

1 International Criminal Court
2 Pre-Trial Chamber I - Courtroom 1
3 Presiding Judge Sylvia Steiner, Judge Sanji Mmasenono Monageng
4 and Judge Cuno Tarfusser
5 Situation Darfur, The Sudan - ICC-02/05-02/09

6 In the matter of the Prosecutor v Bahar Idriss Abu Garda
7 Confirmation of Charges Hearing
8 Thursday, 29 October 2009
9 (The hearing started at 9:32 a.m.)

10 (Open session)

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

13 PRESIDING JUDGE STEINER: Please be seated. 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 Idriss
16 Abu Garda, ICC-02/05/02/09.

17 PRESIDING JUDGE STEINER: Thank you very much. I would like to welcome all
18 those present here in this courtroom today, Mr. Abu Garda, and I would ask, please,
19 the parties and participants to introduce themselves, starting by the Office of the
20 Prosecutor.

21 Mr. Faal.

22 MR. FAAL: Madam President, your Honours, good morning to everyone. The
23 Prosecution is today represented by: Victor Baiesu, associate trial lawyer;
24 Desiree Lurf, associate trial lawyer; Biljana Popova, case manager; and myself,
25 Essa Faal, senior trial lawyer. Thank you, Madam President.

1 PRESIDING JUDGE STEINER: Thank you.

2 Mr. Khan.

3 MR. KHAN: Madam President, your Honours, good morning. Mr. Abu Garda is
4 represented by Andrew Burrow, Anand Shah, RoseMarie Maliekel, and myself, Karim
5 Khan.

6 PRESIDING JUDGE STEINER: Thank you very much.

7 Legal representatives of victims, please.

8 MS. CISSE: (Interpretation) Good morning, your Honour. I am H el ene Cisse,
9 from the Senegal Bar, and I represent the same victims as I mentioned in previous
10 days.

11 MR. KON E: (Interpretation) Good morning, your Honours. I am Mr. Kon e and I
12 represent the same victims as were mentioned earlier during the proceedings.

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

15 MR. AKINBOTE: May it please, Madam President, your Honours, my names are
16 Akin Akinbote and I represent the same set of victim as always in these
17 proceedings.

18 PRESIDING JUDGE STEINER: Thank you very much. So this session is held this
19 morning on an exceptional basis in order to attend a special request of one of the
20 legal representatives of victims and, in holding this session this morning, the
21 Chamber would like to show all due respect to the Defence counsel as a legal
22 representative, as Defence counsel, and also the victims you represent.

23 So, Mr. Frank Adaka, you have the floor for your final observations.

24 MR. ADAKA: Thank you, Madam Presiding Judge.

25 Honourable Judges, thank you for giving me this opportunity to address this

1 hallowed Chamber. I will go straight to the main thrust of this short address,
2 which is to highlight the salient points in the pieces of evidence and
3 presentations made by the Prosecution and the Defence which, in our humble views,
4 could assist the Honourable Judges in their evaluation of the truth about the sad
5 incident that occurred at Haskanita, Sudan, on 29 September 2007.

6 This is consistent with one of the cardinal objectives of the participation
7 of victims which I represent in these proceedings. In this regard, your Honours,
8 please recall that in our opening statement before this Chamber we stated before
9 you that one of our expectations in these proceedings is to discover the truth
10 about the attack on the victims I represent.

11 Your Honours, please kindly permit me to restate some basic facts which I
12 consider to be undisputed in these proceedings. I shall be craving your kind
13 indulgence to restate these facts, because they form the foundation of the position
14 of the victims I represent and I shall itemise them.

15 The first is this. It is the position of the victims I represent that their
16 deployment at MGS Haskanita at the material time was pursuant to peacekeeping
17 operations within the contemplation of Chapter VIII of the United Nations Charter
18 involving the non-use of force except in self-defence. In other words, at the
19 material time of the attack at their base the victims I represent were not engaged
20 in armed conflict within the meaning ascribed to that term under the Geneva
21 Conventions and the Additional Protocols.

22 Second, it is also the position of the victims I represent that the nature of
23 their pre-deployment training and the skill of weapons they were equipped with at
24 that material time were consistent with the non-use of force peacekeeping mandate
25 of the AMIS force to which they belonged.

