

1 International Criminal Court  
2 Pre-Trial Chamber I - Courtroom 1  
3 Presiding Judge Sylvia Steiner, Judge Sanji Mmasenono Monageng and  
4 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 Wednesday, 28 October 2009  
9 (The hearing starts at 9:33 a.m.)

10 (Open session)

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

13 PRESIDING JUDGE STEINER: Good morning. Pre-Trial Chamber I is now in  
14 session. I would ask, please, the court officer to call the case.

15 THE COURT OFFICER: Situation in Darfur, Sudan. The Prosecutor v Bahar  
16 Idriss Abu Garda. ICC-02/05-02/09.

17 PRESIDING JUDGE STEINER: Thank you very much. I would like to welcome all  
18 persons present in this courtroom, including Mr. Abu Garda himself, as well as the  
19 persons in the galleries. I will ask now the parties and participants to introduce  
20 themselves, starting by the Office of the Prosecution. Ms. Bensouda?

21 MS. BENSOU DA: Madam President, Honourable Judges, good morning. The  
22 representation for the Office of the Prosecutor remains the same.

23 PRESIDING JUDGE STEINER: Mr. Khan?

24 MR. KHAN: May it please your Honours, Mr. Abu Garda is represented by Andrew  
25 Burrow, Anand Shah, RoseMarie Maliekel, and myself, Karim Khan.

1           PRESIDING JUDGE STEINER: Thank you. Legal representatives of victims?

2           MS. CISSE: Good morning, Madam President. My name is H el ene Cisse. I am  
3 from the Senegalese Bar and I am representing the same victims as before.

4           MR. KON E: Good morning, Madam Presiding Judge. Good morning, your Honours.  
5 My name is Brahima Kon e and I am legal representatives of victims numbers 0170,  
6 0192 and 0436. And I thank you.

7           MR. ADAKA: Good morning, Madam Presiding Judge, your Honours. My names are  
8 Frank Adaka and I represent the same victims as yesterday. Thank you.

9           MR. AKINBOTE: May it please your Honours, Akin Akinbote and I represent the  
10 same set of victims.

11          PRESIDING JUDGE STEINER: I apologise. I just need a few minutes in order to  
12 have my transcript -- real-time transcript.

13          (Brief pause)

14          PRESIDING JUDGE STEINER: We will start. I will try to follow the  
15 transcripts of my colleagues, in order not to delay the beginning of the  
16 procedures.

17          This first session of today's hearing will be conducted in open court. This  
18 is an open session. In line with what Defence counsel told the Chamber yesterday  
19 that no problem in relation to confidential evidence or protected witnesses would  
20 arise.

21          In any case, I wish to remind the parties of the Single Judge's decision of 6  
22 October 2009, Judge Tarfusser, Single Judge of Pre-Trial Chamber I, decision number  
23 137, whereby the Single Judge ordered protective measures to be put in place for  
24 the Defence witnesses and evidence; among them pseudonyms were assigned to the  
25 witnesses. So I strongly encourage the parties to refer to them by using these

1 pseudonyms and to refrain from disclosing any information that may lead to their  
2 identification.

3         Although today is just Defence presentation, and I hope we don't have  
4 interventions, unnecessary interventions in the Defence presentation of its  
5 evidence.

6         As for the next two sessions of today, the Chamber will ask at the end of  
7 this session what is the final determination of Defence counsel in relation to  
8 confidentiality issues in order for the Presiding Judge to determine whether these  
9 two sessions of today will be held in open, private or closed session, and whether  
10 legal representatives of victims can be present.

11         At the end of this session, the Chamber will also issue its decision in  
12 respect to the schedule for the closing statements of the parties and participants.

13         Without further delay, I will turn to the Defence to start with the  
14 presentation of -- according to the schedule, the presentation of its evidence.

15         Mr. Khan, please.

16         MR. KHAN: Madam President, your Honours, I am most grateful. At the outset  
17 perhaps I can say now so that it will put my learned friends for the victims at  
18 ease, that we do anticipate being able to deal with all aspects of our presentation  
19 in public session. So, your Honours, I thought I would bring that to your -- to  
20 the Bench's attention at the first opportunity.

21         As far as the rest of the day is concerned, we will cover four main areas.  
22 Initially, I will deal with peacekeeping and that, hopefully, will be finished in  
23 this session, although there is a chance I may spill over into the next session.

24         In the next session, my learned friend, Andrew Burrow, with your leave, will  
25 deal with the Defence evidence. He will touch upon forms of participation that are

1 being alleged by the Prosecution and, finally, he will make some submissions on the  
2 evidence relating to the deaths included in the charges preferred by the  
3 Prosecution.

4 Your Honour, we do anticipate being able to finish by lunch. I decided  
5 yesterday that there really is no advantage - and ideally, it is not necessary - to  
6 raise issues now and repeat them again in closing submissions. So, rather than  
7 bore everybody in the Court further, I thought it appropriate to focus on certain  
8 issues now and, hopefully, issues in closing will be self-contained and they will  
9 not have to be repeated.

10 Your Honour, with that road map of today's proceedings, I will proceed to the  
11 substantive aspect of this morning's presentation, which is peacekeeping. When I  
12 was preparing for this presentation and surveying the law on this issue, I could  
13 not but help recall the words of William Fenrick, known to all as "Bill." Bill  
14 Fenrick was the first legal adviser in the International Criminal Tribunal for the  
15 Former Yugoslavia, a very experienced Canadian military lawyer, also a member of  
16 the commission of experts that was set up prior to the founding of the ICTY, and he  
17 had a very robust manner as befits a military man and an experienced military  
18 lawyer. And perhaps in part signifying some exasperation about being surrounded by  
19 all of us human rights lawyers, he used to say, very succinctly, "War is about  
20 killing and about breaking things." This, of course, is the naked reality that we  
21 deal with, that despite the endeavours that have taken place in the last few  
22 decades, war is not prohibited. What the Hague regulations and the Geneva law  
23 seeks to do is to regulate what is permissible and what is not and the modes and  
24 methods of warfare.

25 Your Honour, we all benefitted from the eloquent submissions of my learned

1 friend, Mr. Sachithanandan, on peacekeeping and that presentation, whilst very  
2 illuminating on certain aspects of the law, seemed, in my respectful submission, to  
3 focus predominantly on what cannot be done. It was rather thin, in my respectful  
4 submission, on what can be done in warfare without attracting criminal  
5 responsibility.

6 Your Honour, I will divide the presentation of my submissions in two main  
7 parts. The first, unfortunately, may be more turgid. It will be the law itself.  
8 And then I will seek to turn to what is really fundamental to this case, which is  
9 how is the law effected to the facts. This is the central aspect of this case.  
10 This is the issue that your Honours must determine, not as an academic treatise or  
11 some theoretical understanding of the laws of war but on a concrete situation based  
12 upon the facts put forward by my learned friends opposite, whether or not MGS  
13 Haskanita was a legitimate military objective on 29 September 2007 or whether or  
14 not it retained its protected status so as to mean that any attack would fall foul  
15 of Article 8(2)(e)(iii) of the Rome Statute.

16 Your Honour, Count 2 accuses Mr. Abu Garda of intentionally directing attacks  
17 against personnel installations, materiel unit or vehicles involved in a  
18 humanitarian assistance or peacekeeping mission in accordance with the Charter of  
19 the United Nations, as long as they are entitled to the protection given to  
20 civilians, or civilian objects under the international law of armed conflict.

21 Now, your Honours, you have and will in due course consider the elements of  
22 the crimes which are detailed in the documents in the instruments of this Court  
23 and, of course, you will bear in mind the Pre-Trial Chamber's decision on the  
24 Prosecution's application under Article 58 of 7 May 2009. But, your Honours, the  
25 Prosecution must show two things, at least, that the personnel and installations

1 attacked were involved in a peacekeeping operation in accordance with the United  
2 Nations Charter and secondly, and crucially, that the personnel and installations  
3 attacked were entitled to the protection given to civilians or civilian objects  
4 under the international law of armed conflict. Your Honours, the Defence submit  
5 that the Prosecution, for reasons which will be given in the course of this  
6 presentation and perhaps touched upon in closing, the Prosecution have not  
7 discharged their burden of showing that MGS Haskanita retained that status.

8 Your Honour, what has been touched upon is the very important decision of the  
9 Special Court for Sierra Leone in the Sesay case that -- on Monday, of course, of  
10 this week, the Appeals Chamber of the Special Court for Sierra Leone rendered its  
11 Appeal judgment. Your Honour, I confess I have not had time to read that appeal  
12 with the detail that it merits, and I will hopefully do so before closing  
13 arguments. But, at first blush, it is my respectful submission that no material  
14 finding of the Trial Chamber has been set aside so as to render the legal findings  
15 of the Trial Chamber redundant or deficient.

16 Now, your Honours, paragraph 225 of the Sesay, Kallon and Gbao judgment of  
17 2 March 2009 held, and I quote, "In the Chamber's considered view, three basic  
18 principles are widely understood as the necessary foundation for peacekeeping  
19 operations: consent of the parties, impartiality and the non-use of force, except  
20 in self-defence and defence of the mandate." Now, your Honours, we had Witness 445  
21 before us, a very experienced military officer, perhaps one of the most experienced  
22 military officers that one could hope to find relevant to this issue. And that  
23 witness, at page 62, line 20 to page 63, line 4 of the transcript of 26 October  
24 agreed that these three principles found to exist by the Sesay Trial Chamber were,  
25 indeed, the three principles required in order for peacekeeping operations.

1           Now, your Honours, in relation to consent, the practice of States is, in  
2 fact, overwhelmingly that, in the absence of consent of the parties or in  
3 circumstances where consent is, for any reason, withdrawn, peacekeeping operations  
4 have not been undertaken, or where they have been undertaken, they have been  
5 curtailed, withdrawn or cancelled.

6           And your Honours, Christine Gray, a well-known commentator in the area, in  
7 her book International Law and the Use of Force, at page 298 to 302, discusses this  
8 issue. Your Honours, I am not going to go into detail because, in due course, I  
9 will set out, with the Court's leave, relevant aspects of the law and these  
10 extracts in closing, written submissions, if that is necessary, but I think, for  
11 the sake of the presentation in any event, the submissions should be freestanding.

12           Now, your Honour, the existence of these three elements, this trinity of  
13 conditions, if I can put it that way, was also emphasised by the Prosecution in  
14 their opening submissions.

15           PRESIDING JUDGE STEINER: It is the first of the yellow papers of today's  
16 session. The interpreter is please asking Mr. Khan to slow down a little bit.  
17 Thank you.

18           MR. KHAN: I will do so, and I will endeavour to make it the last piece of  
19 yellow paper.

20           Your Honour, in the submissions of the Prosecution they repeated these same  
21 three conditions and they said, in fact, that AMIS had to be shown to be impartial  
22 and neutral, two, the self-defence mandate rules of engagement are an important  
23 condition, and, three, host nation consent, and that is at page 4 of the  
24 aide-mémoire or the skeleton argument handed up by the Prosecution.

25           In relation to Host State consent, your Honours may wish to consider in due

1 course whether or not that is a narrow and dated characterisation of what is  
2 necessary. Whilst Host State consent, of course, may be a necessary condition in  
3 international armed conflicts, the situation perhaps in internal armed conflict is  
4 different and, indeed, instead of host nation consent, it may seem obvious that  
5 consent of the parties is needed. It goes back to the evidence of the general that  
6 appeared before the Court who said that, in order for there to be peacekeeping  
7 operations, there must be a peace to keep.

8 Your Honour, in any event, whether or not these principles have hardened into  
9 law, what is important is that where these three principles -- where any of these  
10 principles is absent, significant and serious doubt is placed on whether or not a  
11 peacekeeping operation can be established and carry out its functions. At the very  
12 least, it may seem obvious, without these three conditions, a mandate and  
13 objectives of any mission would run into very real difficulties.

14 Now, your Honours, whilst in the Sesay trial judgment there was no count at  
15 all alleging attacks against installations, materiel or units involved in  
16 peacekeeping operations, that's uncontroversial, it is the respectful submission of  
17 the Defence that, as a matter of law, the same reasoning detailed by the trial  
18 judgment in that case must apply in respect of objects -- in respect of objects as  
19 it does in respect of personnel; in other words, that objects maintain their  
20 protected status until such time as they are put to military use. In my respectful  
21 submission, it's a compelling and obvious corollary to the reasoning of the Special  
22 Court for Sierra Leone. Certainly, at least one eminent commentator in the area,  
23 Professor Otto Triffterer, in his commentary on the Rome Statute, has adopted this  
24 view, and at page 336 of the second edition which he edits, he quotes -- he says  
25 that "United Nations personnel and objects not engaged or contributing to



1 hostilities would not constitute military objects."

2 Now, your Honours, when viewing the application of the law, one must go back  
3 to Article 52 of Additional Protocol I, in my respectful submission. Objects that  
4 may be initially protected maintain that status until they become military  
5 objectives. Article 52 describes very clearly when and in what circumstances an  
6 object may become a military one. And it is when, and I quote, "When, by their  
7 nature, location, purpose or use, they make an effective contribution to military  
8 action and whose total or partial destruction, capture or neutralisation in the  
9 circumstances" - this is important - "in the circumstances ruling at the time offer  
10 a definite military advantage." Now, your Honours, this definition, in my  
11 respectful submission, is not only part of -- is not only the standard that will  
12 apply when viewing Article 8(2)(e)(iii), it also is the standard that is part of  
13 customary international law.

14 Your Honours, I will hand up a little bit later the final report of the  
15 Prosecutor of the ICTY by the committee established to review the NATO bombing  
16 campaign against the Federal Republic of Yugoslavia. Your Honours, on this point,  
17 also Triffterer is relevant once again, at page 328. Now, your Honours, I will  
18 return to this issue a little bit later.

