

1 International Criminal Court
2 Pre-Trial Chamber I - Courtroom 1
3 Presiding Judge Sylvia Steiner, Judge Sanji Mmasenono Monageng
4 and Judge Cuno Tarfusser

5 Situation Darfur, The Sudan - ICC-02/05-02/09

6 In the matter of the Prosecutor v. Bahar Idriss Abu Garda

7 Confirmation of Charges Hearing

8 Friday, 30 October 2009

9 (The hearing starts at 9:32 a.m.)

10 (Open session)

11 THE COURT USHER: All rise. The International Criminal Court is now in
12 session.

13 PRESIDING JUDGE STEINER: Pre-Trial Chamber I is now in session. I would
14 like to welcome all those that are here in this courtroom today and also in the
15 public galleries, Mr. Abu Garda, and I will ask, please, the court officer to call
16 the case.

17 THE COURT OFFICER: Situation in Darfur, Sudan, the Prosecutor v Bahar Idriss
18 Abu Garda, ICC-02/05-02/09.

19 PRESIDING JUDGE STEINER: Thank you very much. I will now, for the sake of
20 the record, ask again the parties and participants to introduce themselves,
21 starting with the Office of the Prosecution. Ms. Bensouda, Deputy Prosecutor, you
22 have the floor.

23 MS. BENSOU DA: Thank you, Madam President. Madam President, your Honours,
24 good morning. The Office of the Prosecutor is represented this morning by Mr. Essa
25 Faal, senior trial lawyer; Mr. Ade Omofade, trial lawyer; Shyamala Alagendra, trial

1 lawyer; Victor Baiesu, associate trial lawyer; Pubudu Sachithanandan, associate
2 trial lawyer; Desiree Lurf, associate trial lawyer; Chris Campbell, associate
3 analyst; and Biljana Popova, case manager. I am Fatou Bensouda, Deputy Prosecutor.

4 PRESIDING JUDGE STEINER: Thank you very much.

5 Mr. Khan.

6 MR. KHAN: Good morning, Madam President, your Honours, and everybody in and
7 around the courtroom. Mr. Abu Garda is represented by Andrew Burrow, legal
8 consultant; Anand Shah, case manager; RoseMarie Maliekel, pro bono legal assistant;
9 and myself, Karim Khan.

10 PRESIDING JUDGE STEINER: Thank you very much. Legal representatives of
11 victims.

12 MS. CISSE: (Interpretation) Yes, good morning, Madam President. Good
13 morning, your Honours. My name is Hélène Cisse and I'm from the Senegalese Bar. I
14 represent the same victims as before. Thank you.

15 MR. KONÉ: (Interpretation) Good morning, Madam President. Good morning,
16 your Honours. My name is Brahim Koné. I represent the same victims as
17 beforehand. Thank you.

18 MR. AKINBOTE: Good morning, Madam President, your Honours. My names are
19 Akin Akinbote and I represent the same set of victims.

20 PRESIDING JUDGE STEINER: Thank you very much. According to this schedule,
21 during the first session in the morning we will have the closing statements of the
22 Prosecution. After half-an-hour break we will have the closing statements of the
23 legal representatives of victims, who will have one hour for presenting their final
24 observations. After the lunch break, we will have the closing statements of the
25 Defence during the afternoon session.

1 So, without further delay, Mr. Faal, you have the floor.

2 MR. FAAL: Madam President, your Honours, as a matter of house clearing,
3 before I start delivering the closing statements of the Prosecution I just want to
4 inform your Honours that the Prosecution has provided a copy of its closing
5 submissions in which all the evidence the Prosecution intends to rely on have been
6 cited. That being the case, Madam President, the Prosecution wishes to dispense
7 with having to refer to each and every single item of evidence that we would be
8 relying on just in the interests of time. I hope that would not create a problem.
9 I have earlier on conferred with my colleague on the other side and he agrees with
10 that.

11 Without further ado, Madam President. The Prosecution's case against
12 Abu Garda is that Mr. Abu Garda planned and directed the attack on the MGS
13 Haskanita and used JEM breakaway forces, who were loyal to him, to carry out the
14 attack. As such, he is individually criminally responsible for the attack.

15 The Prosecution submits that there is sufficient evidence to establish
16 substantial grounds to believe that Mr. Abu Garda committed the crimes charged.
17 That the attack took place on 29 September 2007 is not challenged. That it took
18 place in the context of an armed conflict, not of an international character, is
19 not challenged. That 12 peacekeepers died and eight others were seriously injured
20 and the camp pillaged is not challenged. I will therefore focus this address on
21 two areas that were questioned during the course of this confirmation hearing:

22 1. Did the MGS Haskanita enjoy protected status when it was attacked on 29
23 September 2007?

24 2. What was Mr. Abu Garda's role in the attack on the MGS?

25 I'll start with the first question. Did the MGS Haskanita have protected

1 status when it was attacked? Were the personnel and property at the MGS entitled
2 to the protection accorded to civilians on 29 September 2007?

3 The answer is yes. This is established by the Prosecution evidence and the
4 Defence has presented no evidence to contradict it.

5 Your Honours, Mr. Abu Garda during this confirmation hearing, speaking in the
6 context of the Haskanita attack, recognised the protected status of AMIS.

7 Describing the moment when he heard about the Haskanita attack he stated, and I
8 quote:

9 "I told him that 'It is wrong.' I told him that 'If you are there, you don't
10 understand the consequences of what is happening there.' The consequences I
11 mean -- I don't mean the consequences for myself, Bahar, but I mean the
12 consequences regionally, internationally, and the only part that gets the use of
13 that is the Government of Sudan, because by attacking the AMIS base means the
14 international community can do less to participate in solving the problem in Darfur
15 and also can do less in participating by troops to make a peace and protection for
16 our people in the IDPs."

17 Mr. Abu Garda also stated:

18 "I have been -- I condemned this attack at that time. I did it many times
19 and I still condemning now. And I hope we -- I hope that justice can bring the
20 real people, those who commit this crime, back to the trial."

21 Your Honours, this is an unequivocal statement by Mr. Abu Garda that the
22 attack on the MGS Haskanita should never have happened and that there was no
23 justifiable reason for the attack and that he condemned it as a crime. At the time
24 of the attack on Haskanita, Mr. Abu Garda issued a statement which also recognised
25 the protected status of AMIS. Also on 19 October 2009, a few days ago, Mr. Abu

1 Garda did not waver from this stance.

2 These statements, your Honours, make no reference to allegations that the MGS
3 Haskanita allowed itself to be used by the Government of Sudan, or otherwise lost
4 its protected status. The statements, in effect, argued the opposite.

5 The Defence plea that the MGS Haskanita was a legitimate military objective
6 on 29 September 2007 seems an afterthought. The Defence suggested that the motive
7 for the attack was the removal of the GoS representative. It is not so, your
8 Honours. If the GoS representative was the target, then the attack directed by Mr.
9 Abu Garda should have stopped when the camp was overrun and the rebel forces
10 realised that GoS representatives was not there. But it did not stop. The
11 attackers kept killing AMIS personnel.

12 Witness 417, your Honours, explained, for example, and I quote:

13 "I also heard about the killing of Major Ebrim Jagne, a military observer
14 from Mali. I was told by some of the Nigerian Protection Force members that he was
15 shot all over the body in his tent where he was hiding."

16 The same Witness, 417, described the circumstances of killing the military
17 observer in his tent. He explained, and I quote:

18 "They asked him for his money and that he had explained to them that he did
19 not have any money on him, as he had just returned from holiday. He was killed in
20 his tent."

21 When his body was discovered, it was riddled with bullets. Witness 446, who
22 testified before your Honours, explained that Jagne was shot over 30 times all over
23 his body.

24 Witness 420 similarly recalls that, and I quote:

25 "Three attackers entered my tent. They had torchlights. They told me to

1 come out from under the bed and asked me where the money was. I explained that I
2 was a new MILOB and that I have not received my pay. Then they took away all my
3 belongings. They took everything."

4 Your Honours, if the GoS representative was the target, then the attackers
5 led and directed by Mr. Abu Garda would not have been looting vehicles, fuel and
6 the personal belongs of AMIS personnel.

7 Witness 446 described that the attackers looted AMIS property such as
8 computers, approximately 17 white AMIS vehicles bearing "AMIS" logos and flags,
9 petrol, oil, lubricants, ammunition, food stock and other supplies. They also
10 looted personal property of AMIS staff, such as money, personal clothing, phones,
11 military boots and uniforms, personal cameras and money.

12 The AU Board of Inquiry found in its investigations, and I quote, "The
13 motivation of the top level commanders was looting, because they had lost most of
14 their resources from the battle with the GoS on the same day."

15 The only aspect of the base that was alleged to have been -- to have made, I
16 beg your pardon, an effective contribution to the military action of the GoS was
17 the Government of Sudan representative, who was no longer present. The motivation
18 for and the nature of the attack is therefore inconsistent with an intent to target
19 this aspect which the Defence alleges constitute a military target and transformed
20 the entire MGS into a legitimate military target.

21 There is no evidence that protection was lost during the presence of Captain
22 Bashir. In addition, the crucial issue is the status of protection on 29 September
23 2007 and no other date for that matter. The Defence explicitly accepted this when
24 learned counsel, Mr. Khan, stated before this Court, and I quote, "This is the
25 issue that your Honours must determine, whether or not MGS Haskanita was a

1 legitimate military objective on 29 September 2007."

2 Your Honours, Article 13(3) of Additional Protocol II and Article 51(3) of
3 Additional Protocol I provides that "Civilians shall enjoy the protection afforded
4 by this section unless and for such time as they take a direct part in
5 hostilities." I repeat, "for such time."

6 Similarly, Additional Protocol I, Article 52, defines a military objective.
7 It is one which by its nature, location, purpose or use makes an effective
8 contribution to military action and whose total or partial destruction, capture or
9 neutralization, in the circumstances ruling at the time, offers a definite military
10 advantage. The word "time" we are concerned with is the time of the attack on 29
11 September 2007.

12 Your Honours, again, there is no evidence that the MGS ever lost its
13 protected status. In addition, it could not have been the case once Captain Bashir
14 had been removed, since the loss of protection is only during the time that it is
15 being used in such a way that makes effective contribution to the military
16 activities of the enemy - and similarly, for personnel - for such time as direct
17 participation in hostilities takes place.

18 The commentary on Additional Protocol I is clear on this question: "'use' is
19 concerned with its present function." The Defence raised the example of a
20 civilian -- of a civilian house in which soldiers are meeting, but the fact that
21 soldiers met or slept in a house does not justify an attack against that house two
22 weeks after the soldiers have left.

23 Your Honours, every peacekeeping camp will have facilities which might be
24 used for a military purpose. And to accept the argument that the way in which the
25 camp might potentially be used could render it a military target would deprive the

1 protection for peacekeeping missions of all meaning. Rather, any loss of
2 protection can only be founded on the way in which the base was being used at that
3 time.

4 Your Honours, the removal of Captain Bashir took place at least 12 days prior
5 to the attack - and by some accounts, more than two weeks prior to the attack - in
6 the presence of the rebels. AMIS personnel and objects at MGS Haskanita enjoyed
7 their protected status at the time of the attack.

8 Witness 445 was asked by the Defence what he would do if he was a party to a
9 conflict and men under his command were being killed because of an individual that
10 is assisting the enemy while situated in a military base. In this hypothetical
11 example sketched by the Defence, no mention was made of the removal of the
12 offending person, such as the case at hand.

13 The Prosecution notes further that even while faced with this one-sided
14 example, Witness 445 responded that, and I quote, "As a military man, I would not
15 just go, you know, and attack a civilian without, you know, pinpointing the
16 individual I want to deal with."

17 Your Honours, the Defence raised the issue of delay in removing Captain
18 Bashir, suggesting that it was arbitrary and negligent. The Prosecution differs.
19 This was delay that was occasioned by the need for MGS staff to seek orders from
20 their headquarters. Witness 445 confirmed this when, even in the face of the
21 hypothetical scenario sketched by the Defence, he explained that where the relevant
22 place is an outpost with lower ranking officers, they would have to contact
23 headquarters before taking action. This is precisely what AMIS personnel at MGS
24 Haskanita did.

25 Your Honours, the Defence cited the decision of Galic -- the decision in the

1 Galic case to argue that the decision to attack must be judged, bearing in mind the
2 information available at the time. The Prosecution stresses that at the time of
3 the attack, the attackers knew that Captain Bashir had been removed. Apart from
4 the sources of intelligence, Captain Bashir was removed in the presence of the
5 rebels controlling the area. Your Honours, the photographs of Bashir's departure
6 were exhibited before this Court.

7 In addition, the Defence relied on a report prepared by a committee
8 established by the Prosecutor -- or the then-Prosecutor of the ICTY to review the
9 NATO bombing campaign against the Federal Republic of Yugoslavia. And the Defence
10 relied on that document rather extensively.

11 However, the Defence omitted to cite an important provision. Paragraph 28 of
12 this report provides as follows, and I quote, "... commanders deciding on an attack
13 have duties:

14 "a) To do everything practicable to verify that the objectives to be attacked
15 are military objectives."

16 Similarly, Article 57 of Additional Protocol I states, with respect to
17 attacks, the following precautions shall be taken:

18 "a) Those who plan or decide upon an attack shall, one, do everything
19 feasible to verify that the objectives to be attacked are neither civilians nor
20 civilian objects and are not subject to special protection but are military
21 objectives within the meaning of paragraph 2 of Article 52, and that it is not
22 prohibited by the provisions of this Protocol to attack them."

23 No such precaution was taken by the attackers. There is no evidence, for
24 example, of any meeting between the rebels and AMIS after the removal of Bashir and
25 prior to the attack where the rebels could have enquired whether there was a new

1 GoS representative or whether Captain Bashir had returned. In this context, it is
2 important to recall that such a meeting in the past had resulted in the removal of
3 Bashir, but no such meeting was held this time around.

4 Your Honours, attacking communications facilities is a standard military
5 strategy in any attack, irrespective of the effectiveness of AMIS's response
6 capabilities in this case. It is military practice to take out communications
7 facilities in order to contain the situation and minimise the possibility of
8 external assistance to victims.

9 The Defence, however, suggested that it was attacked, the communications
10 facilities in AMIS, because it might have been used by the GoS representatives, but
11 we argue that such representation is baseless. Witness testimony has already
12 established that only AMIS representatives, and never representatives of the
13 parties to the conflict, neither the GoS nor the rebel parties, used the
14 communications facilities at the MGS Haskanita.

15 Equally, there is no conclusive evidence indicating that Captain Bashir was
16 replaced. Witness 446, having said in his statement that Captain Bashir was
17 replaced by another representative, stated in court that he was, in fact, not sure
18 of this. As such, there is no evidence that any replacement - GoS replacement, for
19 that matter, but even if there was, there is no evidence that such person carried
20 out any activity that would render AMIS personnel participants in hostilities or
21 render AMIS property an effective contributor to the military action of the GoS on
22 the critical date, which is 29 September 2007.

23 Your Honours, the attackers knew that Captain Bashir had left and knew that
24 he had been removed because of concerns which they raised regarding his allegedly
25 passing intelligence to the GoS. They knew that he had been removed under strict

1 rebel oversight and control. Therefore, they could not assume that a new GoS
2 representative had arrived at the MGS Haskanita prior to the attack and was
3 continuing his alleged practices.

4 Your Honours, the Prosecution argued during its presentation of evidence that
5 the presence of GoS and rebel representatives in AMIS camps was not only accepted
6 practice, it was required practice by virtue of the various agreements related to
7 the ceasefire. And these include The Humanitarian Ceasefire Agreement and also the
8 Agreement with the Sudanese Parties on the Modalities for the Establishment of the
9 Ceasefire Commission and the Deployment of Observers.

10 Therefore, unless it can be established that the next GoS representative was
11 making an effective contribution to the military action of the GoS through his
12 presence at the MGS Haskanita, it is immaterial whether or not Captain Bashir was
13 replaced. Presence does not, in and of itself, render the base a legitimate
14 military target. If it did, then all AMIS bases in Darfur would be rendered
15 military targets due to the terms of the ceasefire agreement to which the parties
16 to the conflict, including rebel groups, have explicitly agreed.

