2006, UNMIS unequivocally reminded all parties to the conflict to respect the “neutral and impartial status of AMIS”.¹⁰² Finally, in the AMIS Rules of Engagement, use of deadly force is authorised only in

⁹⁶ Resolution 1769 of the Security Council, S/RES/1769 (2007), 31 July 2007. DAR-OTP-0155-0010 at 0013.

⁹⁷ DAR-OTP-0157-1300 at 1303, Report of the Secretary-General to the General Assembly (1956), First Emergency Special Session, Annexes, document A/3302; *see also* DAR-OTP-0157-1324 at 1327-1328 UN Secretary-General, Agenda for Peace of 17 June 1992, UN Doc. A/47/277-S/24111, para. 20.

⁹⁸ Brian D.Tittemore, ‘Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations’ (1997) 33 *Stanford Journal of International Law* 61, p. 77.

⁹⁹ Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in Darfur Area of the Sudan (CFC) of 4 June 2004. Public Source, DAR-OTP-0154-0021 at 0025.

¹⁰⁰ 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. DAR-OTP-0154-0004.

¹⁰¹ Agreement with the Sudanese Parties on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in the Darfur of 28 May 2004. DAR-OTP-0005-0308

¹⁰² [Redacted]..

the case of self defence of AU personnel, highlighting further the self defensive nature of the rules.¹⁰³

97. Based on the foregoing, AMIS is a peacekeeping mission in accordance with the UN Charter and its personnel and objects deployed in Haskanita were entitled to protection under international humanitarian law as required by Art. 8(2) (c) (i) and 8(2) (e) (iii) of the Statute at the time of the attack. In addition, the above equation by the Secretary-General of the UN and UN Security Council of the protection accorded to peacekeepers with that accorded to civilians shows that AMIS personnel are entitled to the same protection accorded to civilians in international humanitarian law as they did not act in any way that would cause them to lose such entitlement.

98. [Redacted] prior to the attack, **JERBO** told [Redacted]; that they were going to carry out the attack because “*those people*” in Haskanita spy on us for the GoS, and whenever they go to Nyala they report our locations” [Redacted]. [Redacted] by “those people” [Redacted] understood **JERBO** to mean the AU forces.¹⁰⁴

99. However, nothing in the investigations carried out by the Prosecution indicates that AMIS personnel provided intelligence information to the GoS or that the AMIS base was being used to transmit information to the GoS or was in any way making an effective contribution to the military action of a party to a conflict, in spite of the allegations by a JEM Commander that information was reaching the GoS about rebel positions through a GoS officer who worked in the MGS Haskanita as the GoS representative in the Ceasefire Commission, named Captain Bashir.

100. In fact, [Redacted] stated that **ABU GARDA** and **BANDA** were spreading the rumour of cooperation between AU and GoS merely to justify their attack,¹⁰⁵ which was actually conducted for the purpose of looting the MGS Haskanita and replenishing their depleted resources.

(c) The Perpetrator was aware of the factual circumstances that establishes this status

101. JEM and SLA-Unity fighters had operated in Haskanita for over a year prior to the attack. They established a base in Dalil Babiker, just an hour’s drive from Haskanita. They knew of the

¹⁰³ Rules of Engagement (RoE) are usually kept confidential, but the AMIS RoEs were referenced in a January 2006 HRW report. See “Sudan: Imperatives for Immediate Change – The African Union Mission in Sudan”, DAR-OTP-0154-0074 at 0081.

¹⁰⁴ [Redacted].

¹⁰⁵ [Redacted]

existence of the MGS Haskanita in the area and have had interactions with the peacekeepers there before the attack. Thus, both JEM and SLA-Unity commanders knew the exact location of the MGS Haskanita and knew that there was no GoS military base in Haskanita. Officials of both JEM and SLA-Unity had a series of contacts with peacekeepers in the MGS Haskanita weeks and days before the attack. [Redacted]¹⁰⁶ [Redacted]

102. A few weeks before the attack on MGS Haskanita, at a point when the GoS offensive against the combined JEM and SLA-Unity force for the control of Haskanita was at its peak, a JEM commander visited the MGS Haskanita with his troops and demanded suspension of all AMIS flights to Haskanita and the eviction of a GoS Military Officer from the base for allegedly providing GoS pilots with coordinates of rebel positions in the area.¹⁰⁷ From the above, it is clear that both JEM and SLA-Unity troops in the area knew of the existence and location of the MGS Haskanita and were well aware that the place was occupied by peacekeepers that were protected.

103. Based on the foregoing the Prosecution submits that there are reasonable grounds to believe that **ABU GARDA, BANDA** and **JERBO** committed the crime of violence to life through the murder of twelve (12) AMIS peacekeepers and the causing of injury to eight (8) others at the MGS Haskanita.

(b) Intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission

104. The crime alleged in Count 2 of this Application relates to intentionally directing attacks against peacekeepers, materials, units or vehicles involved in a peacekeeping mission in accordance with the UN Charter, which were entitled to the protection given to civilians or civilian objects under the international law of armed conflict. In order to prove the crime alleged in Count 2, the Prosecution must first establish the common elements for armed conflict of a non international character (see paragraphs 77 to 88, above), and in addition the following elements:

- (i) the perpetrator directed an attack;
- (ii) the object of the attack was personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the

¹⁰⁶ [Redacted]

¹⁰⁷ [Redacted]

United Nations, and entitled to the protection given to civilians or civilian objects under the international law of armed conflict at the time of the attack;

(iii) the perpetrator intended such personnel, installations, materials and units or vehicles so involved to be the object of the attack;

(iv) the perpetrator was aware of the factual circumstances that established that protection.