19 Going back once more to the first decisions on attacks against peacekeepers,  
20 the Sesay judgment, it is again, in my respectful submission, a legal authority  
21 that provides a great deal of assistance to the Bench in determining this issue.  
22 Your Honour, at paragraph 234, and I will read out the paragraph, the Trial Chamber  
23 held, and I quote:

24 "... that in determining whether the peacekeeping personnel or objects of a  
25 peacekeeping mission are entitled to civilian protection, the Chamber must consider

1 the totality of the circumstances existing at the time of the alleged offence,  
2 including inter alia the relevant Security Council resolutions for the operation.  
3 The specific operational mandates ...", importantly in my submission, "... the role  
4 and practices actually adopted by the peacekeeping mission during the particular  
5 conflict, their rules of engagement and operational orders, the nature of the arms  
6 and equipment used by the peacekeeping force ...", again importantly in my  
7 submission, "... the interaction between the peacekeeping force and the parties  
8 involved in the conflict, any use of force between the peacekeeping force and the  
9 parties to the conflict and the nature and frequency of such force and the conduct  
10 of the alleged victims and their personnel."

11 Now, your Honours, it is my respectful submission that as a matter of law  
12 these principles may be of assistance when at the end, after I have touched upon  
13 certain factual characteristics of this case, these general parameters that are  
14 noted in Sesay may be of assistance to the Bench.

15 What is important, in my submission, in the submission of the Defence, what  
16 is determinative, is whether or not MGS Haskanita was a legitimate military  
17 objective on 29 September 2007. For the sake of clarity, the Defence position is  
18 that when originally established this was a peacekeeping mission. This, when  
19 established, was a protected base. But, for the reasons that I will touch upon, it  
20 is my submission that, whether through negligence, recklessness, indifference, bad  
21 management at whatever level, the AU level, AMIS level and the operational level at  
22 the base, a situation occurred, a conflux of circumstances came together, at which  
23 that protected status was lost as a matter of law, bearing in mind what The Hague  
24 Conventions and the laws of war seek to permit and what they seek to prohibit.

25 Your Honours, the corollary to the proposition that peacekeeping personnel

1 taking no active part in hostilities and that objects not being put to military use  
2 are protected, is that when objects are put to military use they lose that  
3 protection.

4 Your Honours, it is my submission that, if it is demonstrated that the base  
5 was being used to make an effective contribution to military action so that -- and  
6 that its total or partial destruction, capture, or neutralisation in the  
7 circumstances prevailing at the time would offer a definite military advantage,  
8 then the attack would not be unlawful.

9 What is clear and what is important in assessing this issue is not  
10 nomenclature. It is not whether or not the men had blue helmets or had green  
11 berets, whether they are called peacekeepers or not. That is part of the  
12 background tapestry, in my respectful submission. It is part of the context. What  
13 is important is actually their status at the time in question. I come back once  
14 more to that because, in my respectful submission, it is a critical feature of this  
15 case.

16 Your Honour, the Prosecution have the burden of proof and they have the  
17 burden to establish that the object of the attack was not a military objective at  
18 the time the attack took place. There is no burden on the Defence. The burden is  
19 squarely upon my learned friends on the other side.

20 Now, your Honours, whether or not MGS Haskanita was a military objective is  
21 very much intertwined, in my respectful submission, with whether or not the attack  
22 was justified by military necessity. These two concepts are very much intertwined  
23 and there are a plethora of cases that talk about how they interact in various  
24 circumstances.

25 Now, your Honours, going across the road, as it were, to the jurisprudence of

1 the ICTY, it is my respectful submission that your Honours may find -- may find  
2 assistance in the case of the Prosecutor v Pavle Strugar. It is a judgment of 31  
3 January 2005. It was held in that case and I quote:

4 "The Chamber is of the view that military necessity may be usefully defined  
5 for present purposes with reference to the widely acknowledged definition of  
6 military objectives ...", again the intertwined linking nature of these two  
7 concepts, the widely acknowledged definition of military objectives in Article 52  
8 of Additional Protocol I, quote, "... as these objects ...", "those objects",  
9 forgive me, "... which by their nature, location, purpose or use make an effective  
10 contribution to military action and whose total or partial destruction, capture or  
11 neutralisation in the circumstances ruling at the time offer a definite military  
12 advantage."

13 That's the end of that quote, but the Trial Chamber continued, "Whether a  
14 military advantage can be achieved must be decided, as the Trial Chamber in the  
15 Galic case held, from the perspective of the person contemplating the attack,  
16 including the information available to the latter, that the object was -- that the  
17 object is being used to make an effective contribution to military action." In  
18 other words, each case must be determined on its facts. Again, your Honours,  
19 emphasising the comments I mentioned at the outset, this is not an abstract point  
20 of law. However precedential this decision in this case will be, it will turn on  
21 the facts - the peculiar and unique facts - of this case and this cannot be  
22 emphasised enough, in my respectful submission.

23 Now, your Honours, a survey of State practice and various interventions in  
24 various theatres of war, from Baghdad to Kosovo, show that there has been a great  
25 deal of debate regarding what is called dual-use facilities. Now, your Honours,

1 whilst it is accepted for the purposes of this hearing that the AMIS base may well  
2 have continued with its civilian functions throughout the period, it is said by the  
3 Defence that on the Prosecution's own core evidence that base was also put to uses  
4 which rendered them -- which rendered that base legally susceptible to military  
5 attack.

6 Your Honours, if one casts one's mind back to the 1999 NATO bombing campaign  
7 against the Federal Republic of Yugoslavia as it then was, in Kosovo, the  
8 Prosecutor Justice Louise Arbour set up a committee to look at the military attack,  
9 and it's well known that there were serious allegations and complaints that were  
10 received by the Prosecutor that the attack embraced not classically military  
11 targets only, but also dual use facilities; in particular, a radio station.

12 Your Honours, perhaps I can hand up now with the usher's assistance - and I  
13 have copies for the victims' lawyers as well - the final report of the Prosecutor  
14 by the committee established to review the NATO bombing campaign against the  
15 Federal Republic of Yugoslavia. Your Honours, with your leave, I would ask that  
16 this be distributed to the Prosecution and then the Judges and then the victims,  
17 please. And your Honours, for the victims, it may be that there's only two copies;  
18 so one for the front table and one for the back table, perhaps, and they can share,  
19 the victims.

20 Your Honours, moving on, I would refer you to paragraph 37 of this report,  
21 and this is one of the issues that your Honours must eventually consider. Your  
22 Honours, there is a discussion in paragraph 35 onwards on what is a military  
23 objective, and reference is made to Article 52 of Additional Protocol I.

24 But going to paragraph 37, the Special Committee established by the  
25 Prosecutor of the ICTY - later, of course, become the High Commission For Human

1 Rights - held the following:

2 "The definition is supposed to provide a means whereby informed objective  
3 observers and decision-makers in a conflict can determine whether or not a  
4 particular object constitutes a military objective. It accomplishes this purpose  
5 in simple cases. Everyone will agree will agree that a munitions factory is a  
6 military objective and an unoccupied church is a civilian object.

7 "When the definition is applied to dual-use objects with have some civilian  
8 uses and some actual or potential -- actual or potential military uses,  
9 communications systems, transportation systems, the list continues, opinions may  
10 differ. The application of the definition to particular objects may also differ,  
11 depending on the scope, on objectives to the conflict."

12 Now, your Honours, in my respectful submission, this is a useful starting  
13 point, because we are dealing with conflict, not in a sterile environment of a  
14 courtroom, but actually on the ground in real-life situations. The expert  
15 committee of the Prosecutor, former Prosecutor of the ICTY referred to a clear-cut  
16 case whereby an unoccupied church would not be a legitimate military target. Of  
17 course, that must be right. It is right.

18 But let's suppose for a moment that an unoccupied church is being used by  
19 snipers to kill the enemy. Or another example, if there is a spotter using that  
20 church in order to use lasers to pinpoint enemy targets. Does that protected  
21 status remain, notwithstanding the loss of life that has been caused, or is it  
22 rendered a legitimate military target?

23 Another example, which perhaps is well-known as matter of general knowledge.  
24 Let's look at the example of Iraq or Afghanistan. There is a house, a civilian  
25 object, a residential area, and there is information that from within that house

1 there are adversaries that are planning operations, or organising or planning, are  
2 those premises immune from attack or may they be taken out by precision-guided  
3 predator drones? Certainly state practice, when one reviews the practice of the  
4 United States of America, the United Kingdom and NATO forces, which seems to  
5 suggest no criminal liability would attach.

6 As the general mentioned when he gave evidence, the primary duty of a  
7 commander, part of the responsibilities of command to the country and to the  
8 parents who supply the troops is to protect his men. And that is one of the  
9 factors that permits such targets to be attacked, in my respectful submission, in  
10 circumstances where there is a clear military advantage and where that otherwise  
11 protected premises are being used to provide -- are being used to effectively  
12 contribute to the adversaries' activities.

13 Your Honours, there is quite a lot on this, and I can move on. It will be  
14 included -- the law can be included in the final brief; but suffice it to say,  
15 leading commentators, like Major-General A.P.V. Rogers, a well-known publicist in  
16 the area and a former director of the British Army Legal Services, has advanced a  
17 tentative list of military objectives, which certainly includes such dual-use  
18 facilities.

19 Your Honours, turning once again to Kosovo and the bombing of the RTS  
20 television -- television and radio station in Belgrade on 23 April 1999 in which 10  
21 -- between 10 and 17 people were killed, the -- and if your Honours want -- wish to  
22 look at paragraph 72, it was found that the bombing of the TV station was part of a  
23 planned attack aimed at disrupting and degrading the C3, the command, control and  
24 communications network. And at the subsequent press conference, the NATO officials  
25 justified the attack based upon its dual military and civilian use.

1           Your Honours, paragraph 75 is important, in my respectful submission, because  
2 this committee of experts advising the Prosecutor, whose reports were accepted by  
3 her, found as follows: "The attack appears to have been justified by NATO as part  
4 of a more general attack aimed at disrupting the FRY command - Federal Republic of  
5 Yugoslavia - command, control and communications network, the nerve centre and  
6 apparatus that keeps Milošević in power and also as an attempt to dismantle the FRY  
7 propaganda machinery. Insofar as -- insofar as the attack actually was aimed at  
8 disrupting the communications network, it was legally acceptable.

9           Your Honour, this of course is relevant to this case, given the facts on what  
10 we say were the many concerns, threats, misgivings that were made by the rebels to  
11 senior staff in MGS Haskanita, along the lines that there was a clear evidence that  
12 that base was being used in order to provide succour to the enemy and, indeed, to  
13 plan direct military activity that resulted in the loss of life, not only of  
14 rebels, but also of civilians. And this state of affairs, the Defence say, despite  
15 clear warnings, was allowed for whatever reason to persist for months. And it is  
16 that persistence that deprived the base of its protected status as a matter of law,  
17 in my respectful submission.

18           Your Honours, there's numerous examples that one can refer to, but touching  
19 upon this topic - and I am leaving a lot of law aside - it's perhaps useful to bear  
20 in mind what Human Rights Watch have said in a briefing it prepared to, and I  
21 quote, "to provide analytical guidance for those who are examining the fighting, as  
22 well as for the parties to the conflict and those with the capacity to influence  
23 them." And your Honours, this is a question and answer on hostilities between  
24 Israel and Hamas.

25           Now, this report, and we will give the web address of this report in our



1 written submissions, in this report the Human Rights Watch discussed the question  
2 of whether or not Israel may attack a civilian radio station, a protected object  
3 otherwise, a civilian radio station, which was run and operated by Hamas.

4 Now, this is what Human Rights Watch have said. Military attacks on  
5 broadcast facilities used for military operations are legitimate, are legitimate  
6 under international humanitarian law.

7 Your Honour, I am just concerned that a red card will come out at some point,  
8 but I will carry on.

9 But such attacks on civilian television or radio stations are prohibited if  
10 they are designed primarily to undermine civilian morale or to psychologically  
11 harass the civilian population.

12 Civilian television and radio stations are legitimate targets only if they  
13 meet the criteria for military objectives. Once again, the touchstone is  
14 Additional Protocol I, Article 52.

15 Now, your Honours, here they continue. The Human Rights Watch say,  
16 "Specifically, Hamas operated civilian broadcast facilities could become military  
17 targets if, for example, they are used to send military orders or otherwise  
18 concretely to advance Hamas's armed conflict against Israel."

19 Your Honours, in our respectful submission, we will be concluding that this  
20 is indistinguishable from the facts presented not by the Defence but from the  
21 Prosecution's own core witnesses, that this base was being used to send military  
22 orders to direct military attacks that resulted in the loss of life, so as to  
23 deprive the base of their protected status and to make that base a legitimate  
24 military objective.

25 Your Honour, I touched upon it at the outset, but it will be clear on the

1 facts, in my respectful submission, that MGS Haskanita was being used by the  
2 Government of Sudan representatives to provide an effective contribution to the  
3 military action of that party to the conflict and the partial destruction capture  
4 or neutralisation of MGS Haskanita was militarily legitimate and lawful.

5 In other words, whatever one's sensibilities may be, on the facts of this  
6 case, the attack offered a military, distinct military advantage in the  
7 circumstances prevailing at the time from the perspective of those that attacked,  
8 with the knowledge that they had.

9 Now your Honours, I will deal with - with your leave - with the second  
10 requirement first; the question of whether or not the attack was militarily  
11 legitimate and lawful.

12 In my respectful submission, the evidence already before the Bench provided  
13 by my learned friends opposite showed the situation quite adequately that was  
14 prevailing in Haskanita prior to, prior to 29 September 2007.