17 Your Honours, an important provision, Article 52(3) of Additional Protocol I,
18 provides that in case of doubt whether an object which is normally dedicated to
19 civilian purposes or, in this case, to peacekeeping purposes and is usually
20 entitled to protection is being used to make a contribution to military action and,
21 therefore, is a military target, it shall be presumed not to be so used. Whenever
22 there is a doubt, it shall be presumed that it is not so used.

23 The same applies to individuals and their status as civilians. While
24 Additional Protocol I applies to international armed conflicts, it sets out the
25 principles under which civilian objects are entitled to protection or may lose that

1 protection. The Statute and Elements of Crimes in turn apply to the protection of
2 peacekeeping missions regardless of the nature of the conflict.

3 Thus, given the protections accorded to humanitarian and peacekeeping
4 missions under the law of armed conflict and under the Rome Statute, there must be
5 a solid factual foundation before they are deprived of protection. In case of
6 doubt, they must remain inviolate.

7 The Defence has made repeated references of the fact that GoS used white
8 painted aircraft. However, one, AMIS flights in Haskanitas were strictly monitored
9 and controlled by the rebels in control of Haskanita. AMIS personnel had to obtain
10 permission and provide early warning even to receive re-supply helicopters. The
11 rebels knew which AMIS aircraft arrived in Haskanita, and when they arrived and
12 exactly what and who they brought.

13 Second, acts of perfidy have implications only for the party carrying out
14 perfidy - in this instance, the GoS. Such acts have no impact whatsoever on the
15 protected status of the entity being imitated; in this case, AMIS.

16 I will now turn on to the second issue, that is, what was the role of Mr. Abu
17 Garda in the attack against the Haskanita camp on 29 September 2007. And we will
18 pose this question: Did Mr. Abu Garda control the JEM forces which attacked
19 Haskanita?

20 Madam President, your Honours, Mr. Abu Garda argued that he did not split
21 from the Justice and Equality Movement, but that he was sacked shortly before the
22 Haskanita attack and, therefore, could not have played a role in the attack.

23 He hopes to show that he had no authority over the group that committed the
24 crime. However, the evidence shows that there was a split which occurred, in fact,
25 before the attack and that Mr. Abu Garda retained full control over this breakaway

1 force, and even purporting for a time to represent the main JEM.

2 On the first day of the confirmation hearing, Mr. Abu Garda told your Honours
3 that Khalil Ibrahim threatened to kill him if he crossed the border into Darfur.
4 He portrayed himself before your Honours as a loyal member of JEM on the one hand,
5 yet he defied the orders of the president of the movement, even in the face of the
6 threat of being killed and crossed into Darfur. This step of defiance confirms
7 that Mr. Abu Garda had already at this time decided to leave JEM and that the split
8 had already occurred at that stage.

9 Other evidence points to this fact. First, after Khalil sacked the
10 commander-in-chief on 2 July 2007, some JEM commanders gave Khalil an ultimatum of
11 48 hours to rescind his decision. Second, the same interim military council of JEM
12 later purported to remove Khalil as leader of JEM, of which Mr. Abu Garda put
13 himself forward as the leader of JEM. These two facts are critical.

14 The moment Mr. Abu Garda aligned himself with the commander-in-chief who was
15 sacked, it was clear that the split had already occurred. When the Prosecution
16 insider witnesses describe the events surrounding Mr. Abu Garda's departure from
17 JEM -- excuse me, Madam President. Let me take that again. When Prosecution
18 insider witnesses described the events surrounding Mr. Abu Garda's departure from
19 JEM, most of them called it with the term "split" and referred to Mr. Abu Garda's
20 leadership over the troops that remained with him and the commander-in-chief.

21 For instance, Witness 304 observed, and I quote, "When the chairman came -- "
22 your Honours, I'll just skip the next name. You have the documents in front of
23 you, so I'll just continue reading. "'X' and Bahar Idriss Abu Garda decided to
24 split from the movement. I cannot remember the exact date of their split, but I
25 know it was in August." Witness 433 also says, "I was asked why I have referred to

1 JEM as Abu Garda's group. This is because JEM split and there were two JEM
2 movements, one under chairmanship of Khalil, and the other under Bahar." In this
3 regard, I also refer your Honours to Witness 305, 306 and also Witness 442.

4 On 26 September 2007, Khalil Ibrahim formally sacked Mr. Abu Garda. And it
5 then became clear publicly that he and "X" were no longer with Khalil's JEM, but he
6 kept full control over his breakaway forces.

7 Further proof of Abu Garda's control comes from the evidence presented by Mr.
8 Abu Garda himself. Defence Exhibit TN4 annexed to the statement of Defence Witness
9 DC1 is a statement issued by Mr. Abu Garda on 1 October 2007. This statement
10 condemns the attack on the MGS Haskanita, but it's a statement made on mainstream
11 JEM's letterhead paper.

12 Notice also that Mr. Abu Garda signs that document as Vice-Chairman,
13 Secretary for Darfur and Head of JEM Delegation to Arusha Consultations. Why is
14 this the case? Because Mr. Abu Garda continued to use JEM vehicles, JEM equipment
15 and other resources from JEM that remained available to him at his and his
16 breakaway forces.

17 Mr. Abu Garda's subsequent declaration of the formation of JEM-Collective
18 Leadership on 3 September 2007 also confirms Mr. Abu Garda's prior position that
19 from August 2007 he and others considered themselves as the collective leaders of
20 JEM. The evidence shows that Mr. Abu Garda had split from JEM the moment he
21 entered Darfur in early September, if it can be confirmed that he did, in fact,
22 split in August.

23 At this time, a new movement had been formed in alliance with the former JEM
24 commander-in-chief, including Hassan Komoki and Abdallah Haqqar.

25 Mr. Abu Garda portrayed himself to Your Honours as the peacemaker and the

1 intermediary in the JEM. He suggests that he came to Darfur to find a solution to
2 the problem. He told you, and I quote, "Then I start to go to the field in order
3 to contribute to find a solution for the problem happened there, because there is
4 misunderstanding between Khalil and our troops in the area because of the sacking
5 of the chief in command. I tried to resolve this problem, and because of that, I
6 start from N'Djamena."

7 In fact, the Prosecution's evidence reveals that Mr. Abu Garda's real purpose
8 of coming into Darfur at that time was to establish his authority over the JEM
9 troops that had remained behind out of loyalty to him and the ex-commander-in-chief
10 following the split. His aim was to formalize the splinter faction and to ensure a
11 place at the negotiating table in the upcoming peace talks in Sirte, Libya.

12 Your Honours, we would analyse Abu Garda's trip more closely. First, he
13 never met Dr. Khalil Ibrahim, nor did he intend to, contrary to what he said. Even
14 his own defence witnesses did confirm that he never met Dr. Khalil, even though
15 they attempted to offer excuses for that. Contrary to what he says, it appears
16 that Mr. Abu Garda was in fact going to great lengths to avoid meeting with Dr.
17 Khalil or forces of the mainstream JEM. His own words again, and I quote, "We went
18 to Abuliha. This place we went there because we have some relations there. This
19 area controlled by SLA Minni Minawi, but we have some relations with the commanders
20 who are in charge of this area, and because the JEM is very dangerous, we need
21 somebody to lead, to guide, in narrow ways."

22 It's quite obvious, in fact, he was willing to take lesser known routes and
23 to place his faith more in the hands of SLA Minni Minawi group than in the hands of
24 JEM. Your Honour, in fact, his motive for going to Darfur was not to go and meet
25 Dr. Khalil and to find a solution, but rather to go and provide leadership and

1 guidance to the troops that Dr. Khalil left behind, which he eventually did.

2 To understand Mr. Abu Garda's real motive for coming to Darfur, the
3 Prosecution asks you to take a look at the size of Darfur and the direction that
4 Mr. Abu Garda took. Bearing in mind, as Mr. Abu Garda said, that he was told that
5 Khalil directed that they meet in Tina; in Tina, the problem would be solved. But,
6 your Honours, let's take a look at Mr. Abu Garda's steps. What did he do?

7 In this case, your Honours, the Prosecution would play a short video which
8 shows Mr. Abu Garda's movement as soon as he entered Darfur from Tina, which was
9 supposed to be the spot that Dr. Khalil asked him to meet. We would play the video
10 to show all the places Mr. Abu Garda had been to and the distance he travelled.

11 Could we switch to PC1, please?

12 PRESIDING JUDGE STEINER: Mr. Faal, is this evidence of the case file?

13 MR. FAAL: Your Honours, it's just a collection of -- it's a demonstration
14 which shows by Mr. Abu Garda's statement all the places he has been to, and in
15 addition we overlaid it with statements from witnesses as to the places they
16 themselves have been to. So it shows a particular pattern.

17 There are two issues why this is relevant. It's just a visual aid for the
18 understanding of your Honours but it shows two important issues. One is all the
19 places Mr. Abu Garda has been to, according to him, in order to find a solution,
20 and it's quite important for your Honours to be able to have a visual appreciation
21 of what happened. Another reason why this is important is to show certain
22 important coincidences. All the places that Mr. Abu Garda claimed to have gone are
23 the same places that the perpetrators of this crime have also been. So, we think
24 that it is important to have this demonstrated, at least visually, so your Honours
25 would have a good appreciation of exactly what happened, but we do not consider it

1 evidence; it's a mere visual aid. If your Honours do think that perhaps this
2 should not be showed to the Court, we would dispense with it and we would move
3 ahead with the presentation.

4 PRESIDING JUDGE STEINER: Mr. Khan, would you like to --

5 MR. KHAN: Yes, Madam President. It's rather unfortunate because all of this
6 could have been avoided if my learned friend had taken the time to show me this
7 aide-mémoire, this document that he wishes to use prior to today's proceedings. Of
8 course, the statements that he relies upon have been with the Prosecution for many
9 weeks and this presentation, insofar as it had any relevance at all, could have
10 been done in the substantive part of the Prosecution's case rather than in closing
11 speeches. Your Honour, in the circumstances, given that this hasn't been shown to
12 me previously, that it relates to evidence that was before the Prosecution weeks
13 before we started this confirmation, I do object.

14 (Pre-Trial Chamber confers)

15 PRESIDING JUDGE STEINER: This document cannot, of course, be seen or be used
16 as evidence for the Prosecution, but in case the Prosecution intends to show just
17 as a visual aid for the Chamber to understand the map, this map will be filed in
18 the case file, as the report of the ICTY Prosecutor was also filed in the case
19 file, as a non -- a hearing non-evidence, and will be given a number.

20 MR. FAAL: Much obliged, Madam President.

21 Please start the program, please. Could you start it again, please, so that
22 I can comment over it? Go ahead.

23 Madam President, Mr. Abu Garda departed from N'Djamena. He travelled 657
24 kilometres to Abeche, all in the name of finding a solution to the problem. He
25 then moved on to Tina, having travelled 903 kilometres. This is where Dr. Khalil

1 said he should wait for them to solve the problem, let him not come to Darfur. If
2 he crosses the border, he would be killed. What then did Mr. Abu Garda do? He
3 travelled across the length and breadth of Darfur to Dar al Salaam, which is 1,311
4 kilometres. The place is otherwise known as Kattal. Move on, please.

5 From there he moved on to Haskanita, having travelled 1,482 kilometres. Your
6 Honours, as it is being played, you would see the names of individuals or witnesses
7 that Mr. Abu Garda came across during this journey. I will not mention the names.

8 Please continue.

9 And then to Dalil Babiker. Move on, please.

10 PRESIDING JUDGE STEINER: Sorry. Sorry, just one minute, Mr. Faal.

11 Mr. Faal, let's proceed without the visual aid, please.

12 MR. FAAL: As your Honour pleases. Please turn it off, please.

13 Madam President, my apologies. The point we are trying to make is that
14 Mr. Abu Garda criss-crossed between N'Djamena all the way to Jebel Adola in the
15 name of finding a solution, travelling over 1,600 kilometres through harsh terrain
16 all the way, through El Fasher, later to Haskanita and to Jebel Adola. But he
17 never intended to meet Khalil as he previously suggested.

18 Your Honours, at this time the ex-commander-in-chief, who had already been
19 sacked on 2 July 2007, met with Mr. Abu Garda. If the intention was to solve the
20 problem as Dr. Khalil has suggested, he would not have chosen the course of action
21 that he took. The very fact that he chose not only to meet up but also to travel
22 with the ex-commander-in-chief into Darfur indicates that Mr. Abu Garda's motive
23 was anything but to meet with Dr. Khalil to resolve matters within JEM. And this
24 brings us to the question of the leadership of the JEM group in Haskanita.

25 Mr. Abu Garda told the Court that he had no authority over JEM troops before,

1 during, and after the attack. The Prosecution submits that Mr. Abu Garda was the
2 leader of the breakaway JEM forces in Haskanita. He is merely downplaying his
3 authority, or the authority he had at the time, to deflect personal responsibility
4 from himself for the crimes charged. The Prosecution evidence has shown that
5 during the movement of Mr. Abu Garda and his troops to the Haskanita area and in
6 Haskanita itself, he was the leader of the JEM component of the combined forces.
7 He was in total control of the JEM forces through a direct military command
8 exercised, among others, through Hassan Komoki and the ex-commander-in-chief. In
9 addition, Mr. Abu Garda had command and control over the combined rebel force that
10 committed the attack on the MGS, together with other commanders of the respective
11 rebel groups.

12 Your Honours, for years during the absence of Khalil Ibrahim from the field,
13 the power of running the affairs of JEM accumulated in the hands of Mr. Abu Garda
14 and the commander-in-chief. Therefore, at the time of the de facto split from JEM,
15 Mr. Abu Garda effectively retained authority over the JEM troops which remained
16 with him.

17 Witness 304 demonstrates that the troops followed Mr. Abu Garda out of a
18 sense of allegiance to their commanders. And the witness said, "These are the
19 first commanders in JEM movement and before Dr. Khalil came from Britain, these
20 commanders used to distribute orders to all soldiers in JEM. If you had someone
21 who you spend long time with and he used to be your commander, and we are just
22 soldiers, we believed them." Witness 304, the same witness, recalled that, "Abu
23 Garda and other senior commanders were with us in the area in Kattal during the
24 26 days before the attack on Haskanita. Before we left, they arrived. They joined
25 us."

1 In this context, Witness 304 explained that Mr. Abu Garda personally led the
2 troops during their movement from Wadi Hawar to Kattal, as well as Dar al Salaam,
3 which is Kattal, of course, where Mr. Abu Garda himself placed himself. Witness
4 305 also reinforces this account where he said, "Mr. Abu Garda came and joined us
5 immediately after the split of the JEM Chairman." "... after the visit," excuse
6 me, "...of the JEM chairman. Bahar Idriss Abu Garda and ..." the
7 commander-in-chief "... were the leaders of the remaining JEM troops."

8 Your Honours, the Prosecution has presented evidence that while in Haskanita,
9 Mr. Abu Garda also had the power to issue orders to the troops directly. For
10 instance, Witness 306 stated as follows. "It was Abu Garda and the SLA group that
11 came to us and told us we had to attack." Mr. Abu Garda was the chairman and the
12 leader of his movement and, in particular, during the period of time he spent in
13 the Haskanita area. Some even called the movement "JEM Abu Garda's group".
14 Although Mr. Abu Garda had overall command over the troops in Haskanita area, he
15 exercised military authority through his military commanders and, indeed, Mr. Abu
16 Garda reinstated the JEM ex-commander-in-chief. Witness 304 confirms that Mr. Abu
17 Garda was the highest-ranking official and had authority over Banda.

18 During his unsworn statement, Mr. Abu Garda tried to suggest that his group
19 was only established after the attack on the MGS Haskanita. He said he was alone,
20 with just two vehicles. He implies that he did not have an organisation at this
21 time. This is contrary to the evidence presented by the Prosecution which shows
22 that Mr. Abu Garda's group in Haskanita retained the apparatus of power of the JEM.

23 Your Honour, many witnesses describe their troops in terms of hierarchy while
24 on the way to Haskanita and in Haskanita itself. For example, Witness 304
25 identifies commanders such as Mr. Abu Garda and Sonki in terms of their ranking and

1 superiority in the group by referring to them as "higher-ranking officials," "the
2 higher-ranking persons," "leaders," the highest-ranking and the most important
3 commanders". The same witness refers to Mr. Abu Garda as the "first authorities".