(i) The perpetrator directed an attack

105. The conduct prohibited under Art. 8(2) (e) (iii) of the Statute is *directing an attack* against humanitarian assistance or peacekeeping mission.¹⁰⁸ Pursuant to the ICTY's consistent case-law, the notion of "attack" refers to a course of conduct involving the commission of acts of violence.¹⁰⁹

106. The Preparatory Commission for the establishment of the ICC and commentators hold that the term "attack" within the meaning of Art. 8(2)(e)(iii) may be clarified and construed by reference to the 1994 Convention on the Safety of the United Nations and Associated Personnel (hereafter "Convention") as "[t]he intentional commission of (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty".¹¹⁰

107. The Prosecution relies on the factual occurrence of the violent incident at Haskanita directed by **ABU GARDA, BANDA** and **JERBO** against AMIS personnel, official premises and installations, materials, buildings and equipment. The Prosecution submits that this charge

¹⁰⁸ Elements of Crimes, Elements for War crime of attacking humanitarian or peacekeeping mission, para. 1.

¹⁰⁹ Pursuant to Article 49(1) of the Additional Protocol I to the Geneva Conventions "attacks" are acts of violence against the adversary, whether in offence or in defence. *Krnjelac* Trial Judgment, para. 54; *Kunarać* Trial Judgment, para. 415; *Galić* Trial Judgment, ICTY, para. 52; the ICRC Commentary to Additional Protocol I further clarifies its meaning to consist in a "combat action" involving the use of armed force to carry out a military operation at the beginning or during the course of armed conflict. See also *Kordić et al.* Appeal Judgment, para. 47; *Strugar* Trial Judgment, para. 282, referring to ICRC Commentary on Additional Protocols, p. 603. See also K Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary (2003), p. 156; The meaning of "attack" is deemed to go beyond that of "military operation" under Article 49(1) of Additional Protocol I to the Geneva Conventions of 1949 and include *any type of use of force* against humanitarian relief organizations or peacekeeping missions. G. Werle, Principles of International Criminal Law (2005), p. 382, para. 1141.

¹¹⁰ see Article 9 (1) of the Convention on the Safety of United Nations and Associated Personnel, G.A. res. 49/59, 49 U.N. GAOR Supp. (No. 49) at 299, U.N. Doc. A/49/49 (1994); the treaty entered into force on 15 January 1999 (hereafter "Convention on the Safety of UN and Associated Personnel"); Summary of Proceedings of the Preparatory Committee on the Establishment of an International Criminal Court, A/AC.249/1 of 7 May 1996; Kittichaisaree, International Criminal Law, Oxford 2001, at page 160.

does not require any harmful result/consequence (deaths and/or serious injury) and that the mere attack is sufficient.¹¹¹ Nonetheless, in the instant case, **ABU GARDA, BANDA** and **JERBO** and their subordinates killed and injured AMIS peacekeepers as mentioned above and destroyed property belonging to AMIS.

(ii) The object of the attack was personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations

108. This requirement deals with the status of the personnel or objects that were subjected to attack. Under the Statute, personnel, installation, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission which is undertaken in accordance with the Charter of the United Nations are protected from attack by the belligerent parties as long as they are entitled to the protection given to civilian objects under the international law of armed conflict.

109. Although prohibition of attacks on humanitarian and peacekeeping missions has its origins in the 1994 Convention on the Safety of United Nations and Associated Personnel,¹¹² the personal field of application of the latter is not necessarily meant to limit the personal reach of the crime defined under the Statute.¹¹³ Indeed, operations referred to by the term “peacekeeping mission” goes beyond those protected by the Convention (i.e. operations conducted *under the UN authority and control*), it also covers peacekeeping operations carried out under the lead of *regional security arrangements in accordance with the UN Charter*.¹¹⁴

110. The UN Charter contains clear indication of its support for regional arrangements and action aimed at peaceful resolution of disputes. Art. 52(1) of the UN Charter provides: “*Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing*

¹¹¹ K Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary (2003), p.153; see also R. Lee (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, p. 147.

¹¹² On the Convention influence on the development of the elements of the crime at issue see R. Lee (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, p. 145; M. Cottier, Article 8, in O. Triffterer (Ed.), Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article (2008), paras 37-39.

¹¹³ K Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary (2003), p. 156.

¹¹⁴ See M. Cottier, Article 8, in O. Triffterer (Ed.), Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article (2008), paras 44, 48.

with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements and agencies and their activities are consistent with the Purposes and Principles of the United Nations.” Art. 52(3) of the Charter further provides: *“The Security Council shall encourage the development of peaceful settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.”*¹¹⁵

111. AMIS was set up by the Peace and Security Council of the AU to implement the Council’s decisions made in response to the situation in Darfur, the Sudan.¹¹⁶ The catalyst for its formation was the signing of the HCA in N’jamena on 8 April 2004 by the GoS, SLA/M and JEM. On 28 May 2004, the same parties concluded, under the auspices of the AU, an Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur. After AMIS initial deployment, the AU Peace and Security Council subsequently decided to increase the size and broaden the mandate of the force to ensure the effective implementation of the HCA.¹¹⁷ One of the mandates of AMIS was to monitor and observe compliance with the HCA. The force was also mandated to assist in the process of confidence building and contribute to the improvement of the security situation throughout Darfur.¹¹⁸

112. The mandate of AMIS, as contained in the 20 October 2004 Communiqué of the AU Peace and Security Council, is in line with the principles and purposes of the UN Charter as set out in Art. 1 and 2 of the Charter. A peacekeeping mission deployed to monitor and observe compliance with a ceasefire agreement is to be understood as one way of settling an international dispute by peaceful means referred to in Art. 33 of the UN Charter.