15 The picture that emerges is one of rebel groups waging a relatively  
16 successful ground campaign against the Government of Sudan forces. Prosecution  
17 Witness 419 held a senior position in MGS Haskanita. And he states, and I quote  
18 from paragraph 36 of his statement, "that between May and June 2007 government  
19 forces" --

20 PRESIDING JUDGE STEINER: Sorry, Mr. Khan, which paragraph?

21 MR. KHAN: Paragraph 36, your Honour. Between --

22 PRESIDING JUDGE STEINER: 36? And the second time that appears, 37.

23 MR. KHAN: Your Honours, if I may read the relevant paragraph: "Between May  
24 and June 2007, government forces attacked Haskanita village and the SLA/JEM  
25 alliance repelled them." He then states at paragraph 64 that, and I quote, "In the

1 beginning of August 2007 a big government armed force attacked Haskanita village.  
2 They were stopped by the JEM/SLA alliance."

3 And at paragraph 70, this core Prosecution witness states that, in mid-August  
4 2007, there was an incident between Government of Sudan forces and the rebels, the  
5 GoS forces lost about 150 combatants in this incident.

6 Now, your Honours, Witness 446, the second Prosecution witness called viva  
7 voce described a battle close to AMIS, MGS Haskanita, on 10 September 2007. And at  
8 paragraph 56 of his statement, he states that, and I quote, "The GoS troops pushed  
9 the rebels back, but then after about one hour of fighting, the rebels flanked the  
10 Government of Sudan troops. The rebels cut the rear of the Government of Sudan  
11 troops off. Then they faced the contact group and finished them. The rebels  
12 captured the Government of Sudan soldiers of the contact group."

13 Your Honours, Witness 446 provided some further detail of this attack in his  
14 viva voce testimony. And your Honours, at page 43, line 13 to 19 of his testimony  
15 of 23 October, you will recall him confirming that so successful had the rebel  
16 operation been that they had succeeded in capturing a Sudanese general, General  
17 Khamil.

18 So your Honours, in the round, it is my respectful submission, that it would  
19 be fair to say on the Prosecutor evidence that the rebels were able to hold their  
20 own on the ground against Government of Sudan forces at the time. Where they could  
21 not compete at all was in the air. It was in the air where the Government of Sudan  
22 forces had complete superiority, and they were using that superiority to bomb  
23 villages in Haskanita, the civilian town of Haskanita, as well as rebels.

24 This has been alluded to quite clearly, both by Witness 446, who your Honours  
25 will recall in testimony referred to these white Antonov aircraft that were used in

1 bombing actions, and also by Witness 419, who talks about white Government of Sudan  
2 helicopters being used in attacks.

3 Your Honours have previously been shown - and it doesn't need to be shown now  
4 - but shown extracts of the book Flint and de Waal, which bore the ERN number  
5 DAR-OTP-0159-0672, which again refers to these acts of perfidy. Your Honours have  
6 also got in evidence, as supplied by the Prosecution, the final report of the panel  
7 of experts established pursuant to Resolution 1591 of 2005 concerning the Sudan,  
8 submitted pursuant to Resolution 1713, of 2006, which bears a DAR number  
9 DAR-OTP-0127. Sorry, that's the interim report. It's EVD-OTP-0019 with a DAR  
10 report, the number DAR-OTP-0142-0004.

11 And that report includes photographs of aircraft and helicopters painted  
12 white in AMIS colours being used by the Government of Sudan misuse, the Defence  
13 say, the cloak of protection that was granted to AMIS at the outset for their own  
14 ends, an act of complete perfidy, by any definition, in the Defence's respectful  
15 submission.

16 Your Honours, after the attack referred to by Witness 446, there is clear  
17 evidence that the rebels - and he says this in paragraph 36 - "The rebels came to  
18 see us in the camp to intervene with the Government of Sudan to stop the aerial  
19 attacks. Nothing was spared." And I'm sorry, this is Witness 419. "Nothing was  
20 spared," Witness 419 said, "in the aerial attacks, neither animals or people."

21 The SLA requested us to intervene with the Government of Sudan. Then at the  
22 end of May 2007, the aerial attacks by the Government of Sudan started again, and  
23 Haskanita village was targeted.

24 Your Honours, he continues painting what is a pitiful picture at paragraph  
25 46. He says, "In July 2007 the aerial attack started again not only in Haskanita

1 but in the entire area, in the entire sector." That's paragraph 39. And he  
2 described that bombing in paragraph 46 as being, and I quote, "In breach of the  
3 understanding they had with the rebels, the Government of Sudan was supposed to  
4 stop the bombing, but they did not."

5 Your Honours, 419 goes into more detail in describing some of the  
6 consequences of this perfidy which restricted and constrained, for understandable  
7 reasons, the Defence say, the activities of AMIS. We say understandable reasons  
8 with the caveat, understandable with the mandate and resources that they were  
9 given, notwithstanding the wholly unrealistic expectations that the Defence say the  
10 African Union, AMIS and the international community that supported this mission  
11 portrayed to the civilians in Haskanita.

12 As the general himself alluded to, on the one hand they were -- AMIS held  
13 themselves out as being an observer mission, and yet within the terms of their  
14 mandate, they clearly held out the hope and, indeed, the promise that they would  
15 come to the assistance of civilians in their immediate vicinity if they were in  
16 immediate danger.

17 And of course, as the general mentioned, it is inconceivable, given the  
18 mandate, given the resources, how on earth this mission could possibly be a  
19 success. All that resulted were broken promises and disappointment. And in the  
20 end, we say, the terrible -- the events of 29 September.

21 Again, your Honours, I do ask you in due course to refer to the general's  
22 testimony, and I think he puts it exceptionally well, that the foundation and  
23 establishment of AMIS was built with good intentions. But we say that the road to  
24 29 September is littered with good intentions and complete ineptitude and  
25 recklessness that robbed, denied and deprived that base of the protection that it

1 would have otherwise had with a proper mandate, proper resources and proper  
2 organisation.

3 Now, your Honours, Witness 419 states, in paragraph 48 of his statement, that  
4 "As a consequence of these acts of perfidy, I needed to contact these rebels for  
5 permission for the resupply helicopters to land in our camp. The rebels placed  
6 these restrictions on the movement of AMIS helicopters because the Government of  
7 Sudan used white painted helicopters to bomb the sector. I believe that the  
8 government did this as a form of camouflage for their helicopters and in order to  
9 access the sector so they could bomb the rebel groups there. The local population  
10 disapproved of the use by the government of white helicopters to bombard their  
11 area. This caused AMIS to lose a lot of goodwill and trust from the local  
12 population, and ultimately AMIS paid the price as the population suspected us of  
13 the providing support..." It should be, "providing support to the Government of  
14 Sudan to continue to bomb them." "This caused our relationship with the local  
15 population to deteriorate significantly at this time."

16 Your Honours, the rebels clearly formed the view, understandably, your  
17 Honours may think, that the bombing campaign was detrimental to their activities,  
18 and they were exceptionally unhappy by that state of affairs. They made it clear  
19 in no uncertain terms, not once but many times, that they expected AMIS to do  
20 something to stop the bombing. And Witness 419 states at paragraph 54, and I  
21 quote, "There was a meeting at the end of July 2007 when the government bombing was  
22 very intensive in the Haskanita area. The government Antonovs bombed the periphery  
23 of Haskanita village. The rebels came to see us. They warned us that the next  
24 time there was bombing, they, the rebels, would retaliate by attacking us at the  
25 MGS." And he also provides some additional evidence of further warnings received.

1           Now, your Honours, why, why did the rebels blame AMIS? An accusation cannot  
2 be enough to deprive a base of its status. They blamed AMIS because they had  
3 important information, reliable information, or, at the very least, information  
4 which the senior commander of MGS Haskanita himself believed to be true, that that  
5 base was being used for wholly improper purposes.

6           Your Honours, I will take the liberty of reading extracts of Witness 419. I  
7 do so without apology. He is a pivotal witness put forward by the Prosecution,  
8 pivotal for the Defence. And I note that it was -- his testimony has hardly been  
9 touched upon in this regard by the Prosecution opposite, and not touched upon in  
10 any material way on this issue in the submissions as to the information he provided  
11 and whether or not it had an impact as to the status of MGS Haskanita.

12           This witness at paragraph 25 states that he was a senior person at that camp.  
13 He states at paragraph 20 that he arrived in March 2007. So, your Honours, he had  
14 the benefit of being in the camp for a significant period of time between March  
15 2007 and the events of 29 September. Your Honour, at paragraph 35, 39 and 42, he  
16 details a situation of peace prevailing when he came, and this is relevant to the  
17 issue of consent. The reason you may think that there was peace is because the SLA  
18 were in control of that territory, and the SLA, Minni Minawi was a signatory to the  
19 Darfur Peace Agreement whereas the other rebels were not. The other rebel groups  
20 were, in fact, and we touched upon it with the general and again it's referred to  
21 in various documents, including the de Waal and Flint book, that the rebels who  
22 hadn't signed the accord had been expelled from the Ceasefire Commission between  
23 May and August 2006. But, your Honour, he states that once JEM entered the area,  
24 the position changed significantly, and that's at paragraph 35.

25           Your Honours, at paragraph 42 he describes JEM being divided between a

1 military section and a political section. And he also states that, in his view,  
2 being on the ground for those months, the local population respected the SLA/JEM  
3 alliance and supported its ideology and political agenda. All of this is in the  
4 Prosecution evidence.

5 Now, your Honours, at paragraph 45 he states that Abdulaziz and Khatab, who  
6 are leaders of the SLA/JEM alliance came to the camp between May and June 2007 and  
7 they requested that the Government of Sudan representative, Captain Bashir, be  
8 ordered sent out of the camp. Your Honours, at paragraph 45, the witness says  
9 this: "They accused him of relaying to his superiors information of the rebel  
10 positions so that they could be attacked by air. This was at a time when the  
11 Government of Sudan bombing of Haskanita village by military aircraft intensified."

12 According to the rebels, it was Captain Bashir who was providing information  
13 about the location of the rebels to the Government of Sudan. The rebels provided  
14 clear evidence - clear - evidence that Bashir was sending information to the  
15 government for the precise bombing of their group. Your Honours, witness 417  
16 confirms that Captain Bashir, the Government of Sudan representative, was privy to,  
17 "sensitive information" about the rebels.

18 Now, your Honours, that these are not wild accusations devoid of merit or  
19 substance, it is provided, once again, courtesy of my friends sitting opposite,  
20 because their core witness, at paragraph 46, the senior person at that camp, states  
21 unequivocally that he believed the evidence provided by the rebels. Now, your  
22 Honours, at paragraph 46, that witness states that he agreed that Captain Bashir  
23 should leave the camp, and one or two days later, an AMIS helicopter came and  
24 evacuated him. But it is clear from the evidence that it is not a case of a  
25 warning being given and, two days later, the Government of Sudan representatives



1 being expelled for their thoroughly reprehensible conduct; rather, this state of  
2 affairs was allowed to persist for months. For months.

3 Your Honours, in his second statement, in Witness 419's second statement, he  
4 states that he received information that Captain Bashir was using the official  
5 satellite telephone, "to transmit information to his superiors, which was used to  
6 locate and target rebel positions in aerial bombardments from [redacted person] who  
7 overheard several of these telephone conversations and interpreted them to him."  
8 And that's at paragraph 10.

9 Now, your Honours, in the next paragraph he continues, that that person whose  
10 name is redacted, "... told me that Captain Bashir was giving away rebel positions  
11 to his superiors. It appears that this information was being used to locate the  
12 rebels in aerial bombardments. If the rebel forces changed their position, Captain  
13 Bashir would use the telephone to relay the new position of the rebels and this  
14 resulted in further aerial bombardments of the rebel positions and civilian  
15 locations in the zone. During the attack, he would be relaying -- he would be  
16 relaying information to his superiors as to whether the bombardments were accurate  
17 and the movement of the rebels." A shocking state of affairs, one that clearly put  
18 in peril the base. Which force on earth, which military referred to that the  
19 Prosecution could refer to, would allow their men to suffer such material  
20 disadvantage whilst such direct precision information was being given, causing lost  
21 of life? The British? The American? The Gambian? I think none of them. Your  
22 Honour, that, of course, is a matter for the Bench to decide in due course.

23 Now, your Honours, the fact that this is not a -- the fact that this runs  
24 completely opposite to the picture which the learned friends -- my learned friends  
25 for the Prosecution seem to sketch is, once again, provided in their own evidence.

1 In their opening statements, in my learned friend's submissions on peacekeeping,  
2 they paint a picture whereby prompt action is taken. Your Honours, not a bit of  
3 it. Witness 419 states in paragraph 12: "On a number of occasions - on a number  
4 of occasions - between May and June, Abdulaziz," a person whose name is redacted,  
5 "and Mohammed Osman Khatab, the JEM and SLA leaders in the Haskanita area, each  
6 came to the camp and passed the same message to me, that the bombardments should  
7 stop and that the Government of Sudan representative, Captain Bashir, should be  
8 expelled because -- because he was providing information that led to aerial attacks  
9 on the rebels by the Government of Sudan." Your Honours, critical, critical  
10 information provided by the Prosecution that was not addressed in their opening and  
11 wasn't properly addressed, in my respectful submission, in their submissions on  
12 peacekeeping.

13 Your Honours, Witness 419 continued, when he said that when the rebels came  
14 and asked AMIS to expel Bashir, he "immediately informed his superiors that they  
15 had a dangerous situation and recommended that Bashir be expelled." He says in no  
16 uncertain terms, and I quote, "The mere presence of Captain Bashir in the camp was  
17 creating a dangerous situation. We were unable to go on patrol because of the  
18 tension that resulted."

19 Now, your Honours, there are two statements from this witness. Both of them  
20 make clear, in my respectful submission, that this state of affairs persisted.  
21 That that is the case is also supported by what he said in this paragraph, in  
22 paragraph 14. He states that because of this threat, they were unable to go out  
23 for patrol. And in paragraph 72, he states that between June and September, they  
24 were not able to go for patrol.