1 Third, it is also their position, your Honours, that they were clearly
2 neutral and therefore they did not consider any of the parties to the armed
3 conflict to be their enemies. In line with this, they were mandated by the Darfur
4 Peace Accord to have representatives of both the Government of Sudan forces and the
5 rebel forces staying with them in their base. This was in line with the peace
6 accord that gave birth to the AMIS force itself.

7 Most of the victims I represent were members of the Protection Force, who
8 were mandated to protect unarmed military observers - that is MILOBs for short -
9 and civil police from attacks from armed bandits and other such similar undesirable
10 elements who may want to take advantage of the unarmed situation of the MILOBs and
11 civil police and prevent them from carrying out their duties of investigation of
12 alleged violations of the then prevailing peace accord.

13 The victims I represent were also supposed to protect civilians, subject to
14 their capacity and capability to do so, because you remember their skill of weapons
15 was mainly geared towards peacekeeping operations, not peace enforcement, not armed
16 conflict.

17 May I also humbly state here, with your kind permission, your Honours, that
18 it was never the understanding of the victims I represent that they would be
19 subjected to deliberate sustained attack from one or more of the rebel factions, or
20 indeed the Government of Sudan, using heavy-calibre weapons such as 106 recoilless
21 guns, anti-aircraft missiles and artillery weapons such as the evidence presented
22 so far in these proceedings have disclosed.

23 Having stated these basic facts, I shall now move on to try to analyse some
24 of the evidence disclosed by both the Prosecution and the Defence in order to
25 enable your Honours to kindly evaluate them to arrive at the truth about the sad

1 incident of 29 September 2007.

2 I have divided them into issues which I have identified. The first is the
3 identity of the attackers. Who were the attackers? Your Honours, in analysing the
4 identify of the attackers on MGS Haskanita on 29 December 2007, I shall be kindly
5 requesting your Honours to look closely at the viva voce testimony of Witness 446
6 who witnessed the attack firsthand. From his evidence, the attackers were
7 certainly not Government of Sudan forces. The unequivocal testimony of this
8 witness was that the attackers consisted of elements of the breakaway faction of
9 SLA and JEM. The veracity of this testimony, we submit, is borne out by the
10 threats which members of this group had issued to peacekeepers shortly before the
11 attack of 29 September 2009.

12 The second issue I will want to analyse is the issue of the justification for
13 the attack on the peacekeepers. Was that attack justified? Your Honours were very
14 aware of some arguments made here that the attack on MGS Haskanita may have been
15 justified by the doctrine of military necessity because the base had somehow lost
16 its protected status and therefore became a legitimate military target. I crave
17 your kind indulgences to draw your kind attention to some salient points which
18 could enable your Honours to arrive at the truth about this matter; that is whether
19 or not that attack was justified.

20 As much as possible I shall leave out the legal arguments, but I shall just
21 go on to analyse the facts. From the evidence and presentations made here by the
22 Prosecution and Defence, I ask is it not the case that the peace agreement between
23 the warring parties at the time mandated AMIS force at Haskanita to harbour
24 representatives of both rebel group and the Government of Sudan in their base? Is
25 that not the truth here, that they were mandated by the peace accord to have both

1 -- representative of both factions staying with them? It wasn't their own
2 volition. It was a mandate imposed on them by the peace accord.

3 And assuming that was the case -- sorry, and assuming it was the case that
4 one of the representatives of the Government of Sudan was using his position within
5 the base to facilitate attacks on his enemies by coordinating -- by communicating
6 coordinates of rebel positions to his own forces, were the members of the AMIS
7 force at MGS Haskanita doing anything to aid and abet this behaviour? Were they
8 doing anything to assist him in furtherance of this behaviour? That is assuming
9 there was such behaviour, and we are not conceding there was, but we are saying
10 assuming there was such behaviour, was there any evidence here to suggest to your
11 good selves that the members of the AMIS force were actually actively aiding him in
12 that communication?

13 Your Honours, I daresay that the evidence before you is that members of the
14 AMIS force at Haskanita did nothing that would have implied that they condoned or
15 aided and abetted such communication, that is assuming that that allegation is
16 true, as I submit that the actions taken by the AMIS personnel at that material
17 time were sufficient. For instance, they did not permit either of the parties to
18 use their own AMIS communication centre. This came from the viva voce testimony of
19 Witness 446. None of the factions were allowed to use AMIS' own communication
20 centre.