113. Furthermore, through a number of UN Security Council resolutions and Presidential Statements, the Security Council has encouraged and endorsed the deployment of AMIS in the

¹¹⁵ DAR-OTP- 0157-1315 at 1316, Elaborating on Chapter VIII of the Charter, the UN Security Council, in recalling the Chapter among other things, in Resolution 1631, reiterated “the need to encourage regional cooperation, including through the involvement of regional and sub-regional organizations in the peaceful settlement of disputes”. See Resolution 1631 of the Security Council, S/RES/1631 (2005), 17 October 2005.

¹¹⁶ Communiqué of the Peace and Security Council of the African Union, PSC/AHG/Comm. (X), 25 May 2004. Paragraph 6 of the Decision on the Crisis in the Darfur Region of the Sudan in the Communiqué provides that the Peace and Security Council “authorizes the Chairperson of the [AU] Commission to take all steps deemed necessary 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).” Public Source, DAR-OTP-0154-0495 at 0496.

¹¹⁷ Communiqué of the Peace and Security Council of the African Union, PSC/PR/Comm. (XVII), 20 October 2004. DAR-OTP-0154-0500 at 0501 para 4.

¹¹⁸ DAR-OTP-0154-0500 at 0501-0502, paras 4-6.

manner envisaged by Art. 52(3) of the UN Charter. For example, in a Statement by the President of the Council dated 26 May 2004, the Council expressed “*its full and active support for the efforts of the African Union to establish the ceasefire commission and protection units*”.¹¹⁹ In its Resolution 1556 of 30 July 2004, the Security Council endorsed “*the deployment of international monitors, including the protection force envisioned by the African Union, to the Darfur region of Sudan under the leadership of the African Union*” and further expressed “*its full support for the African Union-led ceasefire commission and monitoring mission in Darfur*”.¹²⁰ In another Presidential Statement of 13 October 2005, the Council also demanded that the parties to the conflict should “*cooperate fully with the African Union Mission*”.¹²¹

114. From the foregoing, AMIS is a peacekeeping mission in accordance with the Charter of the United Nations, particularly Chapters I and VIII of the Charter, as envisaged in Art. 8(2) (e) (iii) of the Statute.

115. The question remains as to whether as peacekeepers, the AMIS personnel were entitled to the protection normally accorded to civilians not taking any active part in hostilities. This issue has been addressed in paragraphs 92 to 101 (inclusive), above.

116. When it comes to other protected objects, the law of non-international armed conflicts does not contain any provision comparable to Art. 13(3) of Additional Protocol II. Neither are there conditions for the loss of protected status expressly set out there under. Nevertheless, the relevant rules are to be deduced from the conditions of protection of civilian objects in international conflicts as embodied in the First Additional Protocol,¹²² and imply an affirmative showing that the object *did not make an effective contribution to the military action of a party to a conflict* and had retained protection accorded to a peacekeeping mission as such.¹²³

¹¹⁹ Public Source, DAR-OTP-0155-0016 at 0017.

¹²⁰ Resolution 1556 of the Security Council, S/RES/1556 (2004), 30 July 2004. DAR-OTP-0155-0002 at 0004-0006.

¹²¹ Public Source, DAR-OTP-0155-0018 at 0019; Public Source, DAR-OTP-0155-0020.

¹²² See Article 52 of the First Additional Protocol. Note also that the Sudan was a party to the Additional Protocols at the time of the attack.

¹²³ See K Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003), p. 455, referring to Article 2(6) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices as amended on 3 May 1996 and Article 1 (6) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 May 1999, both of which apply the same definition of military objective without a distinction drawn as to the nature of an armed conflict.

(iii) *The perpetrator intended such personnel, installations, materials and units or vehicles so involved to be the object of the attack*

117. Following from the requirements of Art. 30 of the Statute, the attack against personnel and objects involved in a peacekeeping mission must be accompanied by requisite mental state of the perpetrator - the perpetrator should have meant to engage in the attack. The Elements of Crimes in addition require that the personnel, installations, material units or vehicle involved in a humanitarian assistance or peacekeeping mission *be intended to be the object of the attack*.¹²⁴ This element requires the Prosecution to show that the perpetrator intended to attack AMIS personnel and objects involved in a peacekeeping operation.

118. **ABU GARDA, BANDA** and **JERBO** held a series of meetings during which they planned the attack. Prior to the attack **JERBO** told at least one of the Unit Commanders that they were going to attack “*those people*” in Haskanita “*because they were spying on us*”. [Redacted] understood him to mean that they were going to attack the AMIS forces. It is therefore clear that the object of the planned attack was personnel, materials, units and installations of AMIS - a peacekeeping force.

119. The manner in which the attack on the MGS Haskanita was executed suggests that the attackers targeted the personnel, installations, materials, units and vehicles of AMIS. In the first wave of the attacks, **ABU GARDA, BANDA** and **JERBO** and their subordinates specifically targeted and destroyed the AMIS communication platform rendering it difficult for the AMIS forces to communicate with each other or the outside during the attack. The very fact that the attackers were able to identify exactly where the communication platform was located, shows their prior knowledge of the lay out and set up of the Camp. This further demonstrates the pre-planned nature of the attack and the intention of the group to attack the mission, as such.