25 Your Honours, the Prosecution's own evidence is corroborating the account of

1 the Defence that the rebels faced a situation whereby their threats -- their  
2 concerns, firstly, and then their threats, fell on deaf ears. And your Honours  
3 must decide whether or not, as a matter of law, such warnings, such warnings can be  
4 summarily disregarded simply because they come from rebels who may be considered to  
5 be somehow less impressive and less -- their rights or their concerns are less  
6 important than, for example, if the same warnings had been given by an organised  
7 army like the Government of Sudan or any other military in the world.

8 Now, your Honours, at paragraph 14, Witness 419 states that he wrote a report  
9 informing his superiors about all of this and then, some days later, an AMIS  
10 helicopter came and evacuated Captain Bashir after the battle between the  
11 Government of Sudan forces and the rebels in August, in August 2007. But, your  
12 Honours, we have now also the evidence of Witness 446, who appeared in that seat  
13 just a few days ago, and he made it clear both in paragraph 56, 61 and 64 of his  
14 statement, and in Court, that on 10 September the rebels made this threat. Indeed,  
15 he says on that occasion he saw Captain Bashir and told him to go to one side.

16 Witness -- your Honour, just bear with me just for a moment, please. Your  
17 Honours, I will come back to the witness number. It escapes me. Witness 417. I  
18 am grateful. Witness 417; I couldn't recall it, so I apologise. Witness 417 also  
19 makes it clear in paragraphs 25 to 29 that that account is accurate.

20 Now, your Honours, the Witness 446 was clear, and not only was the Government  
21 of Sudan representative still in the base on 10 September, he stated at page 30,  
22 line 9 to 13 of the transcript of 23 October of this year that it was about -- it  
23 was on about 17 September that this representative, Bashir, left and that he was  
24 replaced by another. That's at paragraph 76. So one government representative  
25 leaves and is replaced with another.

1           Now, your Honours, so persistent were the warnings from these rebels, it  
2 appears on the Prosecution's evidence, that 446 describes at paragraph 74 that  
3 after Captain Bashir was removed, an SLA leader, Mohammed Osman was still  
4 threatening to attack AMIS MGS Haskanita in the event that the Government of Sudan  
5 attacked the rebels again. By this time, in my respectful submission, all the  
6 evidence points to the fact that AMIS, the base and the interests of the Government  
7 of Sudan are viewed as one. They are viewed as a means. MGS Haskanita is viewed  
8 as a means of assisting the enemy of the rebels.

9           Now, your Honour, 446 stated that they -- and you will recall his testimony,  
10 they called Osman on the phone and he came to meet them. And he said, even after  
11 -- even after Bashir left, at paragraph 75, that they still believed that the  
12 Government of Sudan is getting intelligence from the camp and once again, the  
13 warning, or the threat, is made that that is why he said that they would attack,  
14 the rebels would attack MGS Haskanita if there is a further Government of Sudan  
15 attack upon them. And your Honours, I also refer you, in your deliberations, to  
16 the transcript of Witness 446, page 32, lines 22 to 25 of the 23 October.

17           Now, your Honours, during cross-examination I tried my best, however  
18 deficient that may have been, to repeatedly ask that witness as to what measures  
19 were taken by MGS Haskanita after the rebels expressed their concerns and  
20 threatened AMIS. And your Honours, beyond saying he informed headquarters, I was  
21 unable to get a clear answer from him. In my respectful submission, your Honours,  
22 that witness, albeit not the person responsible for rebels that entered the camp,  
23 wasn't able to point to a single measure that AMIS took in that period, 10th to the  
24 17th, that would prevent Government of Sudan representatives passing intelligence  
25 on to their government and to guard against that danger and the risks, of course,

1 it would involve on the AMIS personnel as a whole.

2 PRESIDING JUDGE STEINER: Mr. Khan, may I interrupt you, with all due  
3 respect. We need to have a break. I would ask whether it's possible -- although  
4 you have still ten minutes left, if this ten minutes can be compensated on a later  
5 stage.

6 MR. KHAN: Your Honour, of course we can take the break now and, hopefully,  
7 no compensation is needed.

8 PRESIDING JUDGE STEINER: Thank you very much. So we are going to suspend  
9 this session for half an hour. We will be back for the continuation of the Defence  
10 presentation of his evidence at 11:30. This session is suspended.

11 THE COURT USHER: All rise.

12 (Recess taken at 10:59 a.m.)

13 (Upon resuming at 11.33 a.m.)

14 THE COURT USHER: All rise.

15 PRESIDING JUDGE STEINER: We are resuming the second part of today's hearing  
16 and, before I give the floor to Mr. Khan, I have, just for the sake of the record,  
17 first to inform that this authority presented by Mr. Khan during his presentation,  
18 in accordance with Regulation 29 of Regulations of the Registry, where a document  
19 other than evidence is submitted by participant during a hearing, the Chamber can  
20 order the registration of such document in the case record and it shall be numbered  
21 as follows: As an HNE document, which means a hearing not evidence, and will be  
22 given a number, so therefore the Chamber orders the Registrar to file in the case  
23 record that document as a hearing not evidence document and give it a number.

24 The second point: In relation to the request made by Defence to postpone its  
25 closing statements from Thursday to Friday the Chamber issues the following

1 decision:

2 Noting the request made by the Defence to postpone its closing statements  
3 from Thursday to Friday, noting the observations of the legal representatives of  
4 victims, noting the observations made by the Prosecution, the Chamber issues the  
5 following decision:

6 Rule 122(8) of the Rules states that, and I quote, "The Pre-Trial Chamber  
7 shall permit the Prosecutor and the person in that order to make final  
8 observations." It is, therefore, the Chamber that decides on whether legal  
9 representatives of victims are also entitled to present final observations. The  
10 Chamber, taking into account the importance given to victims' participation in the  
11 proceedings, in its decision on victims' modalities of participation at the  
12 pre-trial stage of the case, is Decision 136, used its discretionary powers to  
13 allow victims' legal representatives to make opening and closing statements at the  
14 confirmation hearing in accordance with Rule 89(1) of the Rules, and this is  
15 paragraph 19 of the decision.

16 "Granting legal representatives of victims the right to make opening and  
17 closing statements, however, does not mean that it is mandatory for them to make  
18 such statements, nor that each and every legal representative shall make his or her  
19 own statement. Rather, the practice of Pre-Trial Chambers is that legal  
20 representatives of victims are free to organise themselves and to decide whether  
21 they prefer to act separately or to select among themselves a person who speaks on  
22 behalf of all the victims."

23 In the present case, taking into consideration that both Prosecution and  
24 Defence ask the Chamber to make their closing statements on Friday, and taking into  
25 consideration that Rule 122(8) must prevail, the Chamber decides that the final

1 Prosecution and Defence observations will take place on Friday; first in the  
2 morning the Prosecution from 9.30 to 11; subsequently, legal representatives of  
3 victims that are able to be present will have from 11.30 to 1 in the afternoon to  
4 make their final observations. Defence will present his final observations in the  
5 afternoon session from 3 to 4.30 in the afternoon.

6 Taking into consideration that the change on the schedule may affect some  
7 legal representative's right to present their final observations, the Chamber also  
8 decides that in case some of the legal representatives so wish they can present  
9 their final observations tomorrow, Thursday, 29 October. In any case, the  
10 one-and-a-half hours allocated to the four legal representatives shall be shared  
11 among them.

12 At the beginning of this afternoon's session the Chamber must be in a  
13 position to announce whether there will be a session for that purpose tomorrow and,  
14 therefore, legal representatives must inform the Chamber about their intention in  
15 the beginning of this afternoon's session.

16 This is decision taken by the Chamber and now we will turn again to Mr. Khan  
17 for continuation of his presentation. You have the floor, Mr. Khan.

18 MR. KHAN: Madam President, your Honours, I am most grateful.

19 Before the break I was touching upon some of the testimony from the second  
20 Prosecution viva voce witness, Witness 446, and your Honour, despite the fact that  
21 information came to his knowledge, and whilst accepting that he may not have been  
22 the person primarily dealing with rebels, leaving all that aside for the moment,  
23 what is somewhat remarkable is his failure to even answer -- to even ask the  
24 question of the rebels "Where is the information coming from?" And, your Honours,  
25 I simply refer you in due course to the transcript of 23 October 2009 at page 36,

1 line 16 to 18.

2 Your Honour, what Witness 446 was clear about was that the rebels did express  
3 concerns about government representatives as a category. What he says on this  
4 bears repetition. He stated, "What I can say is sometimes the faction, they raised  
5 concern on government representative" - government representative - so it might not  
6 be Bashir, but they raised concern on government representative. Your Honour, that  
7 is transcript of 23 October, page 34, line 11 to 13. So, your Honour, that witness  
8 also is saying that concerns were raised by the rebels on the government  
9 representatives in the camp.

10 Your Honour, in my respectful submission, the evidence put forward by the  
11 Prosecution which will be considered by the Bench in due course clearly and  
12 convincingly demonstrates that for a period of four or five months senior  
13 officials, the most senior official, the most responsible official in MGS Haskanita  
14 was aware that there was government representatives on the base, and one in  
15 particular, that were relaying targeting information to the Government of Sudan.

16 In effect, the Defence would categorise it as the Government of Sudan using  
17 the base as a forward targeting post for its aerial bombing campaign against the  
18 rebels and civilians in Haskanita that they viewed supported the rebels or were  
19 otherwise not at the beck and call of Khartoum.

20 Your Honour, it is the respectful submission of the Defence that the evidence  
21 of Witness 419, his clear and unequivocal knowledge of the perfidious activities of  
22 the Government of Sudan, its extent and the period of time over which these  
23 activities were allowed to continue is fatal to the Prosecution case.

24 Your Honours, the response of the Prosecution up to this point in relation to  
25 this fatal flaw in their case has been hitherto silence. Your Honours, in any



1 event, be that as it may, the Prosecution have not presented proper or sufficient  
2 evidence on this point to establish that MGS Haskanita was protected as of 29  
3 September.

4 Your Honours, Witness 419 does in part of his statement try to make an  
5 impression, or an interpretation could be that prompt action was taken, but it is  
6 clear looking at two statements separately and together that that is not the case  
7 on his evidence that he signed as being true.

8 His unequivocal evidence is that he first was told about the activities of  
9 the Government of Sudan representatives in May or June. He himself states that up  
10 to August Bashir is in the camp. And, your Honours, when you put that against the  
11 evidence of other Prosecution witnesses, 446 and 417, it is clear that up until  
12 around 17 September that government representative remained on the camp with no  
13 curtailment as to the activities that had been clearly complained about.

14 Not only that, the evidence of the Prosecution is clear that when that  
15 representative left, he was replaced.

16 THE INTERPRETER: This is the English booth speaking. If the Presiding Judge  
17 could remind Mr. Khan to slow down a bit, we would be most appreciative in the  
18 Arabic and French booths. Thank you very much.

19 MR. KHAN: Act in a manner --

20 PRESIDING JUDGE STEINER: Mr. Khan, sorry to interrupt you. I am asked to  
21 ask you to slow down a bit in order to allow a proper translation, not only into  
22 French for the real-time transcripts, but also the translation into Arabic, the one  
23 that was requested by your client. So, please, slow down, Mr. Khan.

24 MR. KHAN: Your Honour, I do apologise.

25 Your Honour, the Defence submit that the evidence presented by the

1 Prosecution discloses a state of affairs where the rebels had very understandable  
2 concerns about the activities that were going on in MGS Haskanita by the Government  
3 of Sudan and no effective or proper or sufficient action took place to prevent it.

4 It is clear from the evidence of the Prosecution - and indeed, from the  
5 evidence of General 445 that appeared as the last witness - that the transmission  
6 of such information imperilled the base. It imperilled the impartiality that the  
7 base would otherwise have had.

8 Your Honours, my learned friend, Mr. Sachithanandan, in his submissions -  
9 legal submissions - on this issue, did speak somewhat about the importance of the  
10 fact that there was no Government of Sudan military base in Haskanita. Your  
11 Honours will probably recall it. But in any event, it is clear in black and white  
12 on the transcript of 20 October 2009 at page 33, line 14.

13 With respect, your Honours, there is good reason why there was no Government  
14 of Sudan military base in Haskanita. They didn't need it. The Government of Sudan  
15 on the evidence presented by the Prosecution had MGS Haskanita from which to  
16 conduct intelligence gathering and targeting activities. There was no need to  
17 expose its own troops to potential harm when AMIS personnel and AMIS protection  
18 served those ends fabulously, board and lodgings, security and a safe environment  
19 from which to target the enemy. All of this was allowed to continue.

20 Your Honour, my learned friend's skeleton -- and at page 17 it was handed up,  
21 but at page 17, the Prosecution state, and I quote, "Even if Captain Bashir was  
22 carrying out the kind of activity he was accused of by the rebels, since he was  
23 promptly removed from the AMIS base, the AMIS base would not have lost its  
24 protection under the law."

25 In the respectful submission of the Defence, the incontrovertible corollary

1 to that submission is that if Bashir had not been promptly removed, if the  
2 Government of Sudan's misuse of the AMIS base had not been put to a stop, then AMIS  
3 base MGS Haskanita would lose its protection and become a military objective. That  
4 seems to me, your Honours, to flow directly from the submissions of the  
5 Prosecution. Your Honour, it is the correct legal position on the facts of this  
6 case.

7 Your Honours, I do refer to Witness 445's testimony. The general in his  
8 evidence before the Court - and your Honours may think that a more honourable and  
9 diligent and impressive witness is difficult to think of - detailed at page 75,  
10 line 4 to 8, that as a military man he would view his primary duty to the men under  
11 his command.

