

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-03/09  
Date: 28 September 2011

**TRIAL CHAMBER IV**

**Before:** Judge Joyce Aluoch, Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Silvia Fernández de Gurmendi

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR *v.* ABDALLAH BANDA ABAKAER NOURAIN  
AND SALEH MOHAMMED JERBO JAMUS**

**Public**

**Decision on the Joint Submission regarding the contested issues and the agreed facts**

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

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo  
Ms Fatou Bensouda

**Counsel for the Defence**

Mr Karim A.A. Khan  
Mr Nicholas Koumjian

**Legal Representatives of Victims**

Ms Helene Cissé  
Mr Jens Dieckmann

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

Mr Brahim Koné  
Mr Akin Akinbote  
Mr Frank Adaka  
Sir Geoffrey Nice &  
Mr Rodney Dixon

Trial Chamber IV (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, issues the following Decision on the Joint Submission regarding the contested issues and the agreed facts:

## I. Background and Submissions

### *Parties’ joint submissions*

1. On 19 October 2010, the Office of the Prosecutor (“prosecution”) and defence for the accused persons (“defence”) informed Pre-Trial Chamber I in a joint filing that the “Defence does not contest any of the material facts alleged in the Document Containing the Charges for the purposes of confirmation, and that the Pre-Trial Chamber may therefore consider such alleged facts to be proven for the purposes of the confirmation of charges, in accordance with Rule 69 of the Rules of Procedure and Evidence”.<sup>1</sup>
2. On 19 April 2011, the Chamber instructed the parties to provide an update on the status of the discussions on a possible agreement as to evidence.<sup>2</sup>
3. On 16 May 2011, the defence and the prosecution in a joint filing (“Joint Submission”)<sup>3</sup> addressed the contested issues in the trial of the accused persons and

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<sup>1</sup> Joint Submission by the Office of the Prosecutor and the Defence as to Agreed Facts and submission regarding the modalities for the conduct of the Confirmation hearing, 19 October 2010, ICC-02/05-03/09-80, paragraph 5.

<sup>2</sup> Transcript of hearing on 19 April 2011, ICC-02/05-03/09-T-10-ENG CT WT, page 7, lines 6 – 10.

<sup>3</sup> Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Person, 16 May 2011, ICC-02/05-03/09-148.

submitted an agreement as to evidence (“Agreement”)<sup>4</sup> pursuant to Rule 69 of the Rules of Procedure and Evidence (“Rules”), attached as a confidential annex to the Joint Submission. At paragraph 3 of their Joint Submission, the parties submit that the accused persons will contest only the following three issues:

- i. Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;
- ii. If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and
- iii. Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.<sup>5</sup>

4. The parties submit that the Agreement “narrow[s], to a very significant extent, the issues in dispute between the parties” and will facilitate the fair and expeditious conduct of the proceedings.<sup>6</sup>
5. Furthermore, the parties state that if the Chamber determines that AMIS was a peacekeeping mission in accordance with the Charter of the United Nations, that the attack was unlawful and that the accused persons were aware of the factual circumstances that established the unlawful nature of the attack, the accused persons will plead guilty to the charges against them without prejudice to their right to appeal the Chamber’s decision on the contested issues.<sup>7</sup>
6. The parties submit that, apart from evidence on the contested issues, they will not call additional evidence or make additional submissions regarding the guilt or

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<sup>4</sup> Agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence between the Defence of Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus And the Office of the Prosecutor, ICC-02/05-03/09-148-Conf-AnxA.

<sup>5</sup> ICC-02/05-03/09-148, paragraph 3.

<sup>6</sup> ICC-02/05-03/09-148, paragraph 4.

<sup>7</sup> ICC-02/05-03/09-148, paragraph 5.

innocence of the accused persons, unless the Chamber, within its discretion, deems it necessary to have additional evidence and/or submissions on the issues before it.<sup>8</sup>

7. Finally, the parties note that, pursuant to Article 64(3)(a) of the Rome Statute (“Statute”), the Chamber is required to “[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings” and, pursuant to Regulation 54(h) of the Regulations of the Court (“Regulations”), issue any order “in the interests of justice for the purposes of proceedings on [...] [t]he issues the participants propose to raise during the trial”.<sup>9</sup>
8. To this end, the parties invite the Chamber to “adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the upcoming trial proceedings only on the limited issues in paragraph 3” of the Joint Submissions, namely on the three contested issues set out above.<sup>10</sup>

#### *Non-anonymous victims’ submissions*

9. In response to an enquiry by the Chamber on 23 May 2011,<sup>11</sup> the prosecution and the defence indicated that the annex containing the Agreement could be notified to the legal representatives of the victims participating in the proceedings as is, with the limitation that it should not be notified to any victims for as long as they remain anonymous.<sup>12</sup>

<sup>8</sup> ICC-02/05-03/09-148, paragraph 6.