21 The evidence available also reveals that both the Government of Sudan
22 representative at the MGS and the rebels had their own communication apparatus,
23 independent communication apparatus - they said they had the Thuraya satellite
24 radio set, both of them - and this was not under the control of the AMIS personnel.
25 It was not under their control.

1 And even if it was the case that the rebels expected that AMIS personnel
2 should selectively impound the handheld satellite radio set of the representative
3 of the Government of Sudan because of their supposed complaints, would AMIS forces
4 then have been justified to leave the rebel representative with their own
5 communication apparatus? Because we all know that both of them had parallel
6 communication apparatus and so, if the rebels complained that the Government of
7 Sudan representative was misusing this radio set, were the rebels expecting that
8 they would impound the radio set of the Government of Sudan representative and
9 leave the apparatus of the rebels? If they chose this line of action to
10 selectively impound one party's radio set, how would the Government of Sudan have
11 viewed the neutrality of the AMIS force?

12 Your Honours, please permit me to suggest here that leaving the independent
13 communication apparatus with both the Government of Sudan representative and the
14 rebel representative at the material time was obviously the most neutral position
15 the AMIS force could adopt at the time in line with their peacekeeping mandate.

16 Here if I could just crave your kind indulgences to explain a little bit. We
17 had Witness 446 here in his testimony. We had accounts of a battle that took place
18 between the rebel force and the Government of Sudan forces around 10 September and
19 the rebel forces were successful in that attack. Can it not be assumed too that
20 the radio set with the rebel forces was useful in coordinating the disposition of
21 the government forces that led to the rebel victory, any which way?

22 So if you take one radio set from one man and you leave it with the other man
23 it is trouble, so the most sensible thing to have done on the ground as a
24 peacekeeper was to leave them with the radio sets and convey the complaint to the
25 higher headquarters. That was the best the people at MGS Haskanita could do and

1 that is what they did. That is our argument.

2 The next issue I shall move on to is the motives for the attack on MGS
3 Haskanita. Your Honours, it is our humble position that understanding the motives
4 for the attack on MGS Haskanita would also assist this hallowed Chamber to arrive
5 at the truth of the matter. In this regard, I crave your kind indulgence again to
6 draw your attention to the following points. I will try to make them in point
7 form.

8 First, if indeed the motives of the attackers of MGS Haskanita was to remove
9 or neutralise what they considered to be the threat to their military situation
10 resulting from the perfidious of the base by the Government of Sudan
11 representative, why then was it the case that the evidence presented so far did not
12 indicate by any stretch of imagination that when the attackers eventually gained
13 entry into the base they even tried to locate the Government of Sudan
14 representative staying in the base?

15 What we are saying here is that, if that was their intent that they wanted to
16 neutralise the perfidious conduct of the Government of Sudan representative, the
17 evidence we have heard here so far did not reveal that eventually when they gained
18 forced entry into the base they sought to remove him. We only heard them demanding
19 for guns and money. We didn't hear anybody say, "Where is the Government of Sudan
20 representative? We want to get rid of him." There is no such thing in the
21 evidence here. So, could that then be consistent with the postulation that their
22 aim was to get rid of the Government of Sudan representative? I doubt very much,
23 your Honours.

24 The evidence presented here so far was that, on gaining forced entry into the
25 base, the rebel attackers were more interested in taking away guns belonging to

1 peacekeepers and were also carting away valuables such as jewellery, money and
2 personal effects.

3 Perhaps I may just pose a rhetorical question. Sorry, your Honours. Perhaps
4 I will take that again. I would just pose a rhetorical question here. Were the
5 guns of the peacekeepers that were carted away also being used to provide
6 coordinates to the Government of Sudan forces? If that was their intention, were
7 those guns also being used to provide coordinates?

8 Another question. What was the significant military advantage the rebels
9 stood to gain by carting away personal items - cameras, jewellery? Did they stand
10 to gain any military advantage from that?