12 Your Honour, the inability of the rebels to challenge the Government of Sudan  
13 in the air was exacerbated by the precision with which the Government of Sudan  
14 could bomb their positions by dint of the representatives in MGS Haskanita. And,  
15 your Honours, the evidence discloses, in my respectful submission, that AMIS was  
16 repeatedly warned about intelligence being gathered by Government of Sudan  
17 representatives and being relayed for targeting purposes.

18 Indeed, your Honours may think whatever one may think of the events of 29  
19 September and how we got to that sad day, that the rebels in fact may have showed  
20 quite a remarkable degree of constraint given what was happening on the  
21 Prosecution's own evidence.

22 And, your Honour, on the morning of the attack, the bombing conducted by the  
23 Government of Sudan continued. That Witness 416 at paragraph 34 details the  
24 Antonovs that were flying that day. That same witness then describes that bombs  
25 were dropped on Haskanita.

1           Your Honours, on the evidence submitted by the Prosecution, the partial  
2           destruction and neutralisation of MGS Haskanita was the only way to prevent the  
3           flow of intelligence to the Government of Sudan air forces and thereby negate the  
4           one area where the Government of Sudan was militarily superior to the rebels in the  
5           circumstances prevailing at the time, and viewed from the perspective of the  
6           information they had in their possession, information of course which the ranking  
7           AMIS officer was convinced was true.

8           Now, your Honours, the consistent evidence put forward by the Prosecution is  
9           that the first -- or one of the first buildings that was targeted was the  
10          communications block. And your Honours will refer in due course, I am sure, to  
11          paragraph 35 of Witness 416's statement, and also Witness 446's statement at  
12          paragraph 93, Witness 315's statement at paragraph 56, and Witness 355's statement  
13          at paragraph 47 and 82.

14          Now, your Honours, this may well be considered to be directly linked to the  
15          complaints that the rebels had directed to AMIS on numerous occasions over many  
16          months about intelligence being passed by the Government of Sudan representatives  
17          on to the government.

18          Your Honour, contrary to what is suggested by the Prosecution in its document  
19          containing charges - and I would refer you to paragraph 66, for example - it is in  
20          fact unlikely, in my respectful submission, that the destruction of the  
21          communications centre was in fact primarily connected with the aim of preventing  
22          assistance arriving.

23          Witness 355 has given evidence in his statement to the effect that there was  
24          no support in the area or anybody near enough to MGS Haskanita to get there in  
25          time. That is paragraph 91. But furthermore, Witness 315's evidence is

1 illuminating. He states that, although the communications centre was destroyed at  
2 the beginning of the attack, some soldiers in the MGS used their cell phones to  
3 inform other colleagues in other units about the attack.

4 By 1915 hours, the commander at Al-Deain had received information about the  
5 attack. However, because of night flight restrictions imposed by the Government of  
6 Sudan, AMIS could not send reinforcements or carry out medical evacuations until  
7 the next morning. And your Honour, that appears at paragraph 56.

8 Your Honour, events even prior to 29 September 2007, and unrelated to the  
9 issue of Government of Sudan bombing, do not in fact disclose an intent on the part  
10 of the rebels to harm the MGS Haskanita personnel. Indeed, Witness 419 provides  
11 evidence that at the time of early August -- of the early August battle between the  
12 Government of Sudan and the rebels, and I quote, "... that the rebels forbade us  
13 from leaving the camp. I believe that they said this for the safety of those in  
14 the camp," not for the danger, not to imperil, not to attack those in the camp, but  
15 for their safety. My superior officer, the Sector Commander Colonel -- or Sector  
16 Commander Colonel Abujerin also instructed us not to leave the camp." And that is  
17 at paragraph 65.

18 Your Honours may think, once again, this is linked to the climate of fear and  
19 insecurity, the atmosphere of distrust that is a direct consequence to the blatant  
20 perfidy carried out by the Government of Sudan both by using AMIS-coloured  
21 aeroplanes, AMIS coloured helicopters and putting its representatives in what would  
22 otherwise have been protected objects in protected bases.

23 Your Honours, in those circumstances, the evidence shows that the base as a  
24 whole needed to be neutralised because of its location and the fact that the  
25 constant warnings and complaints put forward by the rebels had gone unheeded.

1           Now, your Honours, the possibility that the communications block was being  
2 used or not used, as Witness 446 said, albeit he did not have particular knowledge  
3 of the Government of Sudan representatives, or whether Thuraya phones were used, in  
4 fact fortifies the argument as to why the base needed to be neutralised.

5           What the convincing evidence was, according to Witness 419, was that the  
6 Government of Sudan representatives were misusing their presence in the camp with  
7 the effects that he mentions, the pinpointing and directing of rebels and their  
8 movements and, of course, also the targeting of civilians.

9           But your Honour, in totality the evidence discloses that the base as a  
10 military object was viewed as one that needed to be put out of commission as a  
11 matter of the laws of war in relation to the direct military advantage that those  
12 that attacked thought would be gained.

13           Your Honours, General 446 was clear what he would do as a military officer.  
14 He stated he would not allow a base, a civilian object, to be used as a Trojan  
15 horse so as to allow his men to be killed. It is the respectful submission of the  
16 Defence that this is precisely what MGS Haskanita became. It became the Trojan  
17 horse of President Al Bashir and the Government of Sudan, by which they could  
18 direct attacks, obtain intelligence and further their own ends.

19           No wonder perhaps, your Honours, that the general, Witness 446, had  
20 information that the Government of Sudan was very pleased with the work of AMIS.  
21 They were very content. Of course they were, because they were flagrantly and  
22 cynically misusing AMIS and unfortunately, however bitter a pill it be to swallow,  
23 AMIS allowed itself to be misused.

24           Your Honours, I don't need to go further and talk about AMIS as a whole in  
25 the whole of Sudan. I am not. My submissions are focused on the one base, MGS

1 Haskanita. We accept as a matter of law that all those bases deserved and had the  
2 status as protected objects at the time they were established but, for the reasons  
3 I have sought to detail, it is my respectful submission because of a catalogue of  
4 indifference, incompetence, lack of resources and either collusion with the  
5 Government of Sudan, or the cynical misuse by the Government of Sudan of the AMIS  
6 colours and the AMIS base, they lost that status.

7 Your Honours, if that is so, it leaves then the question of the death of the  
8 12 AMIS personnel. Your Honours, the question then would be whether or not their  
9 deaths is disproportionate to the military advantage and benefit that was  
10 anticipated. Your Honours are very familiar with the doctrine that any loss - any  
11 collateral damage - must be proportionate to the anticipated military advantage  
12 gained.

13 Now, your Honours, going back to the report of the Prosecutor of the Chapter  
14 VII established court, the ICTY, and leaving aside for the moment any submissions  
15 as to the effect of this being a Chapter VII referral, it is clear that when it  
16 comes to the killing of innocent people, 10 to 17 civilians in Kosovo, in the --  
17 the RTL, in Belgrade at the RTL station, the Prosecutor of a Chapter VII founded  
18 court found that those deaths, however tragic, however lamentable, were not  
19 disproportionate to the military advantage gained.

20 Now, your Honours, I must go back here to comments made by my client at the  
21 outset and by myself. On behalf of the Defence, we lament and do express our very  
22 sincere condolences to those that lost their lives in Haskanita. It is a tragedy,  
23 as one of the representatives made in due course an inquiry is needed and your  
24 Honours play a pivotal role in getting to the bottom of this, both in determining  
25 whether or not there are substantial grounds to believe that this case should go

1 forward to trial, but also to learn lessons for the future to ensure that  
2 peacekeepers are not imperilled in the future for the reasons that they were  
3 imperilled and put in jeopardy we say in this case.

4 Your Honours, when it came to the killings of 10 to 17 civilians in the  
5 former Yugoslavia, the Prosecutor said those deaths were not disproportionate.  
6 Your Honours must decide in due course whether or not a different standard applies  
7 when one is dealing with rebels with trucks, as opposed to NATO with precision  
8 guided weapons and satellite technology.

9 Your Honours, the Prosecution, as I said at the outset, have a burden of  
10 establishing that MGS Haskanita was a protected object. We say, your Honours, for  
11 the reasons we have mentioned, they have failed to do this. This is fatal to the  
12 case and your Honours of course have an obligation in due course to decide the law  
13 regardless of the consequences.

14 I do wish to emphasise - and I think it deserves repeating - that the  
15 consequences of such a finding is not a licence to kill peacekeepers. Peacekeepers  
16 deserve respect. Peacekeepers deserve protection. Peacekeepers deserve proper  
17 mandates. Peacekeepers deserve proper resources so that they can do their jobs.

18 It is the minimum duty of the care, the Defence say, that is owed by the  
19 international community and by regional organisations when they are putting young  
20 men and young women in harm's way to secure peace but, your Honours, one does not  
21 extend protection -- one does not extend protection by extending it in  
22 circumstances where it is not warranted.

23 One strengthens protection by upholding the principle of impartiality and  
24 ensuring it is viewed as an absolute imperative. It is only then, your Honours,  
25 that we will ensure that such events do not take place again. In short, it is my



1 respectful submission, for the reasons adumbrated in this submission, that the  
2 Prosecution have not established that the attack on 29 September was against a  
3 protected object. Rather, MGS Haskanita unfortunately and tragically and avoidably  
4 had become a legitimate military target.

5 Your Honours, those are my submissions on this issue, unless I can assist  
6 further. Your Honour, perhaps we could proceed straight, unless there are  
7 questions from the Bench, to my learned friend Mr. Burrow's submissions? Is that  
8 agreeable to the Bench?

9 PRESIDING JUDGE STEINER: Yes, Mr. Khan. You can proceed.

10 MR. KHAN: I am grateful.

11 PRESIDING JUDGE STEINER: I will just insist on the need of a very, very slow  
12 pace in order to allow French real-time transcripts and the translation into  
13 Arabic. Thank you.

14 MR. BURROW: I will keep that in mind, your Honour.

15 Madam President, your Honours, this is the first opportunity I have had to  
16 address Pre-Trial Chamber I and I am grateful for the privilege. I have the  
17 invidious task of following directly on Mr. Khan's eloquence and, perhaps for that  
18 reason, I will take the precaution of being as brief as possible.

19 There is the chance that I may not conclude my presentations - my submissions  
20 - prior to the next break. I will try and arrange those submissions in such a way  
21 that, if that is the case, whole parts of the submissions will be kept separate and  
22 we don't break in the middle.

23 Madam President, your Honours, I will begin with a few brief observations on  
24 some of the Defence evidence that has been tendered into court. I am advised that  
25 all of the evidence on the Defence's list of evidence has in fact been entered into

1 the Court record and I will, therefore, dispense with the need to read all DAR and  
2 EVD numbers into the record.

3 Beginning then with the Defence witness statements, I will start with three  
4 and I will group them together for convenience's sake. These are the statements of  
5 witnesses DCW2, DCW3 and DCW4.

6 PRESIDING JUDGE STEINER: Mr. Burrow, I am sorry if I have to interrupt you.  
7 The need for informing the EVD number is in order to allow parties and participants  
8 to have access to those documents through Ringtail.

9 MR. BURROW: Indeed.

10 PRESIDING JUDGE STEINER: So, I would please ask you to inform the ERN and  
11 EVD number.

12 MR. BURROW: Certainly, Madam President. I will do so in respect of all  
13 documents that I refer to in detail. Those that I do not intend to address  
14 directly, perhaps we can find another way of getting those documents into Ringtail  
15 if that is acceptable.

16 The witness statements of the three witnesses I have referred to, perhaps I  
17 should give those numbers to start with. The witness statement -- the witness  
18 statement of witness DCW2 is DAR-D05-0001-0003, the EVD number is EVD-D05-0003 and  
19 that is the English translation.

20 The relevant number for witness DCW3 is DAR-D05-0001-0008 and the EVD number  
21 is EVD-D05-0005. Again, the English translation.

22 The DAR number of DCW4's statement is DAR-D05-0001-0011, with an EVD number  
23 EVD-D05-0007.

24 Finally, the witness statement of DCW1 is DAR-D05-0001-0019, with an EVD  
25 number EVD-D05-0011.

1           Your Honours, taking the statements of witnesses DCW2, 3 and 4 together,  
2 although they are perhaps rather skeletal and do not seek to establish an alibi of  
3 any kind, what they do is corroborate an important aspect of Mr. Abu Garda's  
4 statement he gave from the dock. You will recall that he stated that he had been  
5 out of Sudan for some eight to nine months prior to the events in Haskanita and  
6 that he only arrived in the Haskanita area very shortly prior to the events of 29  
7 September.

8           He recounted, furthermore, his journey from Chad to the border with Sudan and  
9 then onwards to Haskanita, and the three statements I have referred to do nothing  
10 more and nothing less than corroborate that journey. Rough and ready as they may  
11 be - and that is understandable considering the circumstances in which they were  
12 taken - they do corroborate the essence of that account.

13          Your Honour will bear in mind that these are not anonymous witnesses, albeit  
14 that protective measures have been put in place for them. These are not summaries,  
15 although they are brief. These are sworn statements and they must cast serious  
16 doubts on that part of the Prosecution narrative, or evidence, to the extent that  
17 it may be a part of their case that Mr. Abu Garda's presence in the area was  
18 established or necessary for any period of time leading up to the attack on  
19 Haskanita.

20          I would highlight one or two further aspects from those statements. Witness  
21 statement DCW2 at page 1, witness statement of DCW3 at page 2 and witness statement  
22 DCW4 at paragraph 3 all mention the purpose of the journey that was undertaken and,  
23 simply put, an important objective of that journey was reconciliation. It was the  
24 maintenance, to the extent possible, of the movement to which Mr. Abu Garda  
25 belonged at the time.

1           Secondly, DCW2 also states at page 2 of his statement - and I regret these  
2 are not, the paragraphs are not numbered, but I believe it is about two-thirds of  
3 the way down the page - that save for the men travelling in his own two vehicles,  
4 the witness never saw Mr. Abu Garda meet or give orders to any soldiers.