120. As soon as the attack started, the AMIS peacekeepers fired flares in the air to warn off the attackers. **ABU GARDA, BANDA** and **JERBO** were undeterred by these warnings and persisted with the attack as they led the charge.¹²⁵

121. At the time of the attack, the MGS Haskanita had signs at prominent locations showing that it was the AMIS Camp for peacekeepers. The APCs and other vehicles used by AMIS are all white and had prominent markings showing that they belonged to the AMIS peacekeeping

¹²⁴ Elements of Crimes, Elements for War crime of attacking humanitarian or peacekeeping mission, para. 3.

¹²⁵ [Redacted].

forces. **ABU GARDA, BANDA and JERBO** were not deterred by the warnings or by these signs and markings. This also shows that when they attacked the MGS Haskanita, they intended to attack the AMIS personnel and installations, as such.

122. Finally, the conduct of **ABU GARDA, BANDA and JERBO** after they had overcome the AMIS peacekeepers also demonstrates their intent. In the course of the attack, they must have seen the injured personnel, but rather than provide any form of assistance, they started looting the Camp taking vehicles, fuel, computers, refrigerators, money, light weapons, boots and uniforms. They pillaged at least seventeen (17) AMIS vehicles all marked with AMIS signs. They also pillaged military uniforms which bore emblems and symbols of the countries of their owners. Even if they had not intended to attack AMIS, at this stage would have realised immediately that their victims were AMIS peacekeepers. In spite of such knowledge, **ABU GARDA, BANDA and JERBO** continued their unlawful conduct.

123. The inference to be drawn from the above set of facts is that **ABU GARDA, BANDA and JERBO** planned and intended the personnel, installations, materials, units or vehicles involved in a humanitarian assistance or peacekeeping mission to be the object of their attack.

(iv) The perpetrator was aware of the factual circumstances that established that protection

124. While the perpetrator of the crime must be aware of the factual circumstances that establish the protected status of the objects of the attack,¹²⁶ no legal knowledge is required as to the kind of protection the personnel and/or objects of the attack were entitled to under international humanitarian law.¹²⁷ As one commentator observes, it is not necessary for the perpetrator to have correctly assessed the protected status of a person, for example “a civilian” or “wounded combatant,” under international humanitarian law; it suffices for him or her to have been aware of the factual circumstances upon which the legally protected status was based, for example “non-participation in combat” (for civilians) or “inability to continue participating in combat” (for wounded combatants).¹²⁸

¹²⁶ Elements of Crimes, Elements for War crime of attacking humanitarian or peacekeeping mission, para. 5 (“The perpetrator was aware of the factual circumstances that established that protection”).

¹²⁷ R. Lee (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, p. 147; see also K Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (2003), p. 154.

¹²⁸ G. Werle, *Principles of International Criminal Law*, para. 309.

125. In the instant case, **ABU GARDA, BANDA** and **JERBO** and their troops knew that the AMIS personnel were in Darfur as peacekeepers.

126. **ABU GARDA, BANDA** and **JERBO** were part of JEM and SLA in 2004, and were occupying very high positions in their respective organizations. As mentioned above, under the Agreement on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in Darfur of 28 May 2004 both JEM (from which JEM-CL broke away) and SLA (from which SLA-Unity broke away) committed to ensure the safety and security of AMIS personnel. As such, at the time of the attack at MSG Haskanita, by virtue of the agreements their organizations have entered into, **ABU GARDA, BANDA** and **JERBO** were aware that the AMIS forces were in Darfur as peacekeepers and protected as they did not participate in combat activities.

127. In addition, both SLA-Unity and JEM have had significant dealings with members of the AMIS forces prior to the attack and made statements recognising the neutrality of the AMIS forces and the need to ensure the protection of its personnel. For instance, a few days before the attack, locals in Haskanita vented their frustration at the ongoing conflict and protested against AMIS. Some of the protesters wanted to attack the MGS Haskanita. Khalil Ibrahim claims to have intervened and publicly told the local population that AMIS is to be protected from attack from all sides.¹²⁹

128. From the above, it is clear that **ABU GARDA, BANDA** and **JERBO** were personally aware that AMIS peacekeepers were to be protected from attack.

(c) Pillage

129. To prove the charge of pillage, the Prosecution must establish that: (i) the perpetrator(s) appropriated certain property; (ii) the perpetrator(s) intended to deprive the owner of the property and to appropriate it for private or personal use; and (iii) the appropriation was without the consent of the owner.

130. The Prosecution has already addressed the common elements of war crimes in paragraphs 76 to 88 above, and relies on them for the purposes of the crime of pillage. Below, the Prosecution addresses the three elements specific to the crime of pillage.

¹²⁹ Public Source, DAR-OTP-0135-0165.

(i) The perpetrator appropriated certain property

131. “Appropriation”, the central element of pillage¹³⁰, refers to an act of acquisition of property, whereby the perpetrator assumes proprietary rights – such as holding, receiving proceeds, consuming, destroying, selling, offering or abandoning – over that property or causes a person or persons other than the victim to assume such rights, with the result that the victim is deprived of his/her proprietary rights over the property.¹³¹

132. In the case at hand, **ABU GARDA, BANDA** and **JERBO** and their subordinates looted a considerable amount of property at least seventeen (17) vehicles, refrigerators, computers, mobile phones, military boots and uniforms, fuel and cash. The attack and pillaging had a significant negative impact on the ability of AMIS to discharge its mandate. As a result, AMIS reduced all its activities in the Haskanita area.¹³²

133. The pillaging of the MGS Haskanita was accompanied by violence causing death and injury to peacekeepers as well as destruction of their living quarters, the mosque, communication posts and equipment. As such, the violence implicit in the crime of pillage is present in the instant case.¹³³

(ii) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use

134. Intent and knowledge are required by Art. 30 of the Statute.¹³⁴ The Elements of Crimes require that the perpetrator *had the intent* to deprive the owner of the property in question and to appropriate the property *for private or personal use*.¹³⁵ Hence, the crime of pillage requires a

¹³⁰ Elements of Crimes, Elements for War crime of pillaging, para. 1.