4 The leadership of the combined rebel force in Haskanita, including Mr.
5 Abu Garda, issued orders to the troops without further explanations, and the troops
6 followed commanders' orders automatically. The soldiers were following their
7 commanders' orders without being given any explanation of the upcoming attack.
8 Witness 307 observed, and I quote, "After the meeting they, the commanders, ordered
9 us to get on our vehicles and move. The practice was that when a mission or an
10 attack is about to start, they just go and start their vehicles, and if you are
11 with them -- and if you are with that vehicle, you jump in." Witnesses 304, 305
12 and 306 are consistent when they say that their commanders ordered them to go and
13 attack the government troops in Haskanita. They complied.

14 From the above, your Honours, it is quite clear from the events I have just
15 described, that at the time of the attack at the MGS Haskanita, Mr. Abu Garda had
16 split from JEM and had a structured organisation behind him.

17 The Defence sought to adduce evidence to the contrary. They relied on charts
18 to show that when JEM-CL was established and that it only had three people.
19 However, the documents they provided do not stand up to scrutiny, as I will
20 describe later.

21 Your Honours, during examination of Defence witness -- of Prosecution --
22 during the Defence examination of Prosecution witness 416 and 446, the Defence
23 sought to adduce evidence to suggest that the attack on the MGS may have been
24 carried out by JEM forces other than Mr. Abu Garda's. Your Honour, the evidence
25 quite clearly suggests that the other JEM forces that were based in Haskanita had

1 moved back to the north. None of them remained.

2 I'll now deal with Mr. Abu Garda's presence at the meetings in which the
3 common plan was devised. In his own statement, in his unsworn statement, Mr. Abu
4 Garda had sought to convince your Honours that he had no part in planning of the
5 attack on the MGS Haskanita. He makes no reference to the fact that there were a
6 number of meetings between the leaders of the groups that carried out the attack on
7 the MGS on 29 September 2007. The only meeting before the attack to which he
8 refers in his -- is his brief meeting with Prosecution witness 442, shortly before
9 the battle in Dalil Babiker commenced. However, several Prosecution witnesses
10 provide evidence that Mr. Abu Garda had one meeting with JEM and SLA-Unity
11 commanders in Dalil Babiker in which they jointly planned and organised the attack
12 on the MGS Haskanita. Before this meeting, however, Prosecution witnesses 307,
13 312, and 314, for instance, described Abu Garda meeting with members of SLA-Unity
14 in Dar al Salaam. Your Honours have heard details of this meeting during the
15 Prosecution's presentation of evidence.

16 Your Honours have also heard details of the commanders' meeting in
17 Dalil Babiker. When the combined rebel forces moved south to Dalil Babiker, they
18 came under a sustained aerial and ground attack from the Government of Sudan
19 forces. They sustained casualties and sufficient material losses and their
20 position in Dalil Babiker became untenable. It was in these circumstances that Mr.
21 Abu Garda and the leaders and commanders of the combined rebel forces had a second
22 meeting. Again, Prosecution Witness 307, whose evidence remained unchallenged,
23 described this meeting in the following terms, and I quote,

24 "When the shelling ended, the commanders called a meeting. Garda joined them
25 for the meeting under a tree. There were about 20 commanders at the meeting. I

1 don't know the outcome of the meeting. However, when they finished, they asked us
2 to enter the vehicles. I asked a SLA-Unity commander where we were going and what
3 those left behind would do."

4 Prosecution witnesses 304, 305 and 306, among others, state that this meeting
5 took place and Mr. Abu Garda and other JEM and SLA-Unity commanders were in
6 attendance.

7 Witness 307 also explains seeing Mr. Abu Garda, another JEM and SLA-Unity
8 commander, talking in the forest near MGS, after which these commanders distributed
9 logistics for the attack and ordered their forces to attack. Your Honours, Mr. Abu
10 Garda, in his unsworn statement, has admitted to the meeting alluded to earlier
11 with Witness 442, describing it in almost the same terms as Witness 442. But there
12 is one fundamental difference. Mr. Abu Garda suggested that he was in fact going
13 in one direction, whereas Witness 442 suggested that he was going in the opposite
14 direction, the direction where the meeting of the commanders was later -- was later
15 to take place.

16 What these various meetings show is the cooperation and collaboration that
17 was ongoing between Mr. Abu Garda, his subordinates and men on the one hand, and
18 the forces of the SLA-Unity on the other hand and were -- and excuse me, I beg your
19 pardon -- and where the common plan was hatched to attack the MGS Haskanita.

20 In sum, your Honours, the Prosecution's core evidence which has been
21 presented to you in the course of this hearing, is the following.

22 1. Witnesses place Mr. Abu Garda in the company of commanders and the forces
23 that carried out the attack, including Komoki, Sonki and Shatta. Witnesses place
24 him in the meeting with SLA-Unity commanders in Dar al Salaam one day before they
25 went to Haskanita. Witnesses also place him in the meeting with commanders after

1 the GoS aerial bombardment of their positions in Dalil Babiker.

2 Your Honours, an important question has been raised before you, which is:
3 Where was Mr. Abu Garda during the attack? We would examine this both from the
4 account of Mr. Abu Garda as well as from the account of the witnesses. In the
5 Defence's cross-examination - or examination - of Prosecution Witness 446, Defence
6 counsel put to the witness the following questions in relation to Mr. Abu Garda,
7 and I quote, "Did you see him anywhere in Haskanita between April and
8 September 2007? Did you ever see him in MGS Haskanita at any time? Was he ever a
9 part of any group that threatened AMIS in any way, shape or form? And on the night
10 in question on 29 September 2007, you didn't see this man, did you?" These are
11 pertinent questions, but put to the very wrong witness. To know the correct
12 answers, we invite your Honours to consider what the insider witnesses who were
13 with Mr. Abu Garda have to say on these issues.

14 In his unsworn statement, Mr. Abu Garda recognises that he was in the
15 vicinity of Haskanita at the time of the attack and admitted that he heard the
16 shelling and the firing of weapons. He said he was 40 kilometres away. When
17 describing the movement of the attack, or the movement of the attacking rebel
18 groups towards the MGS Haskanita, Prosecution Witness 305 states that Mr. Abu
19 Garda's vehicle was one of three vehicles in the front of the formation. He
20 describes this vehicle as having a dushka mounted on it. As to who was in Mr. Abu
21 Garda's vehicle, Witness 306 states that he was riding in the vehicle of Mr. Abu
22 Garda during the attack. He further clarifies that Mr. Abu Garda was not with him
23 in the vehicle.

24 Prosecution Witness 304 states, "As for Bahar Idriss Abu Garda, he did not
25 come to the place where the battle was, but he was a kind of a commander. He

1 remained behind, about ten kilometres away. After we attacked the place and the
2 battle ended, he came and we left together."

3 Where was he in the immediate aftermath of the attack? That he was in the
4 vicinity is again confirmed by Prosecution witnesses when they said that after the
5 attack they moved to the location where Mr. Abu Garda and the other commanders took
6 stock -- or, rather, counted the dead and the injured before moving forward, that
7 Mr. Abu Garda was there, waiting for them to return from the attack. The
8 Prosecution witnesses, while not precise as to the location of this reunion - some
9 say it was 40 kilometres away; some described the location but not the exact
10 whereabouts - what remains consistent, however, is that the attacking rebel troops
11 joined up with their commanders, one of whom was Mr. Abu Garda, soon after the
12 attack, in order to take stock of gains and losses.

13 Mr. Abu Garda told the Court that he moved to Adola. He described how he
14 travelled from N'Djamena via Abeche to Tina. However, the same level of detail was
15 missing from Mr. Abu Garda's explanations as to where he was on 29 September 2007,
16 in particular, the hours preceding the attack when the commanders held their
17 meeting in Dalil Babiker, and during the attack itself, in the hours following the
18 attack, as well as during the events of 30 September 2007. Instead, many hours
19 remain unaccounted for.

20 According to him, he reached Haskanita on the morning of 29 September. Less
21 than an hour after he got there, fighting broke out in Dalil Babiker. That is
22 when, according to him, he left Haskanita and went towards Jebel Adola because he
23 had been informed that the government aircraft were heading towards Haskanita.
24 From that point he told your Honours that he moved to a location 40 kilometres
25 away. And his Defence witnesses suggest that they took him away to protect him.

1 Your Honours, as Defence counsel told you in his submissions, the time we
2 were dealing with, it's one of conflict. A GoS aircraft was approaching. It's not
3 as he put it, not in the sterile environment of a courtroom but actually on the
4 ground, in real-life situations. Difficult circumstances. But, in these
5 circumstances, we submit it would have been impossible for Mr. Abu Garda to have
6 left Haskanita and travelled to the location he said. The witnesses did clearly
7 say when government aircraft approach, they hide themselves and their vehicles,
8 they don't move about. Mr. Abu Garda seeks you to believe that he was moving
9 about.

10 In his statement he told you that he reached Haskanita on 29 September and he
11 talked about the meeting with Witness 442. But in order to avoid putting himself
12 in the subsequent meeting of the commanders in Dalil Babiker, he suggested that he
13 left toward the direction of Adola. But Witness 442 put him in the opposite
14 direction, the direction of where the meeting was taking place. This evidence
15 shows that Mr. Abu Garda was with the troops all along and that he met them after
16 the attack to inspect the wounded and the loot, and thereafter continued north
17 together with the troops. This is how he came to see AMIS vehicles with SLA
18 troops, as he told the Court he did.

19 Let's now look at his move to Adola. Contrary to what he told the Court and
20 the claim of Defence witnesses, Mr. Abu Garda was seen by Prosecution witnesses,
21 including 307 and 433, en route to Adola, not only with the combined forces in the
22 aftermath of the attack against the MGS but also in the possession of looted
23 vehicles. Witness 314 and 443 saw Mr. Abu Garda in Jebel Adola two days after the
24 attack - that was about the 1st or the 2nd of October - and they describe that the
25 commanders were wearing Chadian clothes, long garments, and there he saw one of

1 Bahar's commanders riding a white vehicle on which was written "AMIS", and other
2 troops from Mr. Abu Garda's JEM in possession of looted goods from the MGS
3 Haskanita. We made detailed submissions on this issue and we shall not repeat
4 them.

5 According to Mr. Abu Garda, he heard shelling in the night and he tried to
6 get information, so he left. When he got information, he left in his two cars. He
7 stated, "It is my first time in Haskanita. Even before, I never been in the area."
8 And then he left to Adola. Judging by this account, Mr. Abu Garda is describing
9 himself as an lone, powerless ex-member of JEM, seeking to distance himself from
10 the attackers of the MGS, having to start his group from scratch. Defence counsel
11 made a presentation on this particular issue, and they provided charts to show that
12 Mr. Abu Garda's group had only three people as at that time in Adola.

13 Well, this does not really reflect the true numbers. There is no mention of
14 any of the commanders in that chart. There is no mention of any of the troops.
15 There is even no mention of the Defence witnesses who were with Mr. Abu Garda at
16 the time and claim to have joined Mr. Abu Garda from the start. In addition, the
17 founding declaration which Mr. Abu Garda issued on that day claimed to have 15
18 members. What happened to those individuals? They are conveniently missing from
19 that chart. Judging by this account, Mr. Abu Garda, describing himself as a
20 powerless person, but let's see what happened in Adola.

21 Here is some person who left N'Djamena to come to Darfur to find a solution.
22 He was sacked from his rebel group in which he invested everything. He lost
23 everything and, according to him, was put in a situation wherein he had to
24 establish his own rebel group. He found himself in a situation where there was an
25 attack going on by the government forces. He left. He later heard of an attack

1 against AMIS. He condemned it and sought to separate himself from the attackers.
2 But what happened next? He went to Jebel Adola and suddenly - suddenly - many
3 looted AU vehicles arrived in Jebel Adola. Not only that, troops arrived in Jebel
4 Adola. JEM vehicles which were used in the attack also arrived in Adola. Fuel,
5 foodstuff, military uniforms and oil arrived in Adola, including the very
6 commanders who carried out the attack arrived in Adola.

7 These resources have suddenly materialised in Jebel Adola, just the resource
8 that is Mr. Abu Garda needed. Even though he tried to condemn the attack and
9 distance himself from the attackers, these are the same people Mr. Abu Garda
10 embraced and included in his new rebel group, the vehicles and the personnel,
11 including the person all witnesses indicated to have participated in the attack,
12 and that person was given an important position in the rebel group. Not only that,
13 Mr. Abu Garda again travelled to Juba soon after the incident with one of the
14 commanders who almost all witnesses allege participated in the attack. Is this a
15 coincidence? Or it's just part of the plan?

16 And, your Honours, another interesting issue, three days - three days - after
17 the attack on the MGS, on 3 of October, as Mr. Abu Garda stated in his document,
18 the founding declaration, he was able to establish a new rebel group. It is a
19 strange coincidence, Madam President, your Honours.

20 What emerges out of this is the following. Immediately after the attack,
21 even according to his account, he heads to the same location as the attackers.
22 Strange coincidence. Within three days he declared a rebel movement. It's
23 unbelievable. But more importantly, he puts himself in the apex of a group which
24 comprises of individuals who, quite clearly, carried out the attack.

25 Mr. Abu Garda's version of events prior to the attack and during the attack

1 are also not reconcilable with what actually take place immediately after the
2 attack. JEM-CL's creation was only possible because Mr. Abu Garda had control over
3 the pre-existing forces in the Haskanita area. The JEM forces were loyal to him
4 and that's why they remained there. It was a creation that was aided by an influx
5 of vehicles and logistics looted from the MGS Haskanita. If Mr. Abu Garda did not
6 participate in the attack on the MGS Haskanita and if Mr. Abu Garda was seeking to
7 distance himself from the attackers, we should ask the following questions. He
8 would not have headed to Adola, the meeting point where all the attacking forces
9 gathered after the attack. He would not have integrated those who all witnesses
10 say participated in the attack into his rebel group. He would not have placed
11 himself in the apex of the organisation consisting of individuals who are alleged
12 to have committed the crime. Much as Mr. Abu Garda tries to distance himself from
13 the attack and absolve himself of responsibility, the evidence supports his
14 involvement. We say it is sufficient to warrant Mr. Abu Garda's committal for
15 trial.

16 Your Honours, the Prosecution's evidence has provided -- we would say the
17 Prosecution evidence is sufficient for proof, at least at this stage of
18 proceedings, of all the elements of the crime charged. And, your Honours, with
19 that, the Prosecution rests. Thank you.

20 PRESIDING JUDGE STEINER: Thank you very much, Mr. Faal.

21 Before suspending for -- during half-an-hour for the break, I would like to
22 ask Prosecution whether this visual aid that first was supposed to be filed as a
23 non-- hearing non-evidence, is supposed to be filed as confidential.

24 MR. FAAL: Yes, Madam President.

25 PRESIDING JUDGE STEINER: Microphone, please.

1 MR. FAAL: I beg your pardon. Yes, the Prosecution would be happy to file as
2 a confidential document. Thank you, Madam President.

3 PRESIDING JUDGE STEINER: Thank you. So we are now suspending this hearing
4 for half-an-hour. We'll be back at 11:30 for the final submissions of the legal
5 representatives of victims.

6 We resume at 11:30. The hearing is suspended.

7 THE COURT USHER: All rise.

8 (Recess at 11:01 a.m.)

9 (Upon resuming at 11:31 a.m.)

10 THE COURT USHER: All rise.

11 PRESIDING JUDGE STEINER: So, we are resuming. This is the second part of
12 today's hearing and we are now having one hour to be shared among our legal
13 representatives for their final submissions. So, the floor is with the legal
14 representatives of victims.

15 MS. CISSE: (Interpretation) Thank you very much, your Honours. The
16 essential objective of the victims who have entrusted me with the duty of
17 representing them is to defend their right to a trial so that justice can be
18 rendered. That is to say, these victims have a direct and personal interest in
19 this matter going to the Trial Division of the Court if the Court - and
20 particularly the Pre-Trial Chamber - deems that the evidence produced by the
21 Defence and the Prosecution, in particular, are sufficient to uphold the charges.