5           With that, I will move on to the statement of witness DCW1. Now, witness  
6 DCW1 is a long-time associate of Mr. Abu Garda and he is a man who holds a senior  
7 position currently in the URF. I would urge your Honours to read his statement  
8 carefully, as you no doubt will, and I will do no more than highlight certain  
9 themes or paragraphs from it.

10           I would point, for instance, to paragraphs 8 and 11 of that statement which  
11 discuss the role of Mr. Abu Garda as a politician and as a diplomat. I would refer  
12 your Honours to paragraph 13, which discusses briefly the centralisation of power  
13 that occurred within JEM in the hands of Mr. Khalil Ibrahim and his closest  
14 relatives and associates.

15           I would refer your Honours furthermore to paragraph 15, which corroborates  
16 the statements of Mr. Abu Garda from the dock that when he returned -- that when  
17 Mr. Khalil Ibrahim returned from overseas to the field in 2007, that a lengthy  
18 process took place during which time Mr. Abu Garda handed back the delegated  
19 authority that he had been exercising to Mr. Ibrahim, along with the day-to-day  
20 control over the affairs of JEM.

21           I would refer your Honours to paragraph 24 (d) in particular. You will  
22 recall that Mr. Abu Garda mentioned that in the early days of October 2007 he had  
23 been invited by the SPLM government to attend a unity initiative in Juba in  
24 Southern Sudan and that his departure for that meeting had been delayed by a period  
25 I believe of two weeks, the reason for the delay being a threat issued by

1 Mr. Khalil Ibrahim to shoot or have the AU helicopter that was being sent to  
2 collect Mr. Abu Garda shot down, and witness DCW1 discusses that event.

3           Importantly, I would refer to paragraph 25 and, with the Court's permission,  
4 I would ask the court officer to bring on the screen an annexure to the statement.  
5 Your Honour, I have the DAR number. It is DAR-D05-0001-0034.

6           PRESIDING JUDGE STEINER: What is the level of confidentiality, Mr. Burrow?

7           MR. BURROW: Your Honour, it is -- your Honour, if I can just have a moment  
8 to locate the list that I need.

9           PRESIDING JUDGE STEINER: The ERN that finishes with 0034 cannot be displayed  
10 because it has the name of the witness on the top.

11           MR. BURROW: I am aware of that, your Honour. What I was going to request,  
12 if it is possible, is to display only the second page of that annexure, which does  
13 not have any identifying information on it.

14           PRESIDING JUDGE STEINER: So, 0035?

15           MR. BURROW: Indeed.

16           THE COURT OFFICER: Mr. Burrow, can you also give me the EVD number?

17           MR. BURROW: Certainly. It is EVD-D05-0014.

18           THE COURT OFFICER: So, we publish the second page?

19           MR. BURROW: Just the second page.

20           THE COURT OFFICER: Sorry, one last question: What is the level of  
21 confidentiality?

22           MR. BURROW: It is confidential.

23           PRESIDING JUDGE STEINER: Mr. Burrow, I have to ask whether legal  
24 representatives can have access to such document.

25           MR. BURROW: They may, your Honour. It is simply the first page with the

1 name on that is confidential -- that is sensitive.

2 I am grateful. Thank you, your Honour.

3 Without going into detail, what the exhibit sets out clearly is the political  
4 and military structure of JEM for the period January 2005 to October 2007 and it  
5 breaks the structure of JEM down into the six categories you see on the screen.  
6 And it provides, furthermore, the most important positions and the holders of those  
7 positions within each section. Without having counted, I would guess that there  
8 are in order of 32 to 35 positions set out in that chart.

9 Your Honours, I may have made a mistake with the date. It is until October  
10 2007 that the chart is accurate.

11 Now I would ask that the following exhibit be displayed on the screen. It  
12 too is a confidential document and, again, I ask that only the second page be  
13 displayed. The DAR number is DAR-D05-001-0036 and the EVD number is EVD-D05-0015.  
14 Thank you.

15 What this chart sets out is the political and military structure of  
16 JEM-Collective Leadership established in October 2007, and what it demonstrates is  
17 that far from inheriting, taking over, continuing to use an existing organisation  
18 and structure and, perhaps more importantly, the associated personnel, it  
19 demonstrates that Mr. Abu Garda indeed started afresh. There are four positions  
20 and corresponding names on that chart and those are the persons who agreed to join  
21 JEM-Collective Leadership in October 2007 from what we can perhaps call the  
22 original JEM, the JEM of Khalil Ibrahim.

23 Your Honours, there is a third chart. I am not going to have that displayed.  
24 It simply shows the converse. It shows that those who remained with the original  
25 JEM, and that too is in the evidence before you.

1           Your Honour, the next section of the witness statement that I would highlight  
2 is the section headed "Haskanita incident and Abu Garda's response." It is  
3 paragraph 26, split into subparagraphs.

4           PRESIDING JUDGE STEINER: You are talking about Witness 1?

5           MR. BURROW: DCW1.

6           PRESIDING JUDGE STEINER: One.

7           MR. BURROW: I will not go into the detail of those subparagraphs, save to  
8 say that the submission of the Defence is that, as a whole, they have the ring of  
9 truth. They represent the response to the attack on Haskanita by Mr. Abu Garda and  
10 by the new JEM-Collective Leadership. They do not strike one, we submit, as the  
11 statements and actions of someone involved in the attack.

12           Moving on, I would refer importantly to paragraph 27(a). This is in the  
13 section dealing with Mr. Abu Garda's relationship with the international community.  
14 You will recall that Mr. Abu Garda explained in his statement from the dock that in  
15 2005 he was instrumental in having a group of AU hostages released from captivity,  
16 an incident that in the document containing the charges is described as an attack  
17 by JEM on AU forces, and DCW1 here corroborates the version, the account, by  
18 Mr. Abu Garda.

19           And finally, your Honours, I would refer you to paragraph 27(e), and that  
20 paragraph discusses a letter by the United States President's Special Envoy to the  
21 Sudan, Mr. Scott Gration. It is a letter dated 12 August 2009. I would ask the  
22 court officer to display this exhibit on the screen. Again, I would ask that the  
23 second page of this statement -- of this exhibit be displayed. The first page again  
24 refers to the name of the witness. The DAR number is DAR-OTP-001-0051 and the EVD  
25 number is EVD-D05-0021.

1 THE COURT OFFICER: I am sorry, can I ask you to repeat the ERN number. Is  
2 it DAR-OTP, or -D05?

3 MR. BURROW: Sorry, it is not OTP, in fact. It is -- it is  
4 DAR-D05-0001-0052. In fact, 52 refers to the precise page.

5 THE COURT OFFICER: Sorry, was it public or confidential?

6 MR. BURROW: It is public. Thank you.

7 It starts, "Dear Mr. Abu Garda, we believe that significant process ..." and  
8 I assume that it should be "progress," but it does say "process," "... has been  
9 made in increasing cohesiveness between Darfur rebel movements because of your  
10 leadership. I would like to continue this positive momentum and request that you  
11 and your delegation come to Addis Ababa, Ethiopia, from 19 to 22 August, to deepen  
12 this cooperation and coordination with a broader representation of movements. Your  
13 participation and that of your colleagues is essential to further these efforts."

14 Moving on into the second paragraph, I will leave out the first sentence, "We  
15 are pleased to inform you that the African Union/United Nations Joint Mediator  
16 Bassole and his team will also participate in these discussions. Our objective is  
17 to produce a unified position among the participants that represents the people of  
18 Darfur. We hope that this effort will facilitate an end to hostilities, produce an  
19 inclusive political process, and result in a peaceful and stable Darfur." And it  
20 is signed - if you could scroll down, court officer, please. It is signed by  
21 Jonathan S. Gration, Retired Major General, United States Air Force, the  
22 President's Special Envoy to Sudan, with what looks like a handwritten addition,  
23 "We are looking forward to seeing you in Addis".

24 PRESIDING JUDGE STEINER: Mr. Burrow, I am really sorry to interrupt you.  
25 According to the revised table of current level of confidentiality that the Defence



1 filed in the case file, this was considered as a confidential document. I would  
2 really remind the parties that in case the parties in the case want a  
3 reclassification of the level of confidentiality, that must be done in advance  
4 before exhibiting this piece of evidence on the screens. So I would very, very  
5 much emphasise this aspect, Mr. Burrow.

6 MR. BURROW: I apologise for that oversight, your Honour. I believe that the  
7 confidentiality related once again to the first sheet of that exhibit primarily and  
8 if we -- having found a way to display it without the first page, perhaps I was  
9 mistaken in believing that we could display that publicly. There are in fact two  
10 versions filed of this document and one is public, and I believe this one is  
11 confidential, but the same document is filed publicly in our evidence as well. If  
12 it would assist, I could perhaps at a later stage provide that DAR number.

13 PRESIDING JUDGE STEINER: No, it is not necessary. It was just to remind the  
14 parties of this important aspect.

15 MR. BURROW: I am obliged, your Honour. And, of course, the letter speaks  
16 for itself, Madam President, your Honours, and it represents the man that the  
17 international community trying to resolve the Darfur crisis sees in Mr. Abu Garda.

18 Your Honours, that concludes the presentation of the main points of the  
19 Defence evidence. With your Honour's leave, I would move on to the second part of  
20 our submissions today - of my submissions - which involves a few fairly brief  
21 comments on the modes of liability and, in particular, I will be addressing what  
22 has come to be known as indirect co-perpetration.

23 Now, your Honours, the parties to this case have had several disputes in the  
24 course of this matter so far about what the Statute does and does not provide for.  
25 An example that comes immediately to mind was the issue of whether or not the

1 Defence was entitled to call as a witness an investigator from the Office of the  
2 Prosecutor. Both parties made the argument with reference to the Statute, the  
3 Defence pointing out that the Statute didn't prohibit the idea and the Prosecutor  
4 pointing out that it didn't explicitly provide for, or authorise, the practice. Of  
5 course, both parties were correct in that, the Statute is silent, and the answer to  
6 the problem had to be found by recourse to general principles behind the Statute,  
7 to comparative law and so forth.

8         However, one would have thought that when we get to the issue of individual  
9 criminal responsibility, there would have been no need for an argument of that  
10 nature because the Statute couldn't be clearer. The Statute is not silent on the  
11 issue. It is not abstract in relation to the issue of individual criminal  
12 responsibility. It does not require the parties to revert to fancy legal footwork,  
13 or to their own form of legislative drafting.

14         Article 25(3)(a) says that an individual is criminally responsible if he  
15 commits a crime, one, as an individual, two, jointly with another or, three,  
16 through another person. That is commission of a crime and, in the submission of  
17 the Defence, the three modes or forms of that mode are disjunctive.

18         Ordering, soliciting or inducing the commission of a crime is dealt with in  
19 sub article (3)(b). (3)(c) deals with facilitation of a crime, including providing  
20 the means for its commission. (3)(d) deals with the doctrine of common purpose. I  
21 need say nothing about (3)(e) and (f) for the moment.

22         The obvious point to make, I suppose, is that had the drafters of the Rome  
23 Statute wanted to include a fourth mode of individual criminal responsibility, they  
24 would have done so explicitly.

25         Now forgive the elementary nature of this lecture, or the fact that it is

1 necessary, but it seems to be necessary because of the enhanced or expanded mode of  
2 responsibility that the Prosecution relies on at least partially in the present  
3 case. The document containing the charges tells us in paragraph 117 that Mr. Abu  
4 Garda is individually criminally responsible as a co-perpetrator, or as an indirect  
5 co-perpetrator.

6 The Defence, of course, is aware of the confirmation decision in the Katanga  
7 Ngudjolo case in which certain charges were confirmed for trial on a theory which  
8 is now known -- yes, slow down, which is now known as indirect co-perpetration. We  
9 are also aware that Madam President sat on the Pre-Trial Chamber that rendered that  
10 decision, and I smile only because of the tremendous amusement it caused Mr. Khan  
11 when that realisation dawned on me and I subsequently watered down the adjectives I  
12 was employing in my description of the theory.

13 The Defence is also aware, of course, that the Trial Chamber in that same  
14 case, perhaps sufficiently concerned about the status of indirect co-perpetration  
15 as a mode of criminal responsibility, ordered at a status conference on 1 October  
16 this year that the parties file briefs addressing that specific issue. In fact,  
17 the Prosecution filed its brief on 19 October and we understand that the Defence is  
18 due to file its own brief in two days' time on Friday. In other words, the matter  
19 is far from settled as a matter of law. On the contrary, it is very much alive and  
20 in dispute.

21 Now, the position of the Defence is that it is incumbent on the Prosecution  
22 to establish that this theory of responsibility is good in law and contemplated in  
23 the Statute. The Defence would refer to the decision of the Appeals Chamber of the  
24 ICTY in the Milutinovic case, and perhaps for the assistance of the stenographers I  
25 will spell it out. It's M-I-L-U-T-I-N-O-V-I-C. The reference is Prosecutor v

1 Milutinovic and others, case number IT-99-37-AR72, and the judgment date is --

2 THE COURT OFFICER: Sorry for interrupting, Mr. Burrow. It's going a bit too  
3 fast for the interpreters.

4 MR. BURROW: The date of the decision is 21 May 2003.

5 What the Appeals Chamber held with respect to any mode of criminal  
6 responsibility under that court's Statute is found in paragraph 21 of the judgment.  
7 I will quote from that paragraph. "In order to come within the tribunal's  
8 jurisdiction, *ratione personae*, any form of liability must satisfy three  
9 preconditions." In fact, the Court enumerates four preconditions:

- 10 "(1) It must be provided for in the Statute either explicitly or implicitly;  
11 (2) It must have existed under customary international law at the relevant  
12 time;  
13 (3) The law providing for that form of liability must have been sufficiently  
14 accessible at the relevant time to anyone who acted in such a way;  
15 (4) Such person must have been able to foresee that he could be held  
16 criminally liable for his actions if apprehended."