11 Third, the evidence here so far has given us a fair idea of the casualties
12 from that attack, both the injured and the dead. I stand to be corrected, but
13 nowhere has it been stated here - at least from the evidence we heard - that the
14 representatives of the Government of Sudan at the base were eventually captured,
15 killed, or even wounded. Nowhere has that evidence been shown to us here. There
16 were Government of Sudan representatives there. Somebody replaced Bashir.

17 We know the casualties, or at least we have a fair idea of those that were
18 killed, we have a fair idea of those that were injured and we know that at some
19 point in the battle of 10 September they actually captured a Government of Sudan
20 general. So, if their stated aim was to neutralise the perfidious use of that
21 base, when they got in there why didn't they try to capture the Government of Sudan
22 representative? He wasn't captured. He wasn't killed. Rather, those that were
23 hurt were unarmed military observers and Protection Force personnel. Your Honours,
24 this leads me to a postulation that the attackers could not have been looking for
25 the Government of Sudan representative, I doubt very much.

1 Again, if indeed the attackers merely wanted to neutralise the threat posed
2 to their operational disposition by the Government of Sudan representatives in the
3 base, why did they go ahead to fire at least 30 shots, according to this viva voce
4 testimony of Witness 446 that one particular MILOB was shot 30 times? One shot at
5 very close range would kill a man. They fired at him 30 times. If their focus was
6 neutralising the use of the base to attack them, of what military advantage did
7 they -- what military advantage did they gain by shooting at one individual unarmed
8 30 times?

9 If all the rebel attackers desired to do was to indeed neutralise the threat
10 to their military situation, the vehicles they removed - we heard the testimony of
11 Witness 446 that 17 vehicles they removed - how did that help the Government of
12 Sudan to attack them? The vehicles didn't belong to the Government of Sudan. They
13 belonged to the AMIS force. So, I find no correlation between stealing vehicles
14 and neutralising the perfidious use of the base. There is a total disconnection,
15 there is no nexus between them and that makes it very difficult to believe that
16 their motives were indeed to neutralise the perfidious use of that base.

17 Leaving this issue aside now, I shall go to the third issue of
18 proportionality. Your Honours, in regard to this issue I urge you to kindly
19 examine closely whether it was proportionate to use anti-aircraft missiles on
20 peacekeepers who were armed with just AK-47 assault rifles and two or three
21 armoured personnel carriers, which by the admission of Witness 446 one of the
22 armoured personnel carriers was even out of commission at that time. It was not
23 functioning properly.

24 In regard to this issue of proportionality, may I with your kind permission
25 recall the presentation by my learned friend on the other side for the Defence

1 yesterday. He made a comparison between the rebel force and the NATO forces in
2 terms of proportionality, when -- proportionality of casualties, or harm, in an
3 attack on a dual purpose target.

4 I daresay that such comparison in this case is not appropriate. It is
5 totally inapposite, because in the case of the NATO forces - and I stand to be
6 corrected - I have never, never read any report about NATO forces pillaging,
7 looting and stealing from a target they attacked. The attack on dual purpose
8 targets during the incidents of the Yugoslavian civil war were mostly air raids,
9 air sorties and never any situation where the NATO forces moved in there and looted
10 the items of those they attacked. So, my humble suggestion to your Honours is that
11 this is a very inappropriate comparison. It is totally different from what
12 happened at Haskanita and so it is a poor example to give here.

13 Then on the issue of friendly fire. Your Honours, the issue of friendly fire
14 directly concerns the victims I represent, because this category of victims were
15 mostly members of the Protection Force who, if there were indeed any incidents of
16 friendly fire, would be directly involved because they were members of the
17 Protection Force. They were the only ones armed in the base.

18 It may be necessary, therefore, to draw your kind attention to circumstances
19 which would enable your Honours to arrive at the truth of this matter. Can it be
20 said that AMIS friendly fire would result in the destruction of the AMIS APC by an
21 armour piercing projectile? Could friendly fire have destroyed the APC? From a
22 military point of view, that is totally impossible. An APC can only be destroyed
23 with an armour piercing projectile deliberately fired at vulnerable parts of it,
24 the fuel tank for instance. That is the only way you can take out an APC because,
25 as the name implies, APC is armour plated. Friendly fire certainly would not have

1 done this.

2 Can it truly be said that friendly fire would result in 30 shots of AK-47
3 bullets being fired at an unarmed military observer? Can friendly fire result in a
4 man being shot 30 times? You make a mistake and you shoot a man once, but not 30
5 times. When you shoot a man 30 times, it is not a mistake. It is deliberate.