22 There is no doubt that by way of the assessment that you will be conducting
23 at this stage of the process, namely the Confirmation of Charges, your assessment
24 of the evidence provided, you will be speaking to international law and applying
25 it. Of course, the rule of Article 22 of the Rome Statute, *nullum crimen sine*

1 lege, argued by the Defence, refers first and foremost to the standards of
2 international humanitarian law and those of international criminal law as they are
3 set out in the Rome Statute.

4 The charges and modes of responsibility of the Prosecution are those provided
5 for in provisions 8(2)(c)(i), 8(2)(e)(iii), (e)(v) and 25 of the Rome Statute.
6 These charges relate to violations of the protection afforded to the AMIS mission
7 pursuant to international humanitarian law. I am speaking of the group of soldiers
8 located at MGS Haskanita.

9 The victims whom I represent attach great importance to the interests of --
10 the issues, pardon me, of international law at hand. They are well aware that it
11 is thanks to the progress we have seen in the field of international humanitarian
12 law and progress seen in the area of international justice that their voices can
13 now be heard today.

14 The worst violations of international humanitarian law have now become
15 offences under international criminal law, as is the case for war crimes condemned
16 by international criminal justice, and it is so that -- it is because of this
17 victims of these war crimes can now hope that justice will be rendered. These
18 crimes of international law often involve political and military stakeholders at
19 the highest levels of responsibility, be they States or other parties working
20 jointly and directly, or through armed groups coming under their control.

21 Although the standards of international humanitarian law are based on the
22 very old customary law with the value of jus cogens, even before rules were
23 codified in the law of war and later in the international law relating to conflicts
24 -- and I am speaking of the 1949 Geneva Conventions and the two Additional
25 Protocols of 1977. Although all of this, the development of rules of criminal

1 liability within the framework of an armed conflict, non-international, in any
2 event all of this is part of a process, the result of a process that began barely a
3 decade ago after nearly 50 years of negotiations; i.e., this progress we have seen
4 in the field of international law is complex and fragile, particularly in the
5 context of the non-international armed conflict that raged in Darfur, a matter that
6 has now come before your Court.

7 The International Criminal Court has made it possible to open a door in an
8 invisible war -- wall, pardon me, a wall against which the hopes of victims have
9 been dashed. I wish to speak to the impunity that can be found in the highest
10 ranking positions, be it within a political authority or a military authority
11 within the framework of a constitution, or against the backdrop of an organised
12 rebellion.

13 The arguments put forward by the Defence, saying that the rules that provided
14 protection to the AMIS mission did not apply at the time of the attack, these
15 arguments justifying the destruction, the looting and deliberate murder of the
16 unarmed observers, the non-combatants, the victims whom I represent today, this
17 approach trivialises the acts of savage killing of military observers and civil
18 police officers. Their death seems to be almost deemed to be, and I quote,
19 "collateral damage that should be proportional to the military advantage that is
20 provided." I am speaking of -- quoting from the transcript of 28 October, our
21 colleague, Mr. Adaka, showed that the behaviour of the attackers put the lie to
22 these justifications.

23 And I would also like to speak briefly to the issues of international law
24 here, because the grounds presented to justify the losing of the protected status
25 showed just how the valuable gains we have seen in the field of international

1 humanitarian law can be swept aside by the partisan interests of political
2 stakeholders and military stakeholders as part of their strategy of waging war to
3 gain power.

4 If international justice does not ensure the objective and rigorous
5 enforcement of the rules of law - and in this particular case Article 3, which is
6 found in the four Geneva Conventions of 12 August 1949 and Additional Protocols I
7 and II of 8 June 1977 - the Defence, recognising that AMIS benefitted from a
8 protected status at the beginning, the question is, the issue at hand is, the
9 status of AMIS at the time of the attack on 29 September 2009 (sic).

10 The sources of international law that is within your Statute - namely, the
11 Geneva Conventions - are quite clear pursuant to Section 13 of Additional Protocol
12 II, and this speaks to non-international armed conflicts, as well as Article 52 of
13 Protocol I.

14 The staff of a military mission benefit from the same protection granted to
15 civilians not taking part in the hostilities. And this protection is lost in the
16 same conditions; namely, when the members of the mission take a direct role in the
17 hostilities.

18 The direct participation of members of AMIS staff in the hostilities
19 alongside or to the advantage of one of the belligerent parties has never been
20 proven by way of objective evidence. On the contrary, the evidence confirms that
21 AMIS was neutral and did not intervene. AMIS was neutral with regard to all the
22 belligerent parties.

23 This conclusion is based on the various pieces of evidence taken directly
24 from documents signed by the parties proving the knowledge thereof and the presence
25 of both government representatives and rebels. This bears witness to the

1 neutrality of AMIS, and this has been corroborated by the testimony.

2 Furthermore, it has been corroborated by the agreement setting out the
3 commission -- the Ceasefire Commission, and as well as the deployment of observers
4 to Darfur.

5 So the issue of law is as follows: If the representatives of the belligerent
6 parties -- of all the parties, not just the government forces, but also the rebel
7 representatives who also were at the base, if the representatives of the parties
8 were benefitting from their presence at the base to serve the interests of the
9 armed groups whom they represented with the knowledge of the mission, and, of
10 course, without the knowledge that in no case could be mistaken with the activities
11 or the behaviour of the AMIS members, and even less involved them in the hostile
12 activities of one of any of the belligerent parties against another such party.

13 I would particularly like to stress the fact that with regard to Article 52
14 of Protocol I, it was stressed that communications centres were not available to
15 participants. They had Thuraya satellite phones and more. These parties were well
16 able outside of the base use these tools, and both parties did use these means of
17 communication.

18 The representatives of the rebels in the camp were also in contact with their
19 military factions, particularly the representative of the Sudan Liberation
20 Movement, and I am making reference to the statement by Witness 446. The battles
21 were held a mere 300 metres from the camp. Local workers also provided assistance
22 to the rebels, particularly those of the SLA, taking -- they helped them take
23 arms -- the weapons, rather, when they entered the camp. And I am making reference
24 to paragraph 69 of a witness.

25 With regard to interpretation and application of international humanitarian

1 law, if we are to follow the line of argument of the Defence, probably the Sudanese
2 government could also decide that AMIS in Haskanita was involved in the underhanded
3 -- in the hostilities with the -- the underhanded hostilities. Thus, it is clear
4 that if one follows such a line of argument, the protection provided by
5 international law could be removed by any of the belligerent parties if they
6 thought -- and this would be purely to serve the partisan or military interests of
7 that party.

8 And using international law as a tool, as an instrument, as part of their
9 military strategy, this is an issue of international law that is now before you,
10 even though no member of the AMIS peacekeeping mission was ever involved in any of
11 the hostilities.

12 If we look at all the various pieces of evidence, particularly those provided
13 by the Defence and the Prosecution, we see that there's no doubt -- there was no
14 doubt for the rebels that the attacks upon the village of Haskanita were
15 perpetrated by the Government of Sudan forces, and this -- whether that is a war
16 crime is beyond the purview of this Court.

17 Was the purpose to ensure that the Sudanese government stop attacks against
18 the rebels? AMIS could not do that. Furthermore, its status and its mandate
19 prohibited them from intervening or siding with one of the belligerents against the
20 other. The leader of the mission could only pass on information; namely, prepare
21 reports, pass them on to authorities and use diplomatic means.

22 I argue that the total silence of the Defence regarding the activities of the
23 representatives and the partisans of the rebel forces demonstrates the consequences
24 would be terrible for international law. If one party is not happy with the AU, it
25 could decide to attack an AMIS missions.

1 And thus, I would argue that the total silence of the Defence regarding the
2 presence and activities of rebels within the camp, the fact that when the AU
3 helicopter transporting a leader, their silence when they -- this demonstrates the
4 partisan and subjective nature of the approach taken to destroy international law.
5 And I am quite sure that the Court will not allow this to happen.

6 I would stress, furthermore, that in terms of specific war crimes, looking
7 beyond the actual attack, the conditions in which the victims were shot repeatedly
8 in their tents, under their beds or on their belly in a trench, shot in the back,
9 this bears witness to -- rockets were fired at the mosque while the faithful were
10 attending the religious service in the very middle of Ramadan. All of this shows
11 that the elements -- the Prosecution elements show that there was the attack.
12 There was looting.

13 And I would conclude on one particular point. I would draw the Court's
14 attention to the probative force and the direct nature of the evidence. This all
15 converged towards the involvement of Mr. Abu Garda in these war crimes.

16 Since -- as the Pre-Trial Chamber stressed in the case of Katanga/Ngudjolo in
17 the Confirmation of Charges, the Chamber has that discretionary power to assess the
18 probative value of evidence. And so this Chamber will examine the evidence and
19 decide whether this evidence is intrinsically consistent.

20 And this assessment of the evidence will be done with regard to all aspects
21 of the evidence; that is, I would stress one particular point -- and my colleague
22 -- I wish merely to stress that the evidence provided by the Defence on 28 October
23 2009 demonstrating the organisational chart of the organisation and the
24 organisational chart of -- the same commander was at the head of both org charts.
25 This can be seen, the continuous leadership and control of Mr. Abu Garda. And this

1 has been corroborated by all the testimony. I thank you.

2 PRESIDING JUDGE STEINER: Maître Koné?

3 MR. KONÉ: (Interpretation) Madam President, your Honours, it is for me a
4 great honour to address this august Chamber and fulfil my mission of defending the
5 interest of 24 Malian victims bearing numbers 170 to 192 and 436. It is indeed an
6 honour, yet a formidable honour in that I am addressing you on behalf of the widows
7 and orphans whose husbands and fathers met their deaths while fulfilling a noble
8 mission with honour and dignity until the fateful moment. I have never hesitated
9 for a moment in accompanying these victims as I am deeply convinced that they
10 deserve justice and reparation.

11 Madam President, your Honours, I have been following the Defence submissions
12 keenly, and I must admit to having gleaned a good deal of information on
13 comparative law and, to a certain extent, on the jurisprudence of international
14 criminal tribunals. Notwithstanding, I am still seeking to grasp the relevance of
15 such an approach before the International Criminal Court.

16 This approach, to my mind, is purely legal diversion whose sole aim is to
17 distance us from the true debate at hand. I finally grasped that the Defence was
18 finding it extremely difficult to justify the unjustifiable and that they were
19 using intellectual exercises lacking in coherence and logic.

20 We should recall the provisions of Article 21(1)(a) of the Statute which
21 states that the Statute is the primary source of applicable law. The rules and
22 principles of international law are secondary sources which only apply when the
23 instrument provide no legal solution.

24 As a result, and in view of the fact that the chart -- the facts charged are
25 specifically provided for in the Statute, in addition to the nature of the criminal

1 responsibility applicable, the question as to whether common law actually
2 recognises this form of responsibility is irrelevant before this Court. This is a
3 perfect illustration of why jurisprudence from the tribunals should not be
4 transposed mechanically to the Court's system.

5 In respect of the charges brought by the Office of the Prosecutor, the facts
6 with which Abu Garda is charged reflect a violation of Article 8(2)(c)(i) and
7 (2)(e)(v) of the Rome Statute. And his responsibility is sought on the basis of
8 Article 25(3)(a), (3)(f) and (3)(e) of the very same Statute.

9 In the face of such a legal arsenal, the Defence must understand that the
10 nullum crimen poena sine lege principle which it has tirelessly cited during its
11 legal arguments is inappropriate in the present case for the simple reason that the
12 provisions of the Rome Statute are what serve as the legal foundations to the
13 charges brought against Abu Garda.

14 In embarking upon its legal adventure, the Defence has built a case which
15 attempts to justify the attack perpetrated upon Haskanita military base whilst
16 advancing arguments which do not stand up to any serious legal analysis.
17 Furthermore, it has never broached the subject of Abu Garda's responsibility,
18 notwithstanding the light shed on the matter this morning leaves no doubt as to the
19 merits of the charges brought.

20 In view of the relevance of the evidence brought, and the strength of the
21 legal arguments supporting this element -- or this evidence, I shall not dwell on
22 this point. I shall merely provide a brief overview of the contents of these
23 facts, the responsibility of Abu Garda within the rebel movement and the powers he
24 enjoyed. I will thereby provide a logical and chronological assessment of his
25 effective and continuous involvement in the attack perpetrated upon the Haskanita

1 military base on 29 September 2007.

2 Abu Garda's positions of vice-president and secretary of the JEM, of the
3 Darfur region, have never been contested. Due to the absence of Khalil Ibrahim,
4 the president of the movement, the authority for conducting the group's affairs was
5 handed over to him.

6 However, when in June 2007 Dr. Khalil Ibrahim returned to Darfur, the Defence
7 nevertheless showed us an organisational chart attributing to JEM a mandate
8 extending from January 2005 to October 2007, in order to have us believe that Abu
9 Garda belonged to this branch until the month of October, thereby forgetting the
10 fact that the Commander General had been removed from his post as of 1 July and
11 that Abu Garda was officially removed from his post during the month of September
12 2007.

13 The Defence's approach is purely strategic. It involves ascribing to JEM the
14 action of the JEM Collective Leadership which has not been officially recognised.
15 This will certainly not have escaped the attention of the Chamber.

16 With reference to Abu Garda's responsibilities within the JEM Collective
17 Leadership, as established in the Defence evidence - and this has also been borne
18 out in the organisational chart that Abu Garda was President at the moment of the
19 facts - we can see that this dissident group retained the features of the
20 organisation. This group was a hierarchal and organised group of power. And the
21 orders given by the leaders were respected by the lower ranking people as borne
22 out in various statements.

23 It has also been established that Abu Garda was the leader of the JEM
24 component. It was he and the other SLA-Unity and SLA group who had the control of
25 the combined forces. And it was in this capacity that together they planned and

1 executed the attack of 29 September.

2 PRESIDING JUDGE STEINER: We can see that the court reporter is having
3 difficulties in typing the English translation. So could you please speak slowly?
4 Thanks.

5 MR. KONÉ: (Interpretation) And this was confirmed by numerous witnesses,
6 and was also shown or demonstrated by the Office of the Prosecutor this morning.
7 Now, witnesses 304, 305 and 307 stated that in the day of 29 September after the
8 attack of the government, Abu Garda and other leaders of the combined forces
9 convened a meeting with 20 to -- 20 commanders near Dalil Babiker. Between 17:00
10 and 18:00, they ordered the troops to proceed towards the Haskanita base.

11 As the Office of the Prosecutor recalled, and this is borne out in the
12 statement of Witness 307, on their way to the Haskanita base, the combined forces
13 stopped in a forest close to the Haskanita base, and Abu Garda held a further
14 meeting with the other commanders. They then shared out the troops between the
15 different vehicles before pursuing their journey to Haskanita.

16 Now, with reference to the attack, Witness 305 stated that when the troops
17 arrived in Haskanita, Abu Garda and the other commanders started shooting in the
18 direction of the military enclosure. Witnesses 305, 306, 312 and 446 stated that
19 during the attack the assailants looted the property and took away numerous
20 vehicles. According to these witnesses, Abu Garda took approximately ten vehicles.
21 Witness 312 states that he saw Abu Garda in a white car belonging to the African
22 Union.

23 Madam President, your Honours, these various testimonies expose the
24 involvement of Abu Garda in the attack perpetrated against the military base of
25 Haskanita; attack during which Mr. Ibrahim Diagne from Mali, a military observer,

1 was killed in a horrific manner. Words cannot describe such a horrendous and
2 inhumane act.

3 During their testimony, witnesses 416 and 446 described the circumstances of
4 his death, as did witness 417. He was not armed, but he was shot at least 30 times
5 in different areas of his body whilst he was in his tent. He was quite simply
6 killed because he was asked for money and he did not have any.

7 There were many other deaths in similar circumstances and there were other
8 people who were injured. We have unfortunately noted that the Defence has
9 trivialised these deaths, as if forgetting that the same blood runs in all our
10 veins across the borders that separate us. This depiction is proof enough that the
11 rebels were mere attackers and true predators that were skilled in what is
12 described as a criminalised rebellion, whose leaders had neither vision nor
13 conviction, but whose sole ambition was to loot AMIS property and that belonging to
14 soldiers out of purely material interest.