<sup>9</sup> ICC-02/05-03/09-148, paragraph 7.

<sup>10</sup> ICC-02/05-03/09-148, paragraph 9.

<sup>11</sup> Email communication from the Chamber to the prosecution and the defence through the Legal Adviser to the Trial Division of 19 May 2011.

<sup>12</sup> Email communication from the prosecution and the defence to the Chamber through the Legal Adviser to the Trial Division of 23 May 2011.

10. On 22 June 2011, the Chamber issued a decision holding that, for the purpose of its determination on the agreement as to evidence pursuant to Rule 69 of the Rules, it would only consider the observations submitted on behalf of non-anonymous victims. The Chamber therefore instructed the legal representatives of victims to consult with their clients to ascertain whether they would agree to the disclosure of their identities to the public at large or, at a minimum, to the parties and participants in the trial proceedings. The Chamber further ordered the prosecution and defence to file a redacted version of the Agreement by 29 June 2011.<sup>13</sup> Finally, the Chamber requested the legal representatives acting on behalf of non-anonymous victims to file observations on the Joint Submission and on the Agreement by 8 August 2011.<sup>14</sup>

*Submissions on behalf of non-anonymous victims a/0434/09, a/0435/09, a/0457/09, a/0458/09, a/0655/09 and a/0656/09*

11. On 8 August 2011, Ms H el ene Ciss e (“legal representative”) filed her observations,<sup>15</sup> made on behalf of victims a/0434/09, a/0435/09, a/0457/09, a/0458/09, a/0655/09 and a/0656/09 who disclosed their identities to the parties in the context of the proceedings before the Pre-Trial Chamber.

12. The legal representative raises several concerns about the Joint Submission and the Agreement. First, she expresses reservations as to the chronological order in which

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<sup>13</sup> Prosecution and Defence’s Submission of a Public Redacted Version of Confidential Annexure “A” to the “Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons”, 29 June 2011, ICC-02/05-03/09-167 and public redacted annex.

<sup>14</sup> Order requesting observations from the legal representatives on the agreement as to the evidence pursuant to Rule 69 of the Rules of Procedure and Evidence, 22 June 2011, ICC-02/05-03/09-165.

<sup>15</sup> Observations of the Legal Representative on the agreement as to evidence pursuant to rule 69 of the Rules of Procedure and Evidence, 8 August 2011, ICC-02/05-03/09-190-tENG. The Registrar appointed Ms Ciss e, together with Mr Jens Dieckmann, as common legal representative of all the victims participating in the case on 13 September 2011: Notification of appointment of common legal representatives of victims, 14 September 2011, ICC-02/05-03/09-215 and confidential annexes 1 and 2.

the contested issues are presented.<sup>16</sup> The legal representative also takes issue with the substance of the proposed restrictions themselves.<sup>17</sup> It is submitted that the restrictions cause serious prejudice to victims' participation rights, in that they fail to reflect charges and factual evidence which are crucial to the victims' right to know, in all transparency, the full facts of the case, including the level of the accused persons' responsibility.<sup>18</sup>

13. According to the legal representative, "in light of the drastic truncation" of the facts and evidence set out in the Agreement, it is crucial for the interests of justice – which include the interests of the victims – that the Chamber request the prosecution and the defence to set out more comprehensively both the contested issues and the related facts and evidence.<sup>19</sup>

*Submissions on behalf of non-anonymous victims a/1646/10 and a/1647/10*

14. On 15 July 2011, Messrs Geoffrey Nice and Rodney Dixon, the legal representatives of victims a/1646/10 and a/1647/10 at the time of the submission ("legal representatives"), filed the "Notification by the Legal Representatives for Victims a/1646/10 and a/1647/10 of Modification of the Anonymous Status of the Two Victims"<sup>20</sup> and conveyed the names of both victims to the parties for the purpose of submitting observations in respect of the Agreement.<sup>21</sup>

<sup>16</sup> ICC-02/05-03/09-190-tENG, paragraphs 14 and 20.