¹³¹ See also G. Werle, Principles of International Criminal Law (2005), p. 334, para. 988; M. Cottier, Article 8, in O. Triffterer (Ed.), Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article (2008), para. 169.

¹³² Public Source, DAR-OTP-140-0282.

¹³³ See *Čelebici* Trial Judgment, para. 591.

¹³⁴ In line with the requirements of Article 30, the conduct of appropriation must be carried out with the requisite mental state, i.e. the perpetrator should have meant to engage in the appropriation of property that can be established through an utterance, a document or a deed, as well as circumstances of the act of pillage (see Article 30(2) (a); on the evidentiary point see *Kordić and Cerkez* Appeal Judgment, paras 576-577; *Naletilić and Martinović* Trial Judgment, para. 625). With respect to the knowledge requirement, the perpetrator must be aware that the appropriation took place without the consent of the owner (see Article 30(3); on the evidentiary point see *Naletilić and Martinović* Trial Judgment, paras 620-625; *Jelisić* Trial Judgment, para. 49).

¹³⁵ Elements of Crimes, Elements for War crime of pillaging, para. 2.

specific intent.¹³⁶ The jurisprudence of the ICTY and International Military Tribunal tends to infer the requisite intent from the circumstances under which the appropriation took place.¹³⁷

135. From the facts described in paragraph 72 above, **ABU GARDA, BANDA** and **JERBO** intended to deprive AMIS and the peacekeepers of the properties pillaged from Camp. None of the items pillaged were returned to AMIS by those that carried out the attack. Even as the international community and the UN were condemning the attack, **JERBO** for instance, set up a committee to sell the vehicles that were pillaged from MGS Haskanita. Several vehicles were sold in Chad and the Sudan.

136. Beyond this, the Elements of Crimes note that, as manifested in the use of the term “private or personal use”, appropriations justified by military necessity cannot constitute the crime of pillaging.¹³⁸ Whether a given act is “militarily necessary” is a matter to be settled by reference to the norms of international humanitarian law. While there is as yet no authoritative definition of military necessity, the following common features derive from the literature: military necessity is a measure which is (1) urgent, (2) required for the attainment of (3) a known military purpose, and (4) in conformity with international humanitarian law.¹³⁹ Non-compliance with either of these requirements would render the course of action “militarily unnecessary” and “not justified by military necessity” under international humanitarian law.

137. In the case at hand, **ABU GARDA, BANDA** and **JERBO** and their subordinates used some of the items they pillaged from the MGS Haskanita including the vehicles, cash and fuel for their private or personal use. Even though some of the items looted were subsequently recovered, many of the items were carted away by some of the attackers who lived nearby, to their homes. While some of the items such as vehicles are still being used by **ABU GARDA, BANDA** and **JERBO** and their subordinates, many of them were sold soon after the attack.

¹³⁶ See R. Lee (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, p. 177; G. Werle, *Principles of International Criminal Law* (2005), p. 335, para. 989; see also M. Bothe, War crimes, in Cassese A. (Ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002).

¹³⁷ *Naletilić and Martinović* Trial Judgment, paras. 619-622, 627-628, 630-631; IG Farben Trial, UNWCC, *LRTWC*, Vol. X, p 50; Krupp Trial, UNWCC, *LRTWC*, Vol. X, p 73.

¹³⁸ Elements of Crimes, Elements for War crime of pillaging, para. 2, FN 61. See *Simić* Trial Judgment, para. 100.

¹³⁹ For example, see Christopher Greenwood, "Historical Development and Legal Basis," in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), paras 131-132; William Gerald Downey, "The Law of War and Military Necessity," 47 *AJIL* 1953, p. 254; Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (New York: Columbia University Press, 1928), 59-61; B.V.A. Röling, "The Law of War and the National Jurisdiction Since 1945," 100 *Hague Recueil* 1960, pp. 382-387; Bernhardt (ed.), *Encyclopedia of Public International Law* (1982), s. v. "military necessity."

138. The fact that some of the items looted such as computers, refrigerators, etc were carted to the homes of some of the attackers and some of the vehicles sold shows that the pillage was not justified by a military purpose/military necessity.

(iii) *The appropriation was without the consent of the owner*¹⁴⁰

139. The facts described in paragraphs 68 to 73 above, establish that the items pillaged were taken by force and in a fierce attack without the consent of AMIS.

VII. Mode of responsibility: co-perpetration

140. Without excluding any other applicable mode of responsibility, the Prosecution charges **ABU GARDA, BANDA** and **JERBO** with individual criminal responsibility as co-perpetrators who committed the crimes charged in this Application jointly, with each other, pursuant to Art. 25(3) (a) of the Statute.

141. In order to establish that **ABU GARDA, BANDA** and **JERBO** committed the crimes charged in this Application as co-perpetrators, the Prosecution must establish the elements of co-perpetration.

142. The PTC in the *Lubanga case* found that the “concept of co-perpetration embodied in Art. 25(3) (a) of the Statute coincides with that of joint control over the crime by reason of the essential nature of the various contributions to the commission of the crime”.¹⁴¹ The Chamber went on to identify the following elements:

A - Objective elements:

- (i) The Existence of an agreement or common plan between two or more persons;¹⁴²
- (ii) The Coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime.¹⁴³

B - Subjective elements:

- (i) The suspect must fulfill the subjective elements of the crime in question;¹⁴⁴

¹⁴⁰ Elements of Crimes, Elements for War crime of pillaging, para. 3.