15 Madam President, your Honours, the charges formulated by the Office of the
16 Prosecutor have been sufficiently established. The Defence has merely advanced the
17 arguments in support of its case that AMIS had lost its protected status, whereas
18 it has been established that AMIS retained its neutrality under all circumstances
19 and never took part in hostilities. It followed its mandate strictly in the
20 fulfillment of its mission. This was also clearly established by the Office of the
21 Prosecutor.

22 For my part I shall not refer you to the jurisprudence of the International
23 Criminal Tribunal for the former Yugoslavia, or the Special Court for Sierra Leone,
24 nor to American or German jurisprudence, but I would refer you nevertheless to the
25 decision rendered by the Pre-Trial Chamber in the case Germain Katanga and Mathieu

1 Ngudjolo Chui, which bears a close resemblance to the Abu Garda case as my learned
2 friend indicated.

3 It will behove the Trial Chamber, after a coherent and rigorous legal
4 analysis, to independently and beyond reasonable doubt decide whether the charges
5 against Abu Garda have been sufficiently established to commit him to trial in
6 order for him to answer for the crimes charged.

7 In conclusion, Madam President, your Honours, may I thank you most sincerely
8 for your diligence and clarity in these proceedings, but also for the patience and
9 wisdom with which you have conducted these lengthy debates. I would also like to
10 thank all the parties who, despite diverging viewpoints and conflicting interests,
11 have shown courtesy and professionalism which has strongly contributed to the
12 serene nature of the discussions throughout this hearing. I thank you.

13 PRESIDING JUDGE STEINER: Maître -- Mr. Akinbote, you have the floor now.

14 MR. AKINBOTE: (Interpretation) Maître Akinbote is acceptable to me too,
15 Madam.

16 (In English) The charges that have been brought against Abu Garda have been
17 clearly spelled out and referred to severally in the course of these proceedings
18 and I do not intend to repeat this, but just to add that the charges are very clear
19 and unambiguous.

20 The facts and the relevant statutes and rules have also been referred to by
21 my learned colleagues.

22 The main issue your Honours have been invited to determine is whether the
23 parties have placed sufficient facts before this Chamber as to enable your Honours
24 to confirm the charges brought against Abu Garda, or alternatively whether the
25 evidence led so far would justify confirmation of the charges brought against him.

1 In inviting your Lordship to confirm the charges in the light of evidence
2 proffered thus far by the parties, I would like with respect to pose the following
3 questions:

4 (1) Was there any violence to life in the form of murder, whether committed
5 or attempted within the meaning of Article 8(2) of the Rome Statute?

6 (2) Was the attack of 29 September 2007 intentionally directed against AMIS
7 personnel, installations, materials, vehicles and other military hardware within
8 the meaning of Article 8(2)(e) of the Statute?

9 Are there victims resulting from (1) and (2) above as defined in Rule 85?

10 Was there pillaging within the meaning of Article 3(2)(e)(v) of the Statute?

11 The answers to the above questions are all in the positive and I urge your
12 Honours to so hold.

13 On whether or not Abu Garda is criminally responsible for his acts as charged
14 under Article 25(3)(a) of the Statute, I submit that the evidence led so far have
15 established the following:

16 (1) The existence of an armed struggle in Sudan and in general and in
17 particular Darfur.

18 (2) The existence of rebel groups, including JEM and JEM-CL.

19 (3) The attack on MGS Haskanita on 29 September 2007 and the very
20 unfortunate killing of 12 peacekeepers on that day.

21 There are victims within the meaning of Rule 85, 21 of whom I represent.

22 The facts have also been established that Abu Garda is the leader of JEM-CL,
23 that he is a veteran of armed struggle in Sudan and at a point in time he was the
24 chairman and general coordinator of military operations of the United Resistance
25 Front.

1 The evidence led so far by the witnesses, including the witness of the
2 Defence, have been very, very consistent only in one direction, and that is they
3 support the charge against Abu Garda that is placed before your Honours. The
4 Defence has so far not led any evidence either to disprove, to dislodge, or to
5 diminish the probative value of the evidence led so far.

6 It is common knowledge that the aim of the proceedings is to distil and
7 establish the truth from the evidence presented to the Court and call on Abu Garda
8 to account for his acts, if your Honours so find, particularly the events before,
9 during and after the merciless and ferocious attack on the peacekeepers.

10 The evidence led so far also show that Abu Garda, together with his
11 co-travellers in the armed struggle, participated in several forms and took steps
12 to -- in furtherance of their plans. They had a meeting - they had several
13 meetings - there were threats and these threats were actually actualised on 29
14 September 2007.

15 One can only reach an irresistible conclusion, and that is that attack was
16 well thought of, well carried out with military precision, without any regard for
17 human lives. That has not only resulted in the death of the 12 soldiers, but it
18 has also created in the wake victims: victims who are today widows; victims who
19 are today orphans; victims who are today having been told their loved ones are
20 missing in action; victims who are today unable to procreate as a result of the
21 injury suffered in the attack. These are the facts that have been placed before
22 your Honours.

23 There is no gainsaying from evidence led so far if one says that there is
24 indeed a common plan, and I wish to add that there is even a common purpose and I
25 ask myself what is this common purpose? The common purpose is the struggle for

1 power and which is the ultimate control of that country known as Sudan, but at
2 least the flashpoint - the focal point - is Darfur as far as we are concerned.
3 That is the common purpose and that is the ultimate.

4 There is a common plan, yes, take control of this territory by the use of
5 arms, and that is exactly what they've demonstrated from one step to the other.
6 Like I said earlier, Abu Garda is and remains a veteran of armed struggle and that
7 is what has brought us here today.

8 There is of course, like I said earlier on, the existence of a common plan,
9 or agreement, and these have been borne out by the evidence placed before your
10 Honours, and I do not wish to repeat this evidence. We have seen documentary
11 evidence. We have seen videotapes. We have seen bodies of dead soldiers. We have
12 seen dying soldiers making their dying declarations. And we know as a fact that we
13 on this side are representing the victims, victims that will remain victims forever
14 because no amount of reparation can restore what they have lost, but justice must
15 be done and must be seen to be done. This is the only way those who have suffered,
16 those who will continue to suffer as a result of the events of 29 September, can
17 come to the conclusion that at least the world is not against them, that justice is
18 being done.

19 It is not required that all the evidence be placed before your Honours at
20 this stage. It is required -- all that is required at this stage is that
21 sufficient evidence be placed before your Honours that will enable your Honours to
22 confirm the charge. And I submit that the Prosecution has done all that is
23 required of it to -- for your Honours to confirm the charges.

24 I am here today representing the victims because they have not -- because
25 they have suffered untold, undescrivable mental agony. And some of them are today

1 depressed. Some of them today have no hope, because they have children to cater
2 for. Some of them are not even sure where their next meal will come from. That is
3 the situation of the victims that I represent.

4 In conclusion, I would like to draw your Honours' attention to the testimony
5 of Witness 445 when the question was put across to him, "What will be the impact of
6 the events of 29 September 2007 in Haskanita on the victims?" And he gave an
7 example of his own personal experience of a colleague that was killed and the
8 family of that colleague in Kenya will not let him be at peace. That is the
9 testimony of Witness 445.

10 In all, I submit and reiterate, your Honours, that sufficient facts have been
11 placed before your Honours and I recommend the decision in the confirmation hearing
12 of the Lubanga case and say, finally, that this -- it's a simpler case, a simpler
13 case, that it's not as complicated as having child soldiers. It's a very
14 straightforward case. There is an unprecedented attack on AMIS on 29 September
15 2007. Someone has voluntarily volunteered to answer to these charges. At this
16 stage, he is not on trial. He is here to answer to the charges, and it is for your
17 Lordship to confirm or not to confirm the charges. At the end of the day, it may
18 very well be that he is not convicted. That is justice for both parties.

19 I am very grateful for your attention, your Honours. That is where I will
20 stop.

21 PRESIDING JUDGE STEINER: Thank you very much, Maître Cisse, Maître Koné,
22 Maître Akinbote. The Chamber is also very appreciative of the meaningful and
23 professional participation of legal representatives of victims during the court
24 sessions of this confirmation hearing.

25 We are now going to suspend this -- today's session for lunch break, for a

1 little bit more than one-and-a-half hours. We will resume as scheduled at 2
2 o'clock, where Defence will be invited to give its closing statements.

3 The session is suspended.

4 THE COURT USHER: All rise.

5 (Luncheon recess at 12:19 p.m.)

6 (Upon resuming at 2:01 p.m.)

7 THE COURT USHER: All rise.

8 PRESIDING JUDGE STEINER: Please be seated. Good afternoon. We are resuming
9 now for the third and last session of today's hearing, in which we will listen to
10 Mr. Khan, counsel for the Defence of Mr. Abu Garda, who has one hour-and-a-half to
11 present his Defence final submissions.

12 Mr. Khan, you have the floor.

13 MR. KHAN: Madam President, your Honours, I am most grateful. Over the last
14 two weeks the Bench has had the benefit of listening to what is supposed to be the
15 core Prosecution evidence in this case, core evidence upon which they rely in their
16 bid to have this matter go to trial.

17 Your Honours, the Defence state that it is manifestly obvious that this case
18 is in no shape to go anywhere beyond this courtroom. And in due course, your
19 Honours, it will be my respectful submission that in the discharge of your primary
20 obligations as the Pre-Trial Chamber to act as a sieve to prevent unmeritorious
21 cases proceeding a moment longer than necessary, you will have but one option and
22 that option will be not to confirm the charges preferred against my client.

23 Your Honours, at the outset, I will comment upon or make some basic
24 observations. In any criminal trial, particularly a criminal trial where there is
25 loss of life, emotions may run high. Loss of life for any reason, in any

1 circumstances, is never a cause for joy, for celebration, but rather the converse
2 is true. It is a course, an event, that requires to be lamented and taken
3 seriously.

4 And, your Honours, one can sometimes on occasion become rather muddled by
5 mixing normal human emotions of empathy, of humanity, with the law, and it is very
6 important in a criminal trial to remain objective and dispassionate and to follow
7 the law wherever it leads - wherever it leads - because it is only by being a
8 disciple of the law, by applying the law, that one will establish its supremacy and
9 its primacy.

10 Your Honours, we are fortunate that the two parties in this courtroom and the
11 victims opposite in having a Bench of professional judges to decide this issue.

12 My learned friend for the victims, Mr. Koné, stated at the end, I am sure
13 inadvertently, that there had been an attempt by the Defence to trivialise - I
14 think that was the word, to "trivialise" - the suffering of families who had lost
15 loved ones.

16 Your Honours, I must go on record in repeating my opening remarks at the
17 beginning of last week. They were not only my remarks, but they were also the
18 remarks of Mr. Abu Garda who expressed his sincere condolence to all those
19 individuals who suffered a loss.

20 Now, your Honours, the Prosecution have characterised the Defence submission
21 on peacekeeping on the status of the AMIS base in Haskanita as an afterthought.
22 Your Honours, they describe it in their very detailed submissions as a Defence
23 plea. Of course, it is no such thing. It is not a Defence plea; it is a
24 Prosecution burden, and that cannot be emphasised enough. It is a jurisdictional
25 requirement, a legal requirement, that those sitting opposite have a fundamental

1 duty to discharge.

2 And I make it clear, because there has been some mischaracterisation by the
3 Prosecution in their memorandum about issues to which there is no contest, where
4 there is no challenge. Everything - every fact, every element, ever averment of
5 the Prosecution - is in issue unless it has been formally admitted. And my learned
6 friends should be under no misapprehension, that is the normal course of events in
7 prosecutions in criminal trials. And the facts that we agreed on 14 October 2009
8 are the limitations as to what has been formally agreed and admitted by the
9 Defence.

10 Now, your Honours, my learned friends have spent quite a lot of time on a
11 matter that they describe as an afterthought. Indeed, if one looks at the daily
12 agenda for these last two weeks, they have spent a third of their time on
13 submissions of peacekeeping, a third of their time -- a third of their witnesses, a
14 third of their viva voce witnesses that deal with the issue of the protected status
15 of peacekeepers and also the effects that attacks may have upon peacekeeping
16 operations.

17 And looking at the latest of this trinity of documents, we see that more than
18 a third of the skeleton argument put forward by my learned friend deals with this
19 issue with good reason, because the Prosecution are in very real difficulties.
20 There are, the Defence submit, very acute, very real legal obstacles to this case
21 proceeding. And, your Honours, these are not some fanciful, conjured up, clever
22 arguments by the Defence. They were staring the Prosecution in the face from the
23 outset. And on Wednesday I addressed your Honours for about two hours on the issue
24 of whether or not MGS Haskanita had lost its protected status as of 29 September
25 2007. And, Madam President, your Honours, I adopt in totality all those

1 submissions, and I would ask that you give them the most anxious scrutiny when you
2 are deciding this foundational matter as to whether or not this case can proceed.

3 But, your Honours, in the latest filing - in the latest skeleton - of the
4 Prosecution, they start with what they describe as admissions regarding the
5 protected status at the time of the attack that were made by my client in his Rule
6 67 unsworn statement from the dock. And whilst we are delighted, of course, that
7 my learned friends are giving such weight to the unsworn statement, very properly
8 in our submission - and that is a matter we will come back to in due course - their
9 attempt to characterise human sympathy, human decency and empathy as a formal
10 admission discloses nothing but a Prosecution attempt or prosecutorial desperation
11 at scraping the bottom of the barrel.

12 Your Honours, whether they are grasping at straws is a matter that you will
13 determine in due course. But, your Honours, when one goes to the skeleton and the
14 submissions of my learned friend Mr. Faal, on page 3 of his skeleton he states that
15 the various rebel forces that have been described in the Prosecution papers, the
16 various forces were trying to remove the Government of Sudan representatives as
17 being conjured up in many respects.

18 And in paragraphs 3 and 4, they refer to theft of money, some looting, and an
19 assortment, a litany, of other matters in support of that argument; that, in fact,
20 the reason MGS Haskanita was attacked was precisely because of the unwarranted and,
21 indeed, inexcusable activities of the Government of Sudan representatives that were
22 tolerated for more than four months by AMIS personnel and senior officers despite
23 the fact they knew those complaints and despite the evidence of the Prosecution
24 that those complaints were verified and were believed.

25 But, your Honours, what I did on Wednesday was to discuss that evidence from

1 the vantage point of the AMIS personnel, the AMIS witnesses put forward by the
2 Prosecution, but completely at odds with the contention now put forward by the
3 Prosecution that a motive -- or the motive for the attack was to use MGS Haskanita
4 as a warehouse is, once again, not evidence put forward by the Defence, but the
5 evidence of my learned friends opposite.

6 But, once again, they come to the rescue and provide the means by which your
7 Honours can be satisfied that however tragically, however unnecessarily and however
8 avoidably MGS Haskanita did, indeed, lose its protected status by 29 September
9 2007.

10 Now, your Honour, the clear linkage between the threats made by various rebel
11 groups and the attack on 29 September is made patently obvious, in the respectful
12 submission of the Defence, by a number of witnesses. And, your Honours, I will
13 deal with it briefly, because I would ask you to put this portion of our
14 submissions together with the submissions put forward on Wednesday.

15 And it is our respectful submission that when you do that, you will have,
16 once again, a composite picture which permits but one conclusion; and that, of
17 course, is, in the Defence submission, that the reason for the attack was the
18 activities of the Government of Sudan representatives in the camp of Haskanita and
19 the failure of AMIS to properly and promptly do anything about it.

20 Now, your Honours, Witness 419 details that -- and, of course, this
21 individual is an official of the camp, that "on Monday after the attack Mohammed
22 Osman Khattab -- " one of the rebels, Mohammed Osman Khattab, " -- called me to
23 find out whether I was still alive. He said it was not their fault, and the
24 attackers were bandits. I responded, Witness 419 said, that I did not believe him,
25 because he had given us prior warning, and that the day came when they had taken

1 action. I added that my brother was killed by a bullet and that I will kill him
2 with a bullet." That is at paragraph 110.