<sup>17</sup> ICC-02/05-03/09-190-tENG, paragraph 14.

<sup>18</sup> ICC-02/05-03/09-190-tENG, paragraph 15.

<sup>19</sup> ICC-02/05-03/09-190-tENG, paragraph 19.

<sup>20</sup> Notification by the Legal Representatives for Victims a/1646/10 and a/1647/10 of Modification of the Anonymous Status of the Two Victims, 15 July 2011, ICC-02/05-03/09-180.

<sup>21</sup> ICC-02/05-03/09-180, paragraph 3.

15. Their observations on both the Joint Submission by the defence and the prosecution and on the redacted version of the Agreement were filed on 8 August 2011.<sup>22</sup>
16. It is submitted that the public version of the Agreement is so heavily redacted that it does not “permit the victims to make observations on the details of the Agreement”.<sup>23</sup> In the event, the legal representatives still made three observations with respect to the contested issues and the Agreement.
17. First, they point out that given the extensive redactions, the victims do not know whether the parties have agreed to any facts about the local Sudanese civilians who were present in the camp when it was attacked, including the two victims they represent.
18. Second, given that their clients were both present at the camp when it was attacked (and they themselves were attacked as civilians working in the camp), they “may be of assistance to the Trial Chamber in finding the truth and adjudicating th[e] issues”.<sup>24</sup>
19. Finally, the legal representatives inform that three additional victim applicants (whose applications were submitted to the Registry but not yet transmitted to the Chamber at the time of the submission) may also have pertinent evidence to

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<sup>22</sup> Observations by the Legal Representatives for Victims a/1646/10 and a/1647/10 on the “Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons” and the “Agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence between the Defence of Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus and the Office of the Prosecutor”, 8 August 2011, ICC-02/05-03/09-194.

<sup>23</sup> ICC-02/05-03/09-194, paragraph 2.

<sup>24</sup> ICC-02/05-03/09-194, paragraphs 5 to 7.



offer.<sup>25</sup> In addition, other persons, whose applications to participate in the proceedings were rejected by the Pre-Trial Chamber, were present in Haskanita when the camp was attacked and could provide evidence which may assist the Trial Chamber in determining whether the attack as charged was directed at civilians.<sup>26</sup>

## II. Applicable Law

20. In accordance with Article 21(1) of the Statute, the Chamber has considered the following provisions:

### Article 64 of the Statute

#### Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings

[ . . . ]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[ . . . ]

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

[ . . . ]

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.

[ . . . ]

(f) Rule on any other relevant matters.

8. [ . . . ]

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

<sup>25</sup> ICC-02/05-03/09, paragraph 7. Two of the applications referred to (a/6001/11 and a/6002/11) have now been transmitted to the Trial Chamber: Transmission to the Trial Chamber of applications for participation in the proceedings, 16 September 2011, ICC-02/05-03/09-216.

<sup>26</sup> ICC-02/05-03/09, paragraphs 8 and 9.

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

- (a) Rule on the admissibility or relevance of evidence; and
- (b) take all necessary steps to maintain order in the course of a hearing.

#### **Article 68 of the Statute**

##### **Protection of the victims and witnesses and their participation in the proceedings**

[. . .]

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

#### **Article 69 of the Statute**

##### **Evidence**

[. . .]

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

#### **Rule 69 of the Rules**

##### **Agreement as to evidence**

The Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of victims.

#### **Rule 134**

##### **Motions relating to the trial proceedings**

1. Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an *ex parte* procedure, served on the other party. For all requests other than those submitted for an *ex parte* procedure, the other party shall have the opportunity to file a response.

#### **Rule 140 of the Rules**

##### **Directions for the conduct of the proceedings and testimony**

1. If the Presiding Judge does not give directions under article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.

**Regulation 54(h) of the Regulations of the Court**

**Status conferences before the Trial Chamber**

At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, *inter alia*, the following issues:

(h) [t]he issues the participants propose to raise during the trial.