¹⁴¹ Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, 29 January 2007, Public Redacted Version, ICC-01/04-01/06-803-tEN 14-05-2007 (*hereafter* “*Lubanga Decision on the Confirmation of Charges*”), para 341.

¹⁴² *Lubanga Decision on the Confirmation of Charges*, paras. 343-345.

¹⁴³ *Lubanga Decision on the Confirmation of Charges*, paras. 346-348.

¹⁴⁴ *Lubanga Decision on the Confirmation of Charges*, paras. 349-360.

(ii) The suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime;¹⁴⁵

(iii) The suspect must be aware of the factual circumstances enabling him or her to jointly control the crime.¹⁴⁶

A. Objective elements

(i) *Existence of a common plan or agreement between ABU GARDA, BANDA and JERBO*

143. The PTC found that in a case of co-perpetration, there must be an agreement or common plan between two or more persons which amounts to or involves the commission of a crime. The common plan need not be specifically directed at the commission of a crime, but must at least involve the commission of a crime, i.e. it "must include an element of criminality".¹⁴⁷

144. A common plan existed between **ABU GARDA, BANDA** and **JERBO**. As described in paragraphs 64 to 66 above, before the attack on the MGS Haskanita, **ABU GARDA, BANDA** and **JERBO** summoned the commanders of the combined JEM and SLA-Unity force to a series of meetings in which they agreed to carry out an attack and planned it.

Nature of the Common Plan

145. Prior to the attack on the MGS Haskanita, **ABU GARDA, BANDA** and **JERBO** held a meeting with the other commanders to plan the attack. [Redacted] *the commanders had a meeting with SLA Unity commanders before the mission. It was clear that they were having a meeting. All the vehicles were parked together in one place. After the meeting they called us together to go the mission. Banda and Garda met with Saleh Jerbo and other SLA Unity commanders. [Redacted]. The commanders of all of the 33 vehicles were in this meeting. After this meeting they gave us instructions for the mission.*"¹⁴⁸

146. [Redacted] prior to the attack **JERBO** told [Redacted] that they were going to attack "*those people in Haskanita...*" and [Redacted] understood that he meant the MGS Haskanita.

¹⁴⁵ *Lubanga* Decision on the Confirmation of Charges, paras. 361-365.

¹⁴⁶ *Lubanga* Decision on the Confirmation of Charges, paras. 366-367.

¹⁴⁷ *Lubanga* Decision on the Confirmation of Charges, para. 344.

¹⁴⁸ [Redacted].

147. The Prosecution submits that from the above, the only reasonable inference that can be drawn is that a common plan existed between **ABU GARDA**, **BANDA** and **JERBO** to attack the MGS Haskanita.

(ii) Coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime

148. Another objective element that must be established is that the persons charged must have exercised joint control over the implementation of the crime and the coordinated essential contribution to the implementation of the common plan resulting in the realization of the objective elements of the crime.¹⁴⁹ Joint control over a crime exists, not only where the accused has actually made an essential contribution to the commission of the crime, but also where: (a) the role assigned to the accused was central to the implementation of the plan; and (b) it appears in retrospect that his contribution was substantial, though not essential.¹⁵⁰

149. [Redacted] told the Prosecution *“I did not have regular contact or conversations with **BANDA** as he is far superior to me. I respected him as general commander of the forces. I knew of Garda as the Secretary-General of JEM....”*¹⁵¹ **GARDA** and **BANDA** had command over those renegade JEM forces that were with them. [Redacted] prior to the attack on MGS Haskanita, they knew that **BANDA** had split from JEM and that Khalil Ibrahim came to Um Durab, North Darfur, and took with him troops that were loyal to him. Others refused to go and preferred to stay with **BANDA**¹⁵². These same troops stayed behind and participated in the attack. [Redacted]¹⁵³.

¹⁴⁹ Lubanga decision on the confirmation of charges, para. 346.

¹⁵⁰ Roxin, *ibid.*, p. 282-285. According to Roxin, in many instances it is not possible to determine after the commission of a crime whether the contribution of the accused was essential. This would often be an abstract and theoretical assessment. See BHGSt 39, 1 - Mauerschützen I, (section III, 1 (b), para. 72): <http://www.servat.unibe.ch/dfr/bs039001.html>. See Tröndle/Fischer, 54th Ed, Art 25, para. 12a; Leipziger Kommentar, Vol. I, 12th ed. Art 25, para. 188. The ICTY jurisprudence, based on a more limited description of its modes of liability, covers a range of situations where persons have worked together to achieve the commission of a crime under the rubric of Joint Criminal Enterprise. Some of these discussions may usefully inform the interpretation of co-perpetration enshrined in Article 25(3)(a) of the Rome Statute (see Gerhard Werle, Individual Criminal Responsibility in Article 25 ICC Statute, J.I.C.L. 5(2007), p. 961 and Brdanin Appeal Judgement, 3 April 2007, para. 430)

¹⁵¹ [Redacted].

¹⁵² [Redacted].

¹⁵³ [Redacted]

150. With regards to **JERBO**, he was a Chief of Staff/Commander-in-Chief of SLA-Unity. [Redacted] remarked that he was the most powerful person in SLA Unity¹⁵⁴. As such, he had full command and control over the SLA-Unity forces that participated in the attack. [Redacted] just before the attack, about 200 members of SLA/ Abdul Shafie group needed assistance from other rebel groups in order to pass through territory controlled by SLA/MM¹⁵⁵. **JERBO** came to their assistance but compelled them to join SLA-Unity. According to the witness, they did as they were ordered and under the command of **JERBO** participated in the attack on MGS Haskanita¹⁵⁶. [Redacted] indicated that **JERBO** was the Commander in Chief of the operation¹⁵⁷ to attack the MGS Haskanita.