3 Your Honours, Witness 446 again provides a contemporaneous insight as to
4 actually what inspired or compelled the attack on the evidence of the Prosecution
5 themselves. At paragraph 137 of their statement -- of his statement, Witness 446
6 says this, "The investigators asked me about any utterances of the rebels during
7 the attack. There was nothing except where is the OC? And we told you people to
8 leave the area." We told you people to leave the area. "I cannot say who this
9 is."

10 Now, your Honours, one may think for a moment that if the idea or the primary
11 motivation for the attack was simple looting, that looting would not have been
12 possible if the AMIS personnel had left. Your Honours may think that the evidence
13 and the statement narrated by Witness 446 provides some support for the proposition
14 that the rebels undertook that action because their previous warnings had gone
15 unheeded. And, once again, I must emphasise warnings not over a day or a few
16 weeks, but warnings unheeded over several months.

17 And I pause there. I cannot but note that the Prosecution in their
18 submissions did not take issue with the fact that these warnings took place over
19 several months. Of course, they can't, because one of their primary witnesses, the
20 core witness, (Expunged) makes it clear that these

21 warnings about Government of Sudan representatives misusing their presence at
22 the camp and using their presence to target rebels and civilians, to provide
23 in-time intelligence, as it were, that allowed Government of Sudan aircraft to bomb
24 the opposing party had been well-known and well-believed; but, your Honour, the
25 failure of the Prosecution -- or the acceptance by the Prosecution of their

1 witness, of course, is not without legal significance.

2 Your Honour, witness 416 - again, one of the individuals that was heard in
3 this courtroom - states at paragraph 34 that on the morning of 29 September, he
4 heard a plane flying overhead and later heard a bomb being dropped on Haskanita.
5 And, your Honour, he is quite candid, this witness is quite candid, stating "We
6 were scared as we remembered the threat issued earlier in the month during the
7 demonstration."

8 Once again, your Honours, this witness is in no doubt that the threat was
9 real and it was linked to the bombing campaign and the perceived lack of neutrality
10 of AMIS.

11 Your Honours, Witness 305 at paragraph 39 of his statement was told by rebels
12 that they attacked the AU because they were supporting the Government of Sudan. So
13 certainly this is a view of the rebels that was spoken to by Witness 305 that the
14 AU was attacked because they were supporting the Government of Sudan.

15 Now, your Honours, 312 similarly paints a picture, provides an account, not
16 of an attack simply to steal a laptop and some cash, but for another altogether
17 different reason. And this witness says at paragraph 82, "I was told that the
18 reason for the attack was that this force was collaborating with the government.
19 It was said that those people when they came, the government comes behind them.
20 Nothing else was said. It was not explained that this was the reason to attack
21 them, but it was obvious."

22 But, your Honour, the witness goes on in paragraph 96, and I quote, "I also
23 said previously that I was told those people were government spies. I was told
24 this twice; once before the attack on the African Union compound and once three
25 days after the attack. I was told that those people, the African Union, were

1 government spies; and that once they went to Nyala and when they came back, the
2 government came and attacked them. This was one month before the attack on the
3 African Union compound."

4 Your Honours, Witness 314 at paragraph 85 is similarly unequivocal, and this
5 witness says, and I quote, "It was said that they wanted to attack the African
6 Union because they had given information to the Sudanese government troops; and
7 that they had come and attacked, but their group had managed to drive them back.
8 Then on this day -- ", 29 September, " -- the troops came back to attack."

9 And he goes on two paragraphs later at paragraph 87, "An individual told us
10 that the AU had given information to the Sudanese government troops in the past,
11 and that they had come and attacked them, and they had driven them back, but they
12 had come again on that day."

13 And at 124, lest there be any doubt whatsoever or misunderstanding, the
14 witness concluded, "They said they were going to attack the African Union compound
15 in Haskanita. They said that the AU used to give information to the Sudanese
16 government and that this was the reason why the Sudanese government had attacked
17 them during Ramadan and, again, came and attacked them that day in Dalil Babiker."

18 Now, your Honours, the Prosecution have said today and made submissions about
19 the communication centre in the camp. It is, to some extent, a red herring. The
20 evidence shows that the base as a whole provided a safe haven and a refuge for a
21 Government of Sudan -- for Government of Sudan representatives to provide
22 intelligence that was used for military advantage. That intelligence, that
23 communication provided an effective contribution to the war effort, if I put it in
24 that way.

25 Now, your Honours, it is quite clear - and I discussed this in some detail on

1 Wednesday - that what is important is what -- the information and knowledge that is
2 in the mind of the party that attacks, but witness 417 perhaps has some relevance,
3 because what this witness says is that he arrived at MGS Haskanita on 21 August
4 2007, and he states that when he arrived, there were no rebel representatives
5 present. And he goes on, and I quote, "He was told that they had left the camp and
6 did not return. He left a few months before I arrived at Haskanita."

7 So, your Honours, the clear evidence is that a few months before the attack
8 the only party present in the camp was the Government of Sudan representative.
9 And, your Honours, given that there was no rebel representative, there was also,
10 one may think -- at least it has not been demonstrated by the Prosecution how the
11 rebels would know exactly how that individual was performing his duties or how
12 exactly that person was communicating with his superiors. What is clear is such
13 communication was taking place.

14 And Witness 419 is unequivocal that these individuals, the Government of
15 Sudan representatives, were using official AMIS Thuraya telephones. And it was
16 using Thuraya telephones for what purpose? For a humanitarian purpose? No. They
17 were using it as the conduit by which they could relay the intelligence, the
18 information and the coordinates so they could kill rebels and bomb civilians. It
19 is that history, that reality that caused MGS Haskanita to lose its protected
20 status and to become a legitimate military objective.

21 Now, your Honours, Witness 419 at paragraph 67 in his first statement makes
22 it abundantly clear that there were only the government representatives in the camp
23 at the time of the August attack on Haskanita village.

24 Your Honours, however much my learned friends may wish it, however much they
25 would like it to go away, they cannot wish away the evidence. The evidence upon

1 which we rely is the evidence gathered by them, obtained by them. And, your
2 Honours, it speaks far more eloquently with far more force than any submissions by
3 the Defence.

4 Your Honours, while I am on this topic, I will just comment very briefly on
5 perhaps a submission of my learned friend, Madam Cisse, and she said in court that
6 the Defence had been silent on the presence and activities of rebel
7 representatives, and she characterised this purported silence as demonstrating a
8 skewed use or skewed approach to international law. Your Honour, indeed at page
9 33, line 20 to 24 of the transcript, she argues that the total silence of the
10 Defence regarding the presence and activities with the rebels within the camp, the
11 fact that when the AU helicopter transporting a leader, their silence when they -
12 this demonstrates the partisan and subjective nature of the approach taken to
13 destroy international law.

14 Of course, your Honours, there is no desire, nothing could be further from
15 the truth as far as this Defence team is concerned, to destroy or to tarnish or
16 even cut a thread of the fabric of international law, but it goes back to our
17 primary submission that for the law to be respected it must be applied without fear
18 or favour and without adopting a results-orientated approach. And, your Honours,
19 we are confident that the Bench will do precisely that.

20 Your Honours, Colonel Adaka, the Deputy Director of the Nigerian Legal
21 Services Board and also representative of victims in these proceedings, gave --
22 made submissions yesterday in relation to some of the victims he represented. Your
23 Honours, there is an overlap to some degree between some of the submissions put
24 forward by the Prosecution today and some of the submissions put forward by my
25 learned friend, Colonel Adaka, yesterday. I won't belabour the point but, for the

1 sake of the record, it is important perhaps to note that, contrary to the
2 submission put forward by that victim representative that there was no evidence
3 that -- or that there was evidence that the parties had their own Thuraya phones
4 and these phones were not under the control of AMIS, your Honours will, of course,
5 bear in mind the very clear evidence of Witness 419, at paragraph 9 of his
6 statement, when he says, and I quote, "By the terms of the Darfur peace agreement,
7 which was also the practice in all AMIS group sites, the Government of Sudan
8 representatives and the rebel representatives were entitled to use the official
9 satellite telephone in order to communicate information about incidents in the
10 Haskanita area to their superior authorities. There was a Thuraya telephone -- a
11 satellite telephone assigned for such official use. The representatives would come
12 and use the telephone whenever there was an incident in order to report to their
13 superiors. They would often receive instructions from their superiors through the
14 telephone." And, your Honours, it is then in paragraph 10 that he goes on to
15 explain that Captain Bashir was using the Thuraya for illicit purposes of passing
16 on military information.

17 Your Honours, it seems that the Prosecution and Colonel Adaka, in the
18 respectful submission of the Defence, fall under the same misapprehension when it
19 comes to what actually is being alleged by the Defence. The focus is that because
20 there is not evidence, there is not clear evidence, that the communications
21 facility was being used as the conduit in order to relay this intelligence,
22 therefore, in some manner the attack took on a different nature. Your Honours,
23 that is not the case. The simple uncontroverted fact of the (Expunged)

24 charged with these matters is that the camp was being misused for months.
25 And, your Honour, when one is assessing the issue of a legitimate military

1 objective, coupled to the submissions put forward by the Defence on Wednesday, it
2 seems that the attack on the base would mean that the Government of Sudan
3 representatives would not have anywhere in the rebel territory to work from. But,
4 your Honour, this is not focused on an individual, and this is evidenced by the
5 fact that whilst Witness 446 relates that on 17 September, or thereabouts, Captain
6 Bashir left the camp, Witness 446 is clear, contrary to the submissions of the
7 Prosecution today, that he was replaced by another Government of Sudan
8 representative.

9 Your Honour, that is clear not only in the statement, but also in the
10 transcript of the cross-examination of that witness. Indeed, he gives the
11 alternating Government of Sudan representative, he gives the name of the Government
12 of Sudan representatives and so there can be no doubt on his account that, when
13 Bashir left, the situation didn't change. He was simply replaced with another
14 official of the Government of Sudan. No evidence, despite questioning, no evidence
15 was provided by that witness as to any curtailments in the rights of that
16 representative. Any guidance as to what was possible, what was allowable, what was
17 inappropriate. It seems from the evidence put forward by the Prosecution, that
18 business as usual continued. No doubt, business as usual was very agreeable to the
19 Government of Sudan.

20 And, your Honour, I recall once again the comments of the General who gave
21 evidence, who pertinently identified this chasm of difference. I would describe it
22 like that, a chasm of difference, between the contentment of Government of Sudan
23 officials and those of civilians, rebels and other individuals in Sudan. Your
24 Honours, these are all factors that are -- carry some legal import and are worthy
25 of bearing in mind in due course.

1 Your Honour, Witness 446 is also crystal clear, because he says that what is
2 complained of is not an individual, but -- and it is the transcript, page 34, the
3 transcript of 23 October, page 34, line 11 to 18. He states that the rebels
4 complained about the Government of Sudan representatives as a category - as a
5 category.

6 Your Honour, the Prosecution in their skeleton do put forward an argument
7 that somehow, after Bashir left, there should have been another meeting by the
8 rebels to clarify the situation. Well, your Honours, this is completely
9 unnecessary on the evidence put forward by the Prosecution, because what the
10 evidence of 446 is, is that after Bashir left, Mohammed Osman, a senior
11 representative of the rebels in that area, again complained and again warned AMIS
12 that they were convinced that intelligence was leaking from the camp and if it --
13 and if they were attacked again by the Government of Sudan, they would attack AMIS.
14 So, your Honours, one can't say that there was not clear warning or that the state
15 of affairs was not known.

16 Your Honours, the Prosecution also state at paragraph 11 that, in case of
17 doubt, dual-use objects retain protection. Your Honours, in case of doubt. Here
18 there is not some speculative theory by a wacky individual who simply says that out
19 of a figment of his imagination, AMIS is colluding with the enemy or providing
20 succour to the opponents that is resulting in loss of life. Not a bit of it. The
21 information that is given is accepted. It cannot be controverted by the
22 Prosecution. It cannot be wished away, because the person on the ground, the
23 person given responsibility by the African Union, by AMIS, is the same person that
24 said he believed and was convinced by the information received.

25 Now, your Honours, this is not about personal blame, whether the fault is

1 with X or with Y, whether it is an individual or systemic, whether the failures go
2 right back to the international community supporting a mandate that they knew would
3 be doomed to failure and putting African Union troops in a theatre that they would
4 never allow United Nations troops to enter. It is simply about whether or not that
5 base became a legitimate military target. And, your Honours, in my respectful
6 submission, my learned friends for the Prosecution have not put forward a scrap of
7 evidence that would displace the submissions put forward, bearing in mind of course
8 that they have the burden of proof to show that the protection continued. And in
9 face of the evidence put forward by them that was apparent in their own papers, it
10 is very clear, in our respectful submission, however sadly, that that status was
11 lost.

12 Now, your Honours, at page 10 of the skeleton, reference is made to the 2004
13 ceasefire agreement. Now, your Honours, by signing the Darfur Peace Agreement in
14 May 2006 with the Government of Sudan and SLA Minni Minawi, the African Union
15 started its involvement that led to Haskanita.

16 Now, your Honours, before you are various pieces of evidence. I will quote
17 another section of Flint and de Waal. You already have from Wednesday's
18 submissions one extract, but at DAR-OTP-0159 to 0187 and also DAR-OTP-0159-0672,
19 which bears an EVD number D05-0002, those authors write that "Towards the end
20 stages of the Darfur Peace Agreement, negotiations between the AU, the Government
21 of Sudan and SLA Minni Minawi that the DPA was ..." quote, "... 'looking more like
22 an alliance of military opportunity' and part of the deal was expelling the groups
23 that had refused to sign from the AU-chaired Ceasefire Commission and the joint
24 commission, the bodies that handled the key security issues."

25 Your Honours, not only were rebel non-signatories, including JEM and the

1 Sudan Liberation Army, removed from the ceasefire commission and the joint
2 commission, but they were expelled from AMIS observer sites, and that is again in
3 Flint and de Waal at DAR-OTP-015-0817. Your Honour, that is corroborated by
4 Witness 446 at paragraph 21, who again says that the only individuals present were
5 the Government of Sudan and the SLA Minawi.

6 Witness 417, more pertinently, at paragraph 30 makes it clear that non-DPA
7 signatories did not have representatives in AMIS. So, your Honours, thus we get to
8 a position where, for several months, certainly at the time MGA Haskanita was
9 attacked, only the Government of Sudan and SLA Minawi representatives, the military
10 adversaries of JEM and the SLA, were permitted by AMIS to be stationed at MGS
11 Haskanita.

12 Now, your Honours, when one looks at the duties and responsibilities of
13 individuals, it is important to refer again perhaps to the 2004 modalities
14 agreement, DAR-OTP-0005-0308. And, your Honours, for the record that has an EVD
15 number of OTP-0001.

16 Now, your Honour, it is clear that this agreement that created AMIS as a
17 monitoring mission was to direct and control the activities of all observers, so it
18 is not as if AMIS were just giving bed and breakfast. They had responsibilities to
19 direct or control the activities of those observers. And part 2(5) of this
20 modalities agreement makes it clear, and I'll read it, "That to ensure command and
21 control, all observers ..." and observers are defined in 2(4) as observers from the
22 parties, the Chadian mediation African Union Member States and other
23 representatives of the international community, and in 2(1) the various parties are
24 detailed which include the various groups listed at (a) to (f). But, your Honour,
25 it says this: "That to ensure command and control, all observers shall be

1 answerable to the chief military observer, the CMO, to be designated by the AU who
2 shall, in turn, be answerable to the CFC. Additionally, and in order to ensure
3 unity and discipline of command, all observers participating in the monitoring,
4 investigation and verification exercise, as well as members of the CFC, shall be
5 funded through the budget of the CFC. No parallel reporting to other authority
6 shall be allowed in the execution of responsibilities."

7 Now, your Honours, the reality, in my respectful submission, from the
8 evidence your Honours have before you is that it seems that the Government of Sudan
9 representatives could do what they wanted without any restriction put on them
10 whatsoever.

11 Now, your Honours, in this regard the testimony of Witness 446 is perhaps
12 relevant, because on 23 October of 2009, at page 30, line 1 of the transcript, he
13 said, albeit that he wasn't the person primarily responsible for these individuals,
14 he said it was not his responsibility to stop anybody from communicating outside
15 Haskanita camp.