### III. Analysis

*The effect of the Joint Submission on the conduct of the trial*

21. A variety of preliminary issues need to be decided upon before the commencement of the trial. Some of the issues are governed by the Statute,<sup>27</sup> the Rules<sup>28</sup> and the Regulations.<sup>29</sup> Others are left to the Trial Chamber's discretion, to be determined in light of the fundamental principles set out in Article 64(2) of the Statute. Article 64(3)(a) of the Statute, Rule 134(1) of the Rules and Regulation 54(h) of the Regulations provide the Chamber with the power to rule upon the procedures to be followed for the trial.

22. The parties requested the Chamber "to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the [...] trial proceedings" only on the contested issues.<sup>30</sup> The parties recognise however that the Chamber retains the discretion to request additional evidence or "submissions on the issues before it".<sup>31</sup>

<sup>27</sup> Part 6 of the Statute.

<sup>28</sup> Chapter 6 of the Rules.

<sup>29</sup> Section 3 of Chapter 3 of the Regulations.

<sup>30</sup> ICC-02/05-03/09-148, paragraph 9.

<sup>31</sup> ICC-02/05-03/09-148, paragraph 6.

23. Regarding agreements as to the evidence between the parties, Rule 69 of the Rules, which governs agreements as to facts and evidence, uses the wording “*may* consider such alleged fact as being proven” (emphasis added). The use of the word “*may*” makes it clear that it is not mandatory for the Chamber to decide, at this stage, whether the uncontested facts, which are “contained in the [C]harges, the contents of a document, the expected testimony of a witness or the other evidence” are considered to be proven or not proven.

24. The Agreement reached by the parties covers a significant part of the factual allegations contained in the charges.<sup>32</sup> Accordingly, the presentation of evidence at trial will be limited to the following issues: i) whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; ii) if the attack is deemed unlawful, whether the accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and iii) whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations. At this stage the Chamber considers that the Agreement has the procedural effect of narrowing the scope of the issues to be addressed by the parties (and the participants) at trial. It also emphasizes that it remains within its discretion to request additional evidence and/or submissions on the alleged facts if required in the interests of justice. Given that the evidence and the submissions to be advanced at trial will be confined to the contested issues, the Chamber is persuaded that the suggested procedures will expedite the proceedings.<sup>33</sup>

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<sup>32</sup> ICC-02/05-03/09-148, paragraph 3 and confidential Annex A.

<sup>33</sup> According to the Appeals Chamber, the notion of “expeditiousness” shall be understood in the following manner: “Expeditionness is thus an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than just a component of the fair trial rights of the accused” Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” Prosecutor v. Thomas Lubanga Dyilo, 12 July 2010, ICC-01/04-01/07-2259, paragraph 47. “Article 64(2) of the Statute binds the Court to hold, not only a fair, but an expeditious trial too. Expeditionness denotes the speedy doing or transaction of something. The standard introduced by article 64(2) of the Statute is more stringent than the one imported by the requirement of

25. The Chamber is of the view that the procedures proposed in the Joint Submission will additionally shorten the length of the trial preparation. For example, the narrowed scope of the case should have the effect of minimising delays arising from disclosure and translation requirements. The issue of translation in this case has been dealt with in a number of filings.<sup>34</sup> In particular, the number of documents and witness statements to be disclosed and, where applicable, translated into Zaghawa, will be reduced as a consequence.

*The legal representatives' submissions on the scope of the Joint Submission*

26. The Chamber now turns to specific issues raised by the non-anonymous participating victims. In this regard, Rule 69 permits the Chamber to consider the interests of victims when considering a submission of agreed facts and whether a more complete presentation of the alleged facts is required. This consideration forms part of the overarching duties of the Chamber to ensure that the trial is fair and that the adopted procedures will facilitate the fair conduct of the proceedings in accordance with Article 64(2) and (3)(a) of the Statute.<sup>35</sup>

27. The legal representative raised several concerns about the Joint Submission and the Agreement. As regards the chronological order in which the contested issues are

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trial being held without undue delay, which is incorporated in the notion of a fair trial; a standard that the Court is duty bound to uphold" Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" Prosecutor v. Thomas Lubanga Dyilo, footnote 94. The said footnote quotes the Dissenting Opinion of Judge Georghios M. Pikis to the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo'", 21 October 2008, ICC-01/04-01/06-487, paragraph 15.

<sup>34</sup> See relevant background and references set out in the Order to the prosecution and the