151. Because the commanders **GARDA**, **BANDA** and **JERBO** had effective command of the troops that participated in the attack, the only reasonable conclusion that can be drawn is that the attack would not have taken place without their agreement.

152. **GARDA**, **BANDA** and **JERBO** had effective command and total control over the troops that were with them in the period leading up to and during the attack. Together they organized the meetings of the commanders before the attack; they issued orders to their subordinates to attack and personally led the attack. They also shared the looted vehicles. These individuals would not have had the authority to take and distribute the loot if they did not have control over the troops.

153. The Prosecution submits that the above contribution satisfies the requirement under consideration.

B. Subjective elements

154. In order to establish that **ABU GARDA**, **BANDA** and **JERBO** fulfilled the subjective elements, the Prosecution must prove that (i) **ABU GARDA**, **BANDA** and **JERBO** fulfilled the subjective elements of the actual crimes charged in this Application; (ii) **ABU GARDA**, **BANDA** and **JERBO** are all aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crimes charged in this Application;

¹⁵⁴ [Redacted]

¹⁵⁵ [Redacted].

¹⁵⁶ [Redacted].

¹⁵⁷ [Redacted]

and (iii) **ABU GARDA, BANDA** and **JERBO** were aware of the factual circumstances enabling them to jointly control the crimes charged in this Application.

- (i) ***ABU GARDA, BANDA** and **JERBO** fulfilled the subjective elements of the crimes charged in this Application*

155. **ABU GARDA, BANDA** and **JERBO** were individually aware that, at the very least, the implementation of their common plan would involve:

- (a) an attack on peacekeeping forces destruction of materials, installations, dormitories and vehicles which were protected under international humanitarian law and pillaging;
- (b) that in such an attack it was very likely that peacekeepers would be killed; and
- (c) that in the ordinary course of events properties in the MGS Haskanita which are involved in peacekeeping operations would be destroyed.

156. The Prosecution submits in fact that, not only were they individually aware that the implementation of their common plan will involve all the above, but moreover central to their plan was the commission of the aforementioned acts. **ABU GARDA, BANDA** and **JERBO** individually accepted that the above-mentioned would result from the implementation of their plan and reconciled themselves with it: not only by condoning it, but by leading and participating in the attacks and ensuring that these outcomes in fact occurred.

- (ii) ***ABU GARDA, BANDA** and **JERBO** are all aware and mutually accept that implementing their common plan may result in the realisation of the objective elements of the crimes charged in this Application*

157. The Prosecution submits that **ABU GARDA, BANDA** and **JERBO** were all mutually aware and mutually accepted that implementing their common plan would result in the realisation of the objective elements of the crimes charged in this Application. In paragraphs 144 to 146, above, the Prosecution has offered evidence of the expressed agreement among the commanders to attack the MGS Haskanita. The agreement required the realisation of the objective elements of the crimes charged.

(iii) Awareness of the factual circumstances enabling the co-perpetrators to jointly control the crime

158.As demonstrated in paragraphs 149 to 152, above, **ABU GARDA, BANDA** and **JERBO** were aware of their respective roles as commanders who controlled the troops that committed the crimes. As such, they were aware that they jointly controlled the ability of their respective forces to commit the crimes.

159.After their planning meetings, they individually briefed their respective forces. In addition, as they approached the Camp **ABU GARDA, BANDA** and **JERBO** issued the order for the troops to attack.

160.From the above, **ABU GARDA, BANDA** and **JERBO** were aware of the factual circumstances which enabled them as co-perpetrators to jointly control the crimes committed during the attacks on Haskanita.

161.For the above reasons, there are reasonable grounds to believe that **ABU GARDA, BANDA** and **JERBO** acted with the requisite mens rea when they jointly led JEM-CL and SLA-Unity force to attack the MGS Haskanita.

VIII. Necessity of warrants of arrest to ensure the appearance of ABU GARDA, BANDA and JERBO

162.Under Art. 58 of the Statute, if the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that a person has committed crimes within the jurisdiction of the Court, the Chamber may issue, upon the application of the Prosecution, either a warrant of arrest or a summons to appear.

163.The Prosecution respectfully submits that the evidence and information summarised above establish reasonable grounds to believe that **ABU GARDA, BANDA** and **JERBO** committed the crimes alleged in this Application.

164.The next issue to address is the best manner in which to ensure the appearance of the individual. On the basis of Art. 58, the Prosecutor may submit an application requesting an arrest warrant (see Art. 58(1) or a summons for a person to appear (see Art. 58(7)). To decide on the merits of those two options, the Prosecution is obligated to assess all of the information gathered during the investigation. In addition, its assessment and request necessarily involve an

element of predicting the likelihood of future events.¹⁵⁸ The Prosecution finally submits that all of the information in this Application may bear upon the evaluation.

165.[Redacted]

166.[Redacted]

167.Ensuring the persons' appearance will be primarily the responsibility of the territorial States, upon the Chamber's decision. The Prosecution notes, as submitted in its filing of 27 May 2008, that the Government of the Sudan has in practice ceased cooperation with the Office and is not cooperating with the Court. There has been no change since the date of the above mentioned filing. Additionally, the GoS is currently unable to arrest rebel commanders as they continue to operate in rebel held territory over which the GoS has no control [Redacted].

168.[Redacted]

169.In view of the above and in accordance with Art. 58(1) (b), the Prosecution respectfully requests the issuance of the arrest warrants.