6 Even in the particular incident of two peacekeepers who the Defence claimed
7 yesterday allegedly shot and missed a rebel soldier, who was then said to have
8 returned fire and killed the two peacekeepers instantly, perhaps it is good to
9 analyse this piece of presentation, because the two peacekeepers that died there
10 are among the victims I represent and it is our interest to really analyse how they
11 died.

12 Your Honours, I recall yesterday they brought some sketches here. I saw them
13 on the screen here. I will just refer to them. They are DAR-OTP-0165-0517, that
14 is EVD-OTP-0199, and DAR-OTP-0165-0540, EVD-OTP-0201. Without referring to it
15 here, because we saw it yesterday, I dare suggest with your kind permission that
16 from a military point of view there are too many variables which that narrative
17 yesterday did not take account of. Before you tell us that shots fired from a
18 position to the guard post missed -- to the ammo dump missed the ammo dump and
19 killed some other people in a tent away from the ammo dump, there are certain
20 variables we must take into consideration which that narrative did not take into
21 consideration yesterday.

22 In order to make such a conclusive statement, you must take account of the
23 fact that all weapons have a muzzle velocity. All projectiles fired from weapons
24 have what we call an effective killing range. Outside that range, a projectile is
25 as harmless as a piece of stone.

1 Before you make such a conclusion here, we should have had knowledge of the
2 distance from the position of the shot towards the armoury in the first place and
3 also the distance from the armoury to the tents. It may well be that they missed,
4 but it was well beyond the muzzle -- the effective killing range. We don't have
5 that information here. We don't have that before us here.

6 And so my suggestion to you, most humbly, is that without information on the
7 muzzle velocity, on the relative distance between the place the shot was fired from
8 to where it eventually got to, may I suggest to you that that piece of evidence, or
9 information, is highly speculative and therefore following that path I am afraid
10 could lead us down a very slippery slope that could take us further and further
11 away from the truth.

12 Finally, your Honours, I shall talk about the issue of pillaging and the
13 sharing of property looted from the MGS Haskanita. Your Honours, kindly permit me
14 to draw your attention to the issue of the sharing of loots carried away from MGS
15 Haskanita. I humbly suggest to you that you look closely at any evidence relating
16 to how the properties there were shared, because this will give you an indication
17 as to those responsible for that attack.

18 I dare suggest to you, with your kind permission, that only those who were
19 complicit in that attack, or who had knowledge of it and encouraged it, would be
20 given a share of that loot. So, your Honours, this is a piece of evidence that I
21 humbly urge you to look closely at and evaluate closely, because it could help you
22 determine who actually perpetrated the attack either as a commander, or as a foot
23 soldier.

24 Madam the Presiding Judge, your Honours, this is the end of my short
25 observations and I thank you for your patience. I also wish to thank you for the

1 opportunity given to me to make this presentation, adjusting your schedule as it
2 were to enable me to do so. Thank you very much.

3 PRESIDING JUDGE STEINER: Thank you very much, Mr. Adaka, and so it is now
4 for the Chamber just to wish you a nice journey back to your homeland.

5 So, we are finishing therefore the presentation of one of the legal
6 representatives of victims that took exactly 34 minutes of the time allocated to
7 legal representatives, meaning that tomorrow we will start our session at 9:30 with
8 the final observations from the Prosecution 9:30 to 11, we will have a half-an-hour
9 break and so from 11:30 to 12:30 we will have the final observations by the
10 remaining legal representatives of victims, we will have the lunch break and we
11 will resume, if that is agreeable for the Defence, at 2 o'clock. Is that agreeable
12 to the Defence, instead of 2:30?

13 MR. KHAN: It is indeed, Madam President. Thank you.

14 PRESIDING JUDGE STEINER: So, then we will resume for the afternoon session
15 at 2 o'clock for the closing statements of the Defence.

16 Having said that, I would like to thank the parties and participants, I would
17 like again to thank the legal support of Pre-Trial Chamber and Pre-Trial Division,
18 our court officers, as always our interpreters and this session is then suspended.
19 We will resume tomorrow at 9:30.

20 (The hearing ends at 10:06 a.m.)