16 Your Honour, once again, we come back to -- it doesn't matter where the fault
17 lies. There is a failure. And it may be that another enquiry on another occasion
18 will make findings in this regard. It may be, your Honours, in the course of your
19 deliberations, that clear lessons can be learnt. But for whatever reason, in my
20 respectful submission, this camp, this small camp in Haskanita lost its protected
21 status, because clearly over months information was being provided to the Sudanese
22 government for military advantage. And this was made known to the people in charge
23 of the camp.

24 Now, your Honour, it is not an excuse to say, "Well, I sent the complaint off
25 to headquarters." It may be of some personal comfort, it may be of some personal

1 satisfaction; but at the end of the day, as long as the mischief continued, as long
2 as the military advantage continued to benefit one side, there is only one
3 conclusion: That that base became a legitimate military objective.

4 And, your Honour, it is not a submission that gives me the least bit of joy,
5 lest there be any misunderstanding, but it is simply the sad, indeed, the tragic
6 reality of what happened at MGS Haskanita. And, once again, I will not cavil at
7 expressing our remorse and sadness at the loss of life, and the Prosecution can try
8 in any way they want to spin it as some kind of admission, but the two things are
9 very different.

10 Your Honour, just very briefly, on a final submission of Colonel Adaka. He
11 took quite some issue with my -- the submissions of my learned friend, Mr. Burrow,
12 detailing the huge gaps in the Prosecution evidence on the issue of cause of death.
13 And your Honours will perhaps remember the submissions of Mr. Burrow that here we
14 are in October 2009, here the victims are in October 2009, and there has not been
15 any material improvement in the knowledge the victims will have on how their loved
16 ones died. They are in no better position than they were two years ago. That is
17 very surprising in a criminal trial. Very surprising, indeed.

18 But, your Honour, it is not for the Defence, of course, to have any burden of
19 proof. All my learned friend, Mr. Burrow, was saying - all we were saying - is
20 that there was clear evidence that there was fighting within the camp. There was
21 clear evidence of bullets went astray.

22 And despite the recommendations of other Prosecution witnesses, for example
23 Witness 315 and 355, there has been no forensic examination. Of course,
24 exhumations and examinations are very well-known in international justice now.
25 They have been done in Cambodia; they have been done in Rwanda; they have been

1 done, unfortunately, in the former Yugoslavia, but there hasn't been this forensic
2 analysis as to the cause of death, whether or not there is an execution, looking at
3 the nature of the killing.

4 We are simply left with a very general allegation that we know people,
5 unfortunately, are dead without convincing evidence how each individual died. Is
6 it direct fire prior to attackers entering? Is it because of explosions? Is it
7 because of being killed when hors de combat? We don't know. Is it a close range,
8 close proximity shot? We don't know from the ballistics where the bullets came
9 from.

10 This examination has not been done; and it is not for the Defence to prove
11 anything. If there is speculation, the fault must lay in only one direction; and
12 with the greatest of respect, it is on the other side of the courtroom.

13 Your Honour, in any event, Witness 446 makes it clear that friendly fire was
14 a possibility. And that is in the transcript of 23 October at page 46, line 22 and
15 onwards.

16 Now, your Honours, whether or not items were looted, whether or not there
17 were ancillary and baser motives, whether or not individuals took the opportunity
18 of the attack to steal would not, in my respectful submission, as a matter of law,
19 render an attack unlawful. The simple question - the primary question - must be
20 whether or not that base was a legitimate military object on that date.

21 Now, your Honours, when one goes the Kosovo report of the ICTY, your Honours
22 may wish to look at paragraph 76. And in paragraph 76, the expert committee set up
23 by Justice Louise Arbour noted that various reasons had been put forward by NATO,
24 by Tony Blair, by various officials justifying the attack. For example, that the
25 bombing was justified because of the propaganda purposes, for example, for which

1 the TV station was being used.

2 But, your Honours, at the bottom of the page, bottom of paragraph 76, the
3 committee found that if the attack on the RTS TV station was justified by reference
4 to its propaganda purpose alone, its legality might well be questioned by some
5 experts in the field of international humanitarian law. It appears -- they
6 continue, it appears, however, that NATO's targeting of the RTS building for
7 propaganda purposes was an incidental, albeit complimentary aim of its primary goal
8 of disabling the Serbian military command and control systems and to destroy the
9 nerve centre and apparatus that keeps Milosevic in power.

10 So, your Honour, the presence of one illicit motive or some illicit conduct
11 doesn't, in the respectful submission of the Defence, make the attack as a whole
12 unlawful. You have to focus throughout your considerations as to whether or not on
13 the evidence you have this camp was a legitimate military objective. And you will
14 have to weigh the evidence that has been put before you.

15 Your Honour, on the issue of plunder, of looting, of course my learned friend
16 Mr. Burrow has already addressed you on that on Wednesday. The Prosecution, of
17 course, have the burden of proof on all matters that are not expressly admitted by
18 the Defence. And your Honours may have to consider in due course whether or not,
19 at least in relation to those items that had military utility, for example food,
20 fuel and vehicles, whether or not as a matter of law they could amount to war
21 booty, as it is called, under The Hague regime.

22 Your Honours, I don't need to address you further on that at the moment. The
23 burden, of course, is with the Prosecution throughout.

24 Your Honours, I will move in the last half hour I have got to the purpose and
25 the focus of today's hearing. Your Honours are very well aware, of course, of the

1 standard of confirmation, substantial grounds; but in determining what satisfied
2 means, it is my respectful submission that the Bench must be thoroughly satisfied.
3 The Bench must be convinced that the Prosecution have discharged their burden to
4 the standard of substantial grounds to believe that the crime - that the charges
5 have been made out.

6 Your Honours, in considering the evidence the Bemba confirmation decision is
7 very relevant, because in paragraph 31 the Bemba Pre-Trial Chamber made it crystal
8 clear that the principle of in dubio pro reo continues to apply at all stages of
9 proceedings including at this hearing, at least at this stage. So, your Honours,
10 when you are considering the evidence, the benefit of the doubt - when one is
11 reviewing the standard - must in all cases come down on the side of the Defence.

12 Now, your Honours, there is a hierarchy of evidence that was adumbrated by
13 the Pre-Trial Chamber from direct evidence, statement of eyewitnesses, all the way
14 down to anonymous witnesses. Your Honours, I would refer you in due course to
15 paragraph 49 and 62 of the Bemba confirmation decision.

16 Your Honour, here the Prosecution have, despite that injunction, relied
17 primarily or in very large part on summaries. In fact, all the so-called rebels
18 have been -- all that information has been provided to us in summary form. Not one
19 transcript has been given to the Defence. And not only that, all of them except
20 one are anonymous.

21 And, your Honours, when one is giving effect to the Bemba Pre-Trial Chamber
22 evidentiary considerations, I would ask you to pause and also consider that I
23 sought, however inartfully, to put the Prosecution on notice that this would be a
24 real issue; because on 3 September 2009 at page 7, line 14, your Honours, I
25 expressed some disquiet with the evidence that had been provided.

1 Your Honours, I said, "The second issue is one of the record. Your Honours
2 have consented that the Prosecution for reasons that they no doubt detailed in
3 their ex parte communications, that they were allowed to submit summaries, and, of
4 course, the rules make that perfectly proper and perfectly appropriate; but, your
5 Honours, I will confess that the summaries that have been submitted are difficult
6 to fathom, because they are gleaned, they are cut and pasted, and cobbled together
7 in many respects from transcript of interviews."

8 Your Honours, I would ask you to read all of that in due course up to page 8,
9 line 11, but I tried, as far as possible, to put my learned friends on clear notice
10 by saying that I do reserve my right and I do make this a matter of record to make
11 any necessary submissions at the confirmation hearing regarding the probative value
12 in relation to these summaries for the reasons I have adumbrated."

13 Despite that being highlighted, your Honours have certain evidence, and this
14 is not the best evidence at all. Now, when one is evaluating the evidence, the
15 anonymous evidence of the Prosecution in relation to the various rebels,
16 particularly Witness 304, 305, 306, 307, 312, 314, 433 and the summary of named
17 Witness 442, your Honours will have to review it alongside the Defence evidence.

18 The Defence evidence, of course, consists of the unsworn statement of
19 Mr. Abu Garda. Whilst it is correct it has not been open to cross-examination, it
20 is certainly my respectful submission of more probative value than a statement on
21 paper. You have had the benefit of seeing Mr. Abu Garda; you have heard him speak
22 in his own voice directly to you. And in my respectful submission, that unsworn
23 statement carries proper evidential weight, certainly when put against what I would
24 call the second rate, second class evidence in relation to the rebels that has been
25 chosen by the Prosecution.

1 Your Honours, in relation to the statements, as Mr. Burrow mentioned on
2 Wednesday, the statements provided by the Defence give the names and the details of
3 the various witnesses. They are not anonymous. They are not summaries. And,
4 again, they have greater evidential utility than the statements of the Prosecution,
5 in my respectful submission. It is a trite point, of course, that there is an
6 equality between the parties; and just because it comes from the Defence, it is of
7 no less significance or weight than that is gathered further to the instructions of
8 Mr. Ocampo.

9 Your Honour, the other matter that perhaps would give you pause for thought
10 is that various statements have been taken under Article 54(d). And Article 54(d),
11 of course, allows the Prosecution to enter into agreements with witnesses. Now,
12 your Honours, unless I am wrong, I haven't seen one document detailing the terms of
13 those agreements. I haven't seen a summary of those agreements or even to know the
14 nature of those agreements. All we know is that agreements were entered into by
15 the Prosecution.

16 Now, your Honours, ordinarily one would expect the Prosecution to disclose
17 what has been promised, what has been agreed. All we know is that there has been
18 an agreement. And, your Honours, in my respectful submission, again, that is not
19 good enough. It is for the Prosecution to provide good disclosure; and failing to
20 do that which I say a Prosecutor should do to allow the Bench and the Defence to
21 make a proper assessment of the evidence that is before them, they should have
22 given information regarding that agreement. They have failed to do so, and they
23 have failed to do so at their jeopardy.

24 Your Honour, you heard one viva voce witness of the Defence, that's the
25 investigator in the Office of the Prosecutor, Witness DAR-D05-P001. Your Honour

1 will be familiar now with paragraph 133, I think it was, of his statement, in which
2 he detailed a long -- yes. I do apologise. Yes.

3 And, your Honour, we put to him the statement of Witness 355. And we went
4 through in some detail, your Honours, the vast array, I would describe it, the vast
5 array of information that has not been obtained in relation to this case. These
6 are evidentially significant. They include reports made much earlier to the event
7 than the Prosecution's investigation. They include expert panels, police reports,
8 I think five reports of various hues in total, as well, of course, of prior
9 statements of Prosecution witnesses. And, your Honours, of course, will have to
10 look at the right of the Defence under Rule 76 to get prior statements.

11 Now, your Honours, in paragraph 10, I think it is of that statement, right at
12 the outset the witness makes it clear that he is not subject to any confidentiality
13 agreement from the African Union. And also, at 110 - and I would ask that my
14 learned friend, Mr. Burrow, correct me if I am wrong from recollection - from 110,
15 he also makes it clear that he is willing to provide all that information to the
16 Prosecution if requested.

17 Now, your Honours, the witness that came to court stated that that -- these
18 pieces of information were not obtained. Why? Because of a policy, a
19 fundamentally flawed policy, in my submission. (Expunged)

20 (Expunged)

21 (Expunged)

22 (Expunged), your Honours may

23 recall my question to the witness --

24 PRESIDING JUDGE STEINER: Mr Khan, sorry. Mr. Faal, it's about
25 confidentiality?

1 MR. FAAL: Yes, Madam President.

2 PRESIDING JUDGE STEINER: Yes. Please, Court Officer, let's turn for a while
3 into private session.

4 (Private session at 15:10 p.m.)

5 (Expunged)

6 (Expunged)

7 (Expunged)

8 (Expunged)

9 (Expunged)

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19 (Expunged)

20 (Open session at 3:14 p.m.)

21 MR. KHAN: Madam President, in my respectful submission, whatever one calls
22 it - a policy, a practice - everything the Prosecutor does that affects the fair
23 trial rights of an accused is reviewable and judicable before the Judges of this
24 institution. The Prosecutor has previously in the Lubanga case been found to have
25 adopted a flawed policy that resulted in well-documented difficulties. In my

1 respectful submission, the approach that has been adopted to the failure to obtain
2 prior statements of witnesses contrary to the spirit of Rule 76, as well as clearly
3 relevant information under Article 54, demonstrates that once again a flawed and
4 erroneous policy has been adopted by the Office of the Prosecutor.

5 Article 54 and the duties of Prosecutor must trump duties to any other
6 institution or state to which no legal obligation exists, particularly when the
7 witness in question expresses a willingness to provide documents and is not subject
8 to any confidentiality agreements.

9 Your Honours, when the Prosecution are allowed, as they are in these
10 proceedings to rely on written statements and are allowed to rely upon summaries,
11 the need becomes ever more critical, in my respectful submission, to discharge the
12 Article 54 obligations and provide previous statements because it is the only
13 forensic device -- or a main forensic device available for the Defence to test the
14 credibility and the consistency of a witness. A previous statement, of course,
15 could show a huge change in a witness' account, so much so that it may render the
16 second statement completely incredible. Your Honours, this policy is flawed and I
17 would ask you, in considering what was available and not obtained, that the
18 Prosecution be not given the benefit of any doubt and, indeed, your Honours should
19 be informed by what was not available to the Defence that would have been if the
20 Prosecution had adopted a policy that is consistent with the Statute and the Rules.

21 Your Honours, going to the evidence in the last 15 minutes, the Prosecution
22 evidence, in my respectful submission, is confused and contradictory. When one
23 looks at the document containing charges at paragraph 27 - and do forgive me, I am
24 going to be fast because I have spent too long already on matters and I shouldn't
25 have. In paragraph 27 of the DCC, the Prosecution state that a power struggle

1 ensued over the leadership of JEM and on 29 July 2007 - jumping to paragraph 28 -
2 there was effectively a split within JEM. So, by 29 July 2007, going to paragraph
3 28, effectively a split within JEM.

4 And it says, "Dr. Khalil Ibrahim continued to lead JEM troops in the north
5 while Abu Garda and (Expunged) led the remaining troops." Your Honours, I started
6 off by saying that the policies -- or the policy of the Prosecution may well be
7 convenient, but it has to be accurate, because in paragraph 103 of this same
8 charging document, despite the fact that they say that there is a split that took
9 place a month earlier, despite the fact they say Khalil is in the north and Garda
10 and Banda are in the south, they say that Abdulaziz Osher visits Haskanita on 27
11 August and assures the MGS command that JEM forces are in command; a contradictory
12 account by any stretch of the imagination, in my respectful submission.

13 Your Honours, at paragraph 135 the Prosecution state that the SLA-Unity
14 component of the combined rebel force came under the de facto command and
15 leadership of Jerbo. Abu Garda himself was in total control of the JEM forces.
16 Your Honours, there is no mention of Abdulaziz Osher. It is almost as if he has
17 been air brushed out. Despite the fact that Witness 446 and Witness 419 describe
18 that they met that individual many times -- at least 419 says he met him many times
19 between May and the latter part of that year and 41 -- 446 describes seeing him at
20 least once, and on the day in question, on 29 September, certainly 446, one may
21 think, thought that Abdulaziz Osher is in the area because he rings him. And what
22 happens? He is with another witness, 419. They telephone Abdulaziz Osher and he
23 picks up the phone and says, "Don't disturb me when I am fighting" and hangs up.
24 Your Honours, this has not been looked at all, and perhaps it is inconvenient for
25 the Prosecution, but it is striking -- one striking, however small, example of

1 perhaps a flawed and misconceived theory of the case put forward by my learned
2 friends opposite.