17 Your Honours, the Defence is, of course, fully aware of the differences in  
18 the modes of creation of the two courts. The ICTY, as Mr. Khan pointed out, being  
19 a creature of Chapter VII of the UN Charter, it was perhaps incumbent on that  
20 tribunal to lay down those strict requirements, including the second requirement  
21 that the mode of liability existed in customary law prior to it being acceptable to  
22 that court.

23 In distinction to that, the ICC of course is a creature of treaty - a  
24 law-making treaty - and it was entirely proper that the States creating the  
25 institution could agree on the modes of liability found therein.

1           It is perhaps too early in these proceedings for the Defence to attempt a  
2 full analysis of the doctrine of indirect co-perpetration. It is a new creature  
3 and it is in its -- very much in its determinative phases. However it is still  
4 worth keeping in mind that the principle guiding the ICTY in that decision, that of  
5 nullum crimen sine lege, was of course at the forefront of the drafters' minds --  
6 of the drafters of the Rome Statute.

7           In fact in Part 3 of the Statute, under general principles of criminal law,  
8 Article 22 is the first provision and it is the principle of nullum crimen sine  
9 lege. Clearly that was one of the prime principles the drafters had in mind which  
10 would set up the conceptual structure of the court, and the States Parties  
11 expressed themselves very clearly and very precisely in what they considered  
12 acceptable within the bounds imposed by that principle in the drafting of Article  
13 25.

14           What Milutinovic does very usefully is it contrasts precisely the Statute of  
15 the ICTY and the Statute of the International Criminal Court. In paragraph 18 of  
16 that decision the Appeals Chamber finds itself having to explain why a theory of  
17 responsibility acceptable under that Statute would nevertheless not have to be  
18 explicit, or explicitly set out, and the Appeals Chamber said the following, and I  
19 quote:

20           "The Statute of the ICTY is not and does not purport to be - unlike, for  
21 instance, the Rome Statute of the International Criminal Court - a meticulously  
22 detailed code providing explicitly for every possible scenario and every solution  
23 thereto. It sets out in somewhat general terms the jurisdictional framework within  
24 which the tribunal has been mandated to operate."

25           Importantly in that quote is the recognition that the Rome Statute is a far

1 more detailed instrument. It is a law creating treaty, which sets out in  
2 considerable detail what the modes of liability that were acceptable to the States  
3 Parties are.

4 As I indicated earlier, the Prosecutor is not hamstrung at all by the fact  
5 that the modes of liability are set out as they are in Article 25(3). If the  
6 evidence of the Prosecutor is that the person accused has been -- has directly  
7 committed the crimes, that is dealt with in paragraph (3)(a). If the Prosecution  
8 evidence is that a person has ordered the commission of a crime, well, subparagraph  
9 (3)(b) provides for that. If the evidence suggests, on the other hand, that a  
10 person provides the means for the commission of a crime there is subparagraph  
11 (3)(c), and if the evidence is that a person has contributed to the commission of a  
12 crime by a group of persons acting with a common purpose we have subparagraph  
13 (3)(d).

14 These are the grounds that the States Parties were prepared to accept and  
15 they were prepared to accept them precisely because they did not breach the  
16 principle - the primary principle - of *nullum crimen sine lege*, and the submission  
17 of the Defence and our conclusion on this point is simply that the Pre-Trial  
18 Chamber should be very slow indeed to expand upon the basis of criminal liability  
19 for individuals into furthermore exotic realms.

20 Madam President, I have one section left of my submissions. I estimate it  
21 will take in the order of 15 to 20 minutes. I am in your -- in Madam President's  
22 hands. I can commence now, or after lunch.

23 (Pre-Trial Chamber confers)

24 PRESIDING JUDGE STEINER: Mr. Burrow, if that is agreeable to the Defence, we  
25 would prefer to have this last five minutes for the Chamber to decide on the issue

1 of the rescheduling of tomorrow's hearing and then you could continue without being  
2 so pressed by time constraints in the afternoon session. If that is agreeable to  
3 the Defence, the Chamber would prefer.

4 MR. BURROW: Of course, as it pleases the Court.

5 PRESIDING JUDGE STEINER: I would like to ask whether legal representatives  
6 already have their position on the presentation of their final observations.  
7 Maître Cisse?

8 MS. CISSE: (Interpretation) Yes, your Honour. Mr. Adaka would like to make  
9 his final conclusions tomorrow, but I will allow him to now speak to provide  
10 additional details.

11 PRESIDING JUDGE STEINER: Mr. Adaka.

12 MR. ADAKA: Thank you, Madam Presiding Judge, your Honours. My case is  
13 peculiar because our application for legal aid - I mean, my clients' - is still in  
14 the mill. It is still in the process. So, unlike the other three counsels here, I  
15 may not be in a position to reschedule my flight and so I would rather I do mine  
16 tomorrow, with the permission of the Chamber. Thank you.

17 PRESIDING JUDGE STEINER: Have the legal representatives already decided how  
18 they intend to share the one-and-a-half hours allocated on -- in other words, how  
19 long it would take tomorrow for Mr. Adaka to present his final observations?

20 MR. ADAKA: I would say 15 minutes. 10/15 minutes would be fine with me.  
21 10/15 minutes would be fine.

22 MR. BURROW: Your Honour, if I may?

23 PRESIDING JUDGE STEINER: Please, Mr. Burrow.

24 MR. BURROW: I have learnt many things from Mr. Khan and, most importantly,  
25 that I must get permission before I address the Court.

1           Your Honour, I will be very brief after lunch. If it assists at all, there  
2 will be a lot of that session left over, it will be available and, of course, the  
3 Defence would have no objection to the representatives of the victims using some of  
4 that time.

5           PRESIDING JUDGE STEINER: Would it be a solution agreeable to the legal  
6 representative, Mr. Adaka, to have your final observations today, this afternoon's  
7 session?

8           MR. ADAKA: Well, much as I would like to have time constraints, I need to  
9 put my papers together. I would rather tomorrow morning. Thank you.

10          PRESIDING JUDGE STEINER: So, thank you very much for the Defence  
11 availability to provide the legal representative with some of its -- some of the  
12 time allocated to it, but in any case the Chamber therefore decides that the final  
13 observations of legal representative Mr. Frank Adaka will be in a session to be  
14 held tomorrow at 9:30. Therefore, the remaining legal representatives will have  
15 their time -- sorry, the time allocated to them part of Friday morning's schedule  
16 for the remaining of the allocated time.

17          (Pre-Trial Chamber confers)

18          PRESIDING JUDGE STEINER: Before establishing the final schedule, I just want  
19 to ask the Defence -- you don't need to give me any answer now, but since on Friday  
20 legal representatives will not use the hour-and-a-half allocated to them, maybe the  
21 Defence presentation can be anticipated to 2 o'clock, instead of 3 o'clock? But,  
22 in any case, you don't need to give an answer right now. Just for your  
23 consideration.

24          So, at this point this session is suspended for the lunch break. We will  
25 resume at 2:30 - yes, 2:30 - for the continuation of the Defence presentation of



1 its evidence. The session is suspended.

2 (Luncheon recess taken at 1:01 p.m.)

3 (Upon resuming at 2:32 p.m.)

4 THE COURT USHER: All rise.

5 PRESIDING JUDGE STEINER: Good afternoon. We are resuming now for the third  
6 and last part of today's session and, without further delays, I give back the floor  
7 to the Defence for the Defence to proceed with the discussion of the evidence  
8 presented by the Prosecution and presentation of Defence evidence. Mr. Burrow, you  
9 have the floor.

10 MR. BURROW: Thank you, Madam President, your Honours. Your Honours, before  
11 moving on to my final submissions, perhaps I should just clarify one point I tried  
12 to make earlier and didn't succeed in doing very well. That was on the issue of  
13 the detailed nature of Article 25(3)(a) of the Statute and the relationship with  
14 the principle of nullum crimen sine lege.

15 What the Defence submits in that regard is simply that, after all the  
16 prepcoms that were held, after all the drafts of the Statute were circulated and of  
17 all the analysis and discussion that went into preparing the final Statute, keeping  
18 in mind the principle any court should be very slow to further expand upon the  
19 grounds set out in Article 25(3)(a) thereafter. I think that should just clarify  
20 what the nature of our submission is in that regard. I perhaps wasn't very clear  
21 earlier.

22 Your Honours, my final submissions this afternoon concern the proof of, and  
23 manner of, the deaths of the AMIS personnel at AMIS Haskanita. Without wanting to  
24 diminish in any way the prohibition on pillaging or the repugnance we may feel for  
25 the practice, two facts stand at the heart of this case, an attack on an AMIS base

1 and the deaths of the 12 AMIS personnel. If it weren't for the occurrence of those  
2 two events together, it is highly unlikely that we would be here today. Taking  
3 into account the gravity requirement in Article 5 of the Statute, the Defence  
4 submits that those two events are what has led to us being here today.

5 Now, given that fact, the Defence submits that it is strange that the  
6 Prosecution has paid so relatively little attention to the specific detail of those  
7 two facts. This morning, Mr. Khan explored the absence of a necessary detail in  
8 the Prosecution's case in relation to peacekeeping, and my submissions now will  
9 focus on the corresponding lack of detail in relation to the evidence concerning  
10 the manner of deaths of the AMIS personnel.

11 The Defence submits that the Prosecution has been somewhat fast and loose  
12 with its terminology when describing the killings, and I will illustrate what I  
13 mean with reference to the DCC, for instance. In paragraph 96 of that document, we  
14 are told that, "The attackers shot and killed 10 AMIS peacekeepers." The paragraph  
15 continues, "Many of those killed were shot in blatant execution-style murders. In  
16 particular, Morio Kebbeh and Ibrahim Diagne." How does one describe two out of ten  
17 killings as "many of those"? If the evidence is that two persons were executed,  
18 then one should say so. An exaggeration doesn't change or enhance the evidence.

19 On a second occasion in the course of these proceedings, the Prosecution has  
20 managed to raise the bar of gravity on the one hand, while at the same time  
21 lowering the bar of specificity and evidence. In its presentation of submissions  
22 on peacekeeping, the Prosecution said, in concluding that the attack deprived the  
23 civilians in the Haskanita area of AMIS's protection, that "The attack on MGS  
24 Haskanita not only deprived the civilians of their protection, but that it involved  
25 ten execution-style killings."

1           So what does the evidence, in fact, say about the manner in which the AMIS  
2 personnel died? Witness 355 states in paragraph 63 of his statement, and I quote,  
3 "The first soldier was killed in the communication centre and he was from Nigeria.  
4 I believe one MILOB was executed for sure. Another MILOB might be executed. And  
5 others were killed by exchange of fire with rebels; for example, a Nigerian gunner  
6 in the APC. Some were killed because they refused to hand over their weapons to  
7 the rebels."

8           Now, the account of the gunner killed in the APC is, of course, corroborated  
9 by Witness 419. At Paragraph 75 of his statement, he says the following, "Also,  
10 the attackers used a vehicle equipped with a 12.7 millimetre weapon. It was this  
11 vehicle that shot at one of the armoured personnel carriers. The APC remained  
12 intact, except for the hole left by the penetration of the missile from the front.  
13 This was how the driver inside the APC was killed."

14           Witness 315, as you will recall, a member of the AU/UN Board of Inquiry,  
15 states in paragraph 49 of his statement, "It is not clear how many soldiers died  
16 during this battle. But our findings indicate that between six and eight soldiers  
17 were killed in action before the rebels entered the compound. These soldiers were  
18 all part of the Protection Force from the Nigerian Battalion, NIBAT 11." Now,  
19 these two witnesses, of course, were reporting the results of their investigation  
20 and their interaction with other witnesses.

21           The eyewitnesses have the following to say on the matter. Witness 419 states  
22 in paragraph 80 of his first statement, "At this time, I was hiding in the  
23 protective trenches in the western side of the camp," marked B in the sketch that  
24 he attaches to his statement. "There were two soldiers next to me in the trenches.  
25 When one of the attackers wanted to break into the armoury... " marked 30 in the

1 sketch, "... the two soldiers next to me stood up and shot at the attacker, but  
2 they missed. That rebel returned fire and the two soldiers were killed instantly."

3 Your Honours will recall the testimony of Witness 446. From the transcripts,  
4 I refer to the transcript of 23 October, page 46, lines 4 to 5. And when pressed  
5 on the -- his recollection of the number of those killed and the manner of their  
6 killing, says, and I quote, "Based on my personal assessment, I believe about  
7 three, three or thereabouts, were killed before the rebels entered the camp."

8 There is also a wealth of evidence concerning the officer killed in the  
9 communication centre at the beginning of the attack, when the centre is hit by an  
10 RPG or other large calibre weapon. Witness 446 also refers to this incident, both  
11 in his statement at paragraph 93 and he recounted the incident again in his  
12 testimony before this Court. And the reference there is the transcript of 23  
13 October, page 45, lines 21 to 22.

14 Witness 355 at paragraph 47 and Witness 420 in paragraph 53 also both mention  
15 that incident. Witness 420 in the same paragraph 53 also refers to the killing of  
16 a soldier at the northern guard post as the attack commenced. In other words, your  
17 Honours, after a fairly brief review of a number of statements, it seems clear that  
18 at least seven and possibly more AMIS personnel were killed either before the  
19 rebels entered the base or in the course of the attack in exchanges of fire between  
20 the attackers and PF members.

21 Now, you may ask why this is important. Of course it's important, because if  
22 the Defence is correct in its submission that the attack itself was lawful, then  
23 the deaths arising in the course of that attack would not constitute crimes under  
24 the Statute of this Court.