170.The Prosecution submits that a summons to appear could be an alternative pursued by the Court should the three commanders express willingness to pursue this route. The Prosecution submits that any response of the individuals concerned to the public filing of the summary of this application, to the effect that they will comply with any decision by the Pre-Trial Chamber on this matter, would modify this assessment of the OTP and could justify, in the Prosecution's view, and subject to the Pre-Trial Chamber's determination, the issuance of a summons.

IX. [Redacted]

171.[Redacted]¹⁵⁹ [Redacted].

172.[Redacted].¹⁶⁰

X. Admissibility

173.The Prosecution has, in accordance with Art. 53(2) (b), assessed whether the case which is the subject of this application is inadmissible under Art. 17. Under Art. 17, there are two aspects to admissibility: gravity (Art. 17(1) (d) and complementarity (Art. 17(1) (a)-(b)). Art. 17(1) (d)

¹⁵⁸ Similarly, see Appeals Chamber Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "D cision sur la demande de mise en libert  proviso ire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007, para. 137.

¹⁵⁹ [Redacted].

¹⁶⁰ [Redacted].

indicates that a case is inadmissible where it is not of sufficient gravity to justify further action by the Court. For all the reasons in this application, the Prosecution respectfully submits that the case which is the subject of the current application is of sufficient gravity to justify further action by the Court. The gravity of the crimes is not in the instant case related to the number of casualties but to the quality, as peacekeepers, of the personnel attacked. Moreover, as applicable to all war crimes offences involving unlawful attacks, there is no result-requirement as a separate material element of the crime.¹⁶¹ The gravity of the offence also relates to the intentional directing of such an unlawful attack, which in addition, was on such a large scale, involving one thousand rebel combatants. The nature of the crime in question-attacking peacekeepers-is viewed by the international community as “exceptionally serious crimes of international concern”. A report of Preparatory Commission on the Establishment of an International Criminal Court notes that “the attacks were committed against persons who represented the international community and protected its interests; the attacks were in effect directed or committed against the international community....and the international community had a special responsibility to ensure the prosecution and punishment of these crimes.”¹⁶²

174. In its commentary on the crimes charged in this Application, the ILC stated as follows:

“Attacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community. These crimes are of concern to the international community as a whole because they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining the international peace and security of mankind. These personnel are taking part in, present in an official capacity in the area of or otherwise associated with a United Nations operation which is "conducted in the common interest of the international community and in accordance with the principles and purposes of the Charter of the United Nations", as recognized in the preamble to the Convention on the Safety of United Nations and Associated Personnel. Attacks against such personnel are in effect directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security by means of

¹⁶¹ See ICRC Commentary on Elements of Crimes under the Rome Statute of the International Criminal Court, K. Dormann (2003), p.153

¹⁶² Summary of the Proceedings of the Preparatory Committee, A/AC.249/1, 7 May 1996.

*collective security measures taken to prevent and remove threats to the peace. The international community has a special responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal attacks against United Nations and associated personnel which often occur in situations in which the national law-enforcement or criminal justice system is not fully functional or capable of responding to the crimes. Moreover, these crimes by their very nature often entail a threat to international peace and security because of the situations in which such personnel are involved, the negative consequences for the effective performance of the mandate entrusted to them and the broader negative consequences on the ability of the United Nations to perform effectively its central role in the maintenance of international peace and security..”*¹⁶³

175. In addition, there have been a series of attacks against AMIS peacekeepers¹⁶⁴ and humanitarian organizations working in Darfur. The attack in Haskanita is the most serious attack launched against peacekeepers in Darfur to date.

176. In relation to complementarity, in its decision on the warrant application in the case of Thomas Lubanga Dyilo, Pre-Trial Chamber I stated that "it is a condition sine qua non for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the court" The Chamber identified a case before the Court as including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects".

177. The Office of the Prosecutor has continued as far as possible to monitor national proceedings, although since the filing of the application against Harun and Kushayb on 27 February 2007, the Government of the Sudan has ceased sharing information regarding its national proceedings with the Prosecution.

178. There has been no indication, public or otherwise, that the Government of the Sudan has undertaken to investigate or prosecute any of the three individuals named in this application or any other individual for alleged responsibility for the attack on Haskanita.

¹⁶³ International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind (1996), Commentary to Article 19, *Yearbook of The International Law Commission*, 1996, Volume II, Part Two, *Report of the Commission to the General Assembly on the work of its forty-eighth session*, A/CN.4/SER.A/1996/Add.1 (Part 2), p. 51.

¹⁶⁴ Public Source, DAR-OTP-0161-0063; Public Source, DAR-OTP-0161-0082; Public Source, DAR-OTP-0161-0085; Public Source, DAR-OTP-0161-0066

179. According to the latest update on Sudanese national proceedings, provided by the Government of the Sudan to the African Union on 19 September, and through the AU, to the UN on 25 September,¹⁶⁵ this case is not being investigated or prosecuted by the GoS.

XI. Conclusion

180. For the foregoing reasons, the Prosecutor requests that the Pre-Trial Chamber:

- (a) enter a finding that there are reasonable grounds to believe that **ABU GARDA, BANDA** and **JERBO** committed the crimes charged in this Application;
- (b) Issue warrants for the arrest of **ABU GARDA, BANDA** and **JERBO**, who are traversing frequently between Chad and Darfur, and keep such warrants confidential up to the time when measures are in place for arrest.
- (c) [Redacted].
- (d) [Redacted];
- (e) [Redacted].
- (f) [Redacted].



.....
Luis Moreno-Ocampo
Prosecutor

Dated this 20th day of November 2008

The Hague, Netherlands

¹⁶⁵ [Redacted]