3 Your Honour, I would refer you in due course to 416 and 417, but at 137 the
4 Prosecution do, in my respectful submission, try to have it both ways. They say
5 that in spite of - in spite of - his de facto separation, not de jure, de facto
6 separation and subsequent dismissal of JEM, Abu Garda effectively maintained
7 authority over the troop bis virtue of his leadership position in the movement.
8 So, notwithstanding de facto separation and dismissal, he effectively maintains
9 authority over the troops because of his leadership position in the movement. The
10 movement, presumably, is JEM. It is rather difficult to fathom, and I would ask
11 your Honours to consider it when looking at the overall coherence of the
12 Prosecution case.

13 Similarly, what is the attack? It is a well-organised attack of many months
14 planning, or was it a spur-of-the-moment engagement? Here one sees a disparity or
15 tension between paragraphs 90(a) and (b) of the DCC and paragraph 90(c), and your
16 Honour, I won't say more than that but one talks about the attack being planned
17 some time in advance, it seems, and then the other, it seems that the engagement at
18 Dalil Babiker was the decisive factor and, you know, that was the catalyst for the
19 attack itself.

20 Similarly, your Honours, if one looks just at paragraph 151 and 152, on the
21 one hand, the Prosecution say that there was a strong and brutal system of military
22 discipline - strong and brutal - and yet in 28 they say, well, people left with
23 Khalil and other people could choose if they stayed behind. Well, it does not
24 appear to me, your Honours, to fit with a strong and brutal system of military
25 leadership, where troops under individuals' command can decide where they go and

1 who they go with. And your Honours will bear in mind in due course the evidence
2 from the dock of Mr. Abu Garda. This is not a trained, salaried army. These are
3 rebels and, your Honours, these are all matters perhaps that can be borne in mind.

4 Turning finally to some of the core witnesses of the Prosecution, your
5 Honours, general remarks. Identification needs to be proved. Ordinarily, the
6 Prosecution must -- are expected to establish identity, either by recognition, ID
7 parades, or photoboards, or by sufficiently precise questioning to show that the
8 witness actually knew the person that is the target of investigations. In my
9 respectful submission, the summaries and the statements provided by the Prosecution
10 are somewhat deficient in that regard as well.

11 Your Honours, Witness 304, it is a rather poor identification, he simply says
12 that Abu Garda was present in Kattal when the witness arrived. That's at paragraph
13 100. But, again, one of the flaws of summaries and anonymous summaries is there is
14 a huge movement in the witness' account because, on a number of occasions, the
15 witness says, for example, at paragraph 22, that Banda is the commander; he's the
16 power and the subordinate is Abu Garda. It is not said once, it is said many
17 times, paragraph 9, 21, 22 and 23. Now, by the end of the interview, the witness
18 does an about-face and says that Abu Garda, my client, is the superior and Banda is
19 the subordinate.

20 Now, your Honours, one of the evidentiary important reasons for having a
21 transcript is one can see whether or not a witness has been led in a certain
22 direction. As a Defence counsel we have been denied that opportunity, that
23 forensic tool, because of the decisions taken by my learned friends opposite. Your
24 Honour, when assessing the credibility of this account one must, in accordance with
25 the Bemba decision, give less weight to the summary because of the inability of the

1 Defence to properly get behind it. But, on the face of it, this statement has some
2 problems, this being one of them.

3 But, your Honours, there is no basis for knowledge of meetings. At paragraph
4 120, the witness says he heard there was a motoring. At paragraph 135, "I was not
5 present during the meeting." Then at 136, he says, "I saw the meeting." And then
6 it is very clear that, contrary to the DCC and the account of the Prosecution that
7 Abu Garda took part in the attack, the witness says at paragraph 171, "Abu Garda
8 was ten kilometres away." So, not as the Prosecution say now he took part in the
9 attack but, no, their witness say he wasn't there. Your Honours, this is a matter
10 that your Honours will have to evaluate in due course.

11 Similarly, the witness says in 124, 150, that there was a white wall
12 surrounding the base. Well, your Honours have seen the photograph, and one wonders
13 if the witness even went to that location at all, because one thing that is obvious
14 about the camp is that there is no white wall at all. Your Honours, when one is
15 assessing a deficient or second-rate piece of evidence from an anonymous witness
16 from a summary with a lot of information not there that would assist in its
17 evaluation, the benefit of the doubt should go to the Defence.

18 Your Honours, 305, apart from general matters, for example, saying the
19 SLA-Unity began in 2005, when the evidence before the Court shows that it was
20 founded in 2007, it is clear that the witness has no firsthand knowledge of Abu
21 Garda at the meeting. At paragraph 24, he didn't even go to the meeting venue.

22 And, your Honour, it does appear to be an inconsistent narrative because he
23 uses language at 35, "I am sure that Abu Garda was in the attack. (Expunged)

24 (Expunged), commanded it." This witness is the only witness, it seems, that
25 claims to have been seen my client at Haskanita, and he says that "When we

1 approached the compound, Abu Garda, (Expunged) were all in lead vehicles." So we
2 don't know exactly the circumstance of this apparent sighting and all the rest of
3 it. None of this is detailed in the statement. But, your Honours, he does say
4 then at paragraph 30, after purporting to see my client firing, "I don't know who
5 fired their weapons because by the time I arrived, the attack had already started."
6 And, your Honours, again, when evaluating the credibility, this is one of many
7 witnesses who states that they didn't participate, despite being there, because
8 they didn't believe in attacking UN forces.

9 Your Honours, 306, very quickly, doesn't know what is discussed at meetings,
10 paragraph 27 and 28. Once again, in assessing the credibility of this witness, it
11 seems he doesn't have the fortitude to refuse to go to the camp, presumably for
12 fear of what may happen on his account. Who knows? But, at the same time, he says
13 at paragraph 34, despite firing, he goes to this firefight without even loading his
14 Kalashnikov gun. Your Honours, a rather unlikely state of affairs, one may think.

15 Your Honours, at paragraph 39, he states that he was in the vehicle of
16 Abu Garda, but Abu Garda was not in the vehicle. Well, we don't know from the
17 Prosecution's evidence how he knew it was Abu Garda's vehicle. If it was, the
18 Prosecution haven't explained where was Abu Garda. But he is very clear. He says,
19 "Abu Garda did not go." So, again, another witness contradicting the Prosecution's
20 account that my client took part in the attack.

21 Your Honours, after 39, there is another paragraph 43 which contradicts
22 itself: "I met Abu Garda," it seems, "I met Abu Garda during the period of the
23 attack." It is all very confused, second-rate type of evidence that has to be
24 considered.

25 307, your Honours, no description of any identifying characteristics of my

1 client, no interaction with Abu Garda before the incident. The Prosecution haven't
2 bothered to show photoboards, for some unknown reason. They are simply asking us
3 on a leap of faith to accept the account of these witnesses.

4 But, your Honours, at paragraph 31, he doesn't know what is discussed at
5 these meetings. He doesn't know the outcome of these meetings, at 37. At 93, he
6 says, "I did not see Abu Garda, but he's there." Well, your Honours, again, this
7 is the kind of statement that one cannot move swiftly over. It is an exceptionally
8 important statement, "I didn't see Abu Garda but he's there." Why? In what
9 circumstances? We cannot accept this in a way that is favourable to the
10 Prosecution when proper information is missing.

11 At 312, your Honour, this witness has wrongly identified, we say, at
12 paragraph 198, Abu Garda. Again, at paragraph 72, the basis of his knowledge is
13 extremely skeletal. He states that my client would have been part of the meeting.
14 He supposes he would be part of the meetings. Your Honours, this again is second
15 class evidence. But, in any event, at paragraph 85 it is clear this witness is one
16 and-a-half kilometres away from MGS Haskanita. There is no mention in his account
17 after the attack seeing my client with stolen goods and looted goods, as the
18 Prosecution put forward, and certainly there is no mention of seeing him at the
19 camp at all.

20 Your Honours, 314. He says, "I don't know if JEM participated in the attack,
21 but that's what I was told." At 154, "I did not see any other meeting with Abu
22 Garda prior to the attack. I don't know who was involved. I don't know if he was
23 involved in the attack because I don't have direct control of the commanders." So,
24 your Honours, again, not evidentially useful matters.

25 Your Honours, the last witness I will deal with your leave is witness -- two

1 more witnesses. 442. Now, this witness has been glossed over by the Prosecution.
2 An important witness. We have his name. Not an anonymous witness for a change.
3 We have this witness' name. He is unequivocal, paragraph 22, "I did not see Garda
4 in the operation. In regards to the planning, he was not involved", unequivocal.
5 "I think he was in Tripoli." This is an earlier operation. "I think he was in
6 Tripoli. He was not in the operations. I know him personally. He was not there."

7 Your Honours, this corroborates my client's statement from the dock that at
8 least, you know, in the months prior to September he was outside of Sudan in Libya,
9 in Arusha and in other countries. So, your Honours, this witness verifies that.

10 Your Honours, at -- he continues at paragraph 35 that, "Military commanders
11 put their plan together on how to attack the enemy." At 153 he states that, "I
12 didn't need to ask them who was present. It was known to me", and he gives names
13 of people that were present and not my client.

14 Your Honours, he says very clearly at paragraph 77 that my client "... did
15 not have ...", did not have, "... African Union vehicles after the attack. He only
16 had two vehicles." Your Honours, this witness corroborates my client's account
17 from his unsworn statement from the dock that he came into Sudan with two vehicles
18 and by 4 to 6 October he does not see my client with any stolen property from AMIS.

19 PRESIDING JUDGE STEINER: Mr. Khan, let's finalise now please.

20 MR. KHAN: I beg your pardon, your Honour?

21 PRESIDING JUDGE STEINER: It is time to finalise your presentations.

22 MR. KHAN: Your Honours, just five minutes with your leave.

23 Your Honour, at paragraph 59 he notes that, "Abu Garda's group had just
24 arrived and I do not know if they had fighters in the first clashes." Your
25 Honours, again this is important, at paragraph 117 that Osher left on the 29th.

1 Your Honours, 433, the last witness, had never seen Garda or Banda, no photo
2 board, he only saw my client after the attack and the basis of knowledge is very
3 weak. He says that, "Garda was probably ...", probably, "... with his forces
4 because there was no leader who stayed far from the forces." Your Honours, hardly
5 a persuasive basis upon which to attach alleged criminal responsibility.

6 Your Honours, in short, the Prosecution make a number of observations, and
7 time does not permit me to go into detail, but my learned friend took me to task in
8 asking Witness 446 whether or not in the months prior to Haskanita he heard that my
9 client was in command of troops and he said, "No"; whether or not he saw my client
10 at the camp, threatening, and he said, "No", whereas of course he gave names of
11 people who did threaten; and I asked whether or not my client was seen when the
12 camp was attacked, and that witness of course did see at least one individual.

13 Now, my learned friend states, well, that is the right question, but I put it
14 to the wrong witness. Your Honours, as Defence counsel I can only put questions to
15 the witnesses called by the Prosecution. They have chosen not to call other core
16 witnesses and, your Honours, all we can do is to try to challenge that evidence and
17 show your Honours that it would be wholly inappropriate for this case to proceed.

18 My learned friend said in his submissions at some point that there was an
19 attempt by my client to somehow shift, deflect personal responsibility. Your
20 Honours, nothing can be further from the truth. When one looks fairly and
21 objectively at the conduct of my client, there is not a scrap of evidence that
22 would support the contention he has ever sought to deflect responsibility. He has
23 entered this Court voluntarily, from a jurisdiction over which the Court has no
24 power, and he has done so with sincerity and with respect to the rule of law. Your
25 Honours, there are many that seek to deflect responsibility. There are many that

1 turn their face away from the jurisdiction of this Court. My client is not one of
2 them.

3 His Honour Judge Tarfusser said a few months ago, perhaps a month-and-a-half
4 ago - I don't remember - that these proceedings would not be a cosmetic exercise.
5 The Defence have every belief that the Bench will vigorously review the evidence
6 put forward by the Prosecution. It is our submission that there are foundational
7 and fatal flaws in the Prosecution's theory, both on their evidence that AMIS was
8 not a protected object on 29 September and then also evidentiary issues for the
9 reasons I have given.

10 Your Honours, in the round it is my respectful submission that the
11 Prosecution have failed to discharge their burden of proof and this permits only
12 one option: This case cannot be confirmed.

13 Your Honours, this is the case, in my respectful submission, where a clear
14 line can be drawn in the sand as to what amounts to sufficient evidence. If the
15 Pre-Trial Chamber is to have a purpose, it is to permit(sic) cases going ahead
16 which would inevitably result in acquittals. It is to avoid needless trials. Your
17 Honours have a case here where an individual has voluntarily surrendered, where
18 there are significant and fatal flaws, where you can say this case does not deserve
19 to be confirmed.

20 That, of course, under the rules is without prejudice to the Prosecution, and
21 if at any stage further evidence comes to light a Bench of the Court - your Honours
22 included - may review it and decide at any stage to re-charge. And if that is
23 done, if the evidence is sufficient, your Honours, my client's instructions are
24 that once again, as he does today, he will appear with respect before your Honours.

25 As things stand, it is my submission that this case cannot be confirmed.

1 PRESIDING JUDGE STEINER: Thank you very much, Mr. Khan. Having come to the
2 end of the closing statements from the parties and participants, the Chamber has
3 only now to render one last decision on a matter related to the submission of final
4 written observations raised by the parties.

5 Noting the observations of Defence and Prosecution during the hearing on 26
6 October 2009, noting the precedents of Pre-Trial Chambers I and II, considering
7 that the making of final observations by the Prosecution and the Defence in
8 accordance with Rule 122(8) of the rules may encompass in the view of the Chamber
9 not only the final oral observations, but the filing of final written observations
10 as well, considering that in the view of the Chamber the filing by the parties and
11 participants of written observations after the end of oral presentations on the
12 case allow the parties and participants to better elaborate on those issues raised
13 during the confirmation hearing which are of relevance for the purpose of the
14 decision to be taken by the Chamber under Article 61(7) of the Statute, as well as
15 to recall the evidence included in the case file and not referred to during oral
16 debates, the Chamber renders the following decision.

17 The Prosecution, the legal representative of victims and the Defence are
18 entitled to file a document in which they may address those issues raised during
19 the confirmation hearing which are of relevance for the purpose of the decision to
20 be taken by the Chamber under Article 61(7) of the Statute.

21 The Chamber, taking into account the guiding principle that grants Defence
22 the right to have the last word in its precedents on the Lubanga and Katanga and
23 Ngudjolo cases, decides that the Defence is entitled to file its final observations
24 after the final observations of the Prosecution and of the legal representatives of
25 victims. Therefore, the Prosecution and legal representatives of victims shall

1 have until Monday, 16 November 2009 to file their final written observations and
2 the Defence shall have until Monday, 30 November 2009 to file its final written
3 observations.

4 Also, in accordance with its precedents, the Chamber considers the end of the
5 confirmation hearing to be the submission of the last written observations and,
6 therefore, the 60 day time limit provided for in Regulation 53 of the regulations
7 of the Court for the Chamber to deliver its decision confirming or not the charges
8 shall start running on the first day after the filing of the Defence final written
9 observations.

10 The Chamber now would like to express its sincere appreciation and thanks to
11 all those who participated in the proceedings: the Prosecution, Prosecution team;
12 the Defence of Mr. Abu Garda, Mr. Khan - especially Mr. Khan - Mr. Abu Garda
13 himself; the legal representatives of victims, Maître Cisse, Maître Koné, Maitre
14 Akinbote and Maître Adaka, who was here yesterday; as well as those who facilitated
15 the smooth running of this confirmation hearing, including Registry, court
16 officers, IT Services, interpreters, court reporters and security.

17 The Chamber would like to express also its sincere appreciation to all legal
18 support of Pre-Trial Chamber and Pre-Trial Division: the senior legal adviser
19 Mr. Gilbert Bitti; Ms. Federica Gioia, legal officer; Ms. Beatrice Pisani,
20 Ms. Leila Bourguiba and Mr. Silvestro Stazzone, assistant legal officers;
21 Ms. Mary-Anne Power and Ms. Ana Bispo, legal researchers; Ms. Marcela Giraldo,
22 Mr. Francisco Ciampolini, Ms. Chianarackpere Ike and Mr. Simon Grabrovec, interns.

23 We would also like to thank the members of the public who have attended this
24 hearing over the course of this last two weeks, or so. This hearing is now closed.

25 (The hearing ends at 3:43 p.m.)