25 The analysis of whether or not the attack was lawful would already have

1 considered the issue of proportionality; it would have balanced on the one hand the  
2 loss of life, and it would have balanced on the other hand the military advantage  
3 anticipated from the attack. Of course, that doesn't account necessarily for every  
4 person killed.

5       If the evidence establishes that persons hors de combat were killed, such  
6 killings would remain unlawful. Two consequences flow from that. The first is,  
7 that the Prosecution would be obliged to establish precisely how those persons died  
8 and how those deaths could be attributed to anyone, including to Mr. Abu Garda.  
9 If, for instance, one of the attackers, on a frolic of his, own killed an AMIS  
10 personnel, member of the AMIS personnel out of a motive of revenge, out of a motive  
11 of robbery or any other motive, it would be very difficult to see how such a  
12 killing could be attributed to someone such as my client. Lest there is any  
13 uncertainty on this, persons hors de combat would be those, for instance, who were  
14 wounded, those who had laid down their arms and had taken no part in the  
15 hostilities any longer.

16       The second consequence flowing from the fact that deaths of persons hors de  
17 combat are unlawful is, that it reduces necessarily the number of persons killed in  
18 the course of the attack. And what that does is that it renders the balancing, the  
19 proportionality test and the balancing that one has to exercise. Without it ever  
20 being easy, it renders it that much more certain. You would be talking about a  
21 lesser number of deaths in the course of the attack.

22       The evidence, furthermore, is that it appears that the attackers practiced  
23 the principle of distinction in the course of the attack. In other words, they  
24 appeared to differentiate between those firing at them and those offering no  
25 resistance. I refer in this regard to the statement of Witness 419, and in

1 particular to paragraph 133 of that statement. Now, to give the full account, it's  
2 true that this paragraph belongs in a section of the statement headed  
3 "Non-Discriminatory Nature of the Attack."

4 The Defence submission is that, however, the example the witness in fact  
5 provides demonstrates the opposite. At paragraph 133, and I quote, Witness 419  
6 says the following: "During the attack, Abu Ibrahim from Niger was wearing shorts  
7 and T-shirt. When he heard the first gunshots of the attack, he took his Koran and  
8 started to walk towards the road. The attackers were about to kill him when they  
9 apprehended him there. They asked him: 'Who are you? Where are you from?'  
10 Because he spoke Arabic, he answered in Arabic: 'I am Abu, and I want to go and do  
11 my ablution.'"

12 "The attacker said to him: 'We are not going to kill you. Go and stand over  
13 there.'

14 "Abu refused. He said, 'Since you said that my life will be spared, put me  
15 in a safe place. If not, someone who comes after you could still kill me.'

16 "The attackers then took him by the arm and put him in their own car. After  
17 the attack, they asked him to get out. That was how he was saved, and he is still  
18 alive today."

19 Once 419 provides a further example of the fact that distinction was applied,  
20 and it is his own example. It is what happened to him. In paragraph 81 of his  
21 statement, having just recounted the deaths of the two PF members next to him, he  
22 says the following, and I quote, "I could not see the face of this attacker clearly  
23 because it was dusk. He came up to me and poked me with his weapon, motioning me  
24 to stand up. I came out of the trench and stood up, facing him. He said, 'MILOB?'  
25 I nodded. He waved his hand, pointing towards a western trench, indicating that I

1 should go there. This was where two MILOBs, Captain Paul from Rwanda and Major  
2 Okigwe, were. We stayed in the trench. The attackers continued their carnage."

3 Your Honours will no doubt recall the testimony of Witness 416 as well. He,  
4 too, gave evidence supporting the fact that the attackers appeared to implement or  
5 uphold the principle of distinction during the course of the attack. I quote from  
6 the transcript of 21 October, page 23, line 14 to page 24, line 1. He's asked if  
7 the attackers said anything before they fired shots. And he says, yes, they were  
8 asking for guns. And I quote at this point, "They were telling us, give us the  
9 guns." The attackers also said, "Gun, gun. If you do not respond, you will be  
10 shot."

11 A CivPol officer from Cameroon then says, "I am CivPol officer. I do not  
12 have any gun. I am from Cameroon. So they left him and then came to the soldier  
13 who was sitting next to me, and they shouted, 'Gun, gun.' He did not respond and  
14 then they shot him." The evidence is that the person next to him was a PF member.

15 Your Honours furthermore cannot entirely exclude the possibility that one or  
16 more deaths and injuries resulted from friendly fire; in other words, from fire  
17 from PF members. It seems clear on the evidence, firstly, that both attackers and  
18 PF members used the same or similar weaponry, Kalashnikovs or, as they are commonly  
19 known, AK-47s. We don't know which particular type or model of AK-47s were used by  
20 who. That evidence is not before the Pre-Trial Chamber.

21 Secondly, and in order to try and demonstrate the very real possibility at  
22 least of friendly fire being responsible for one or more deaths, I would ask the  
23 court officer to display two sketches which are attached to the witness statements  
24 of Witness 419 and 420. These are public documents and I have provided the DAR and  
25 EVD numbers to the court officer. For the sake of the record, the DAR number of

1 the first sketch is DAR-OTP-0165-0517, EVD-OTP-0199. If you could display that one  
2 first, please. Thank you.

3 Court officer, I wonder if you could please remove that document for a  
4 second. Thank you. Your Honour, although I believe the document is public, it was  
5 brought to my attention that it's possible that the name of the witness appears on  
6 the sketch. If that is the case, your Honours may not want to display it.

7 PRESIDING JUDGE STEINER: It cannot be displayed to the public. There is no  
8 problem with the Prosecution, it is a Prosecution document, that it is displayed to  
9 the legal representatives?

10 MR. FAAL: No objection, Madam President.

11 PRESIDING JUDGE STEINER: The document can be displayed, but not for the  
12 public only.

13 You can now proceed, Mr. Burrow.

14 MR. BURROW: Thank you, your Honour. Thank you.

15 Your Honours, I refer once again to paragraph -- I refer to paragraph 80 of  
16 the witness statement of Witness 419. He says, "At this time I was hiding in the  
17 protective trenches in the western side of the camp (marked 'B' in the sketch)."

18 Now, your Honours will see position "B" in the sketch on the left side of the  
19 diagram. There may well be some confusion in the mind of the witness, because it  
20 appears from the sketch that north, as indicated at the top right-hand corner, is  
21 to the right, meaning "B" would be south. Be that as it may, "B" is clearly  
22 marked.

23 He continues in paragraph 80:

24 "There were two soldiers next to me in the trenches. When one of the  
25 attackers wanted to break into the armoury (marked '30' in the sketch) the two



1 soldiers next to me stood up and shot at the attacker, but they missed."

2 Your Honours will identify number 31 -- sorry, number 30, where almost in the  
3 middle of the sketch there is -- above the road in the middle there is a large  
4 block marked "31" and immediately to its left is number 30.

5 So, the two soldiers fire in that direction and they miss. That rebel  
6 returned fire and the two soldiers were killed instantly. Having missed their  
7 target, the shots fired by the PF members obviously must have gone somewhere, and  
8 your Honours will see a number of structures or objects scattered around the  
9 armoury, number 30.

10 To get some idea of what those structures might be, I would refer to the  
11 witness statement of Witness 420, paragraph 61. I would ask the court officer to  
12 now pull up the second sketch. The same problem occurs in that the name of the  
13 witness appears on the sketch, so I would ask that it again be prevented from  
14 public transmission.

15 THE COURT OFFICER: Just for the transcript, can we have the DAR number and  
16 EVD number please?

17 MR. BURROW: Certainly. The DAR number is DAR-OTP-0165-0540 and  
18 EVD-OTP-0201. Thank you.

19 Now, your Honours, the comparison of the two sketches is made somewhat  
20 difficult by the fact that the perspective appears to have changed. Here we are  
21 confronted with a, if I may call it, broad foreshortened version of the camp,  
22 whereas in the previous sketch it appeared to be a long, narrow camp.

23 Leaving that difficulty aside, I would submit that they represent roughly the  
24 same view. South again is clearly marked at the bottom of the sketch and from  
25 there it is evident that number 47, marked to the left of south, the word "south",

1 represents roughly the equivalent of position "B" in the sketch we have just looked  
2 at previously.

3         According to the legend attached to the sketch, which is itself attached to  
4 the statement, the television hall or recreation tent is number 28, taking up  
5 roughly the same position and in fact identified as the same building or tent as  
6 30 -- sorry, 31 in the previous sketch. We are then told that item 59 in that  
7 diagram immediately to the left of 28 is the armoury.

8         In paragraph 61 of his statement, Witness 420 -- I won't quote the whole  
9 paragraph, but the last sentence of that paragraph reads as follows, "Other  
10 Nigerian PFs were killed in the PF tents (marked from number '20' to number '27' in  
11 the sketch)." Those structures can be seen on the bottom left-hand side of the  
12 sketch.

13         Now, ideally I would have liked to display the two images side by side. They  
14 would just be very small and it would probably be unworkable. With the Court's  
15 indulgence, could we please flip back for a second to the first sketch? Do you  
16 need the EVD number again? Thank you.

17         Again now starting from the left, from position "B", and looking across to  
18 the armoury located at number 30, and drawn from admittedly a different  
19 perspective, or with a different perspective in mind, the tents indicated as the  
20 positions in which certain PF members were shot by Witness 420 are now drawn  
21 directly into the line of fire that would have occurred as recounted by Witness  
22 419. Thank you.

23         Your Honours, I put it as a possibility, as the sketches hopefully  
24 demonstrate a very plausible possibility, that the type of fire described by  
25 Witness 42 -- 419, I beg your pardon, may have been responsible for one or more

1 deaths and/or injuries. I put it no higher than that, because the Defence doesn't  
2 need to. The Prosecution has not demonstrated that it's wrong and the Prosecution  
3 has not established how the PF members referred to by Witness 420 were killed.

4 Your Honours, the evidence considered as a whole simply does not correspond  
5 to a general and uniform intent on the part of the attackers to kill AMIS  
6 personnel. The injuries described again point to no uniform and general intent to  
7 harm or kill AMIS members.

8 Witness 446 himself sustained serious injury. We should recall that his  
9 injury -- injuries were caused by a grenade that exploded in his vicinity, and he  
10 also describes a bullet and I believe the word he uses in his statement is  
11 "scratched" him on the leg.

12 Your Honours, how each individual died is important. It's important legally,  
13 of course, but it's also important for its own sake. Witness 355 says the  
14 following at paragraph 28 of his statement, and I quote:

15 "As the initial forensic investigation was carried out poorly, without  
16 indicating exact cause of the deaths, Witness 315 and I requested re-examination of  
17 the dead bodies, but Rurangwa did not authorise for this to happen. The exhumation  
18 of the bodies should have been performed to establish exact causes of death for all  
19 the victims who died."

20 Much the same might be said for the manner in which the AMIS men died.

21 Your Honours, in a court not very far from here, Radovan Karadzic is  
22 currently being prosecuted for some of the most serious crimes in Europe's recent  
23 past, including the events at Srebrenica. Watching a documentary on the  
24 anniversary of Srebrenica a week or so ago, I was reminded of what an execution  
25 looks like. It looks like a row of men lining up, facing a wall, with a line of

1 soldiers standing behind them. The Prosecution asks you to find that there is  
2 sufficient evidence to establish substantial grounds to believe that a majority, or  
3 at least a significant number, of those killed at MGS Haskanita were executed.

4 With respect, your Honours, the Court and the Defence deserve better. The  
5 victims in this case certainly deserve better. They deserve better than baseless  
6 generalisations. They deserve to know whether those who died were summarily  
7 executed, or whether they died defending their base.

8 Instead the reality, as we near the end of these confirmation proceedings, is  
9 that the relatives of those who died - the relatives of a significant number of  
10 those who died - at Haskanita are today in no better position to say how they were  
11 killed than they were on the day after the attack.

12 Your Honours, I have nothing further. Thank you.

13 PRESIDING JUDGE STEINER: Thank you, Mr. Burrow. May I ask whether Mr. Khan  
14 still has --

15 MR. KHAN: Madam President, your Honours, that concludes the submissions of  
16 the Defence for today. I'm most grateful.

17 PRESIDING JUDGE STEINER: Thank you very much. So that means that this  
18 concludes also our today's session.

19 The Chamber, in deciding on the reschedule of the remaining days of this  
20 confirmation hearing, establishes that the next session will take place tomorrow at  
21 9:30 for the time needed by the closing statement of one of the legal  
22 representatives of victims, Mr. Frank Adaka.

23 On Friday, 30 October, the session will start at 9:30 with the closing  
24 statements of the Prosecution from 9:30 to 11:00. Second session from 11:30 'til  
25 the time needed for the remaining legal representatives of victims to complete

1 their presentations, and in the afternoon session from 2:30 --

2 MR. KHAN: Madam President, I'm sorry, I should have, when I was on my feet  
3 earlier, answered the invitation of the Bench from before lunch. I would very much  
4 welcome making the closing speech at 2 o'clock. Perhaps it would be welcome by  
5 all. I'm grateful.

6 PRESIDING JUDGE STEINER: Thank you, Mr. Khan, but taking into account that  
7 we need to have a one-and-a-half-hour lunch break and since we don't know at what  
8 time legal representatives will finish their presentation in the morning session, I  
9 think it's more -- it's more prudent maybe to establish the beginning of the third  
10 session as we did during this week, at 2:30, for the Defence presentation -- final  
11 observations. If that is agreeable for the Defence, of course.

12 MR. KHAN: Your Honours, so be it. I'm grateful.

13 PRESIDING JUDGE STEINER: Since there are no other issues to be discussed in  
14 this afternoon's session, we will suspend the present session. We will resume  
15 tomorrow at 9:30 for the final observations of one of the legal representatives of  
16 victims.

17 This session is suspended.

18 (Hearing ends at 3:17 p.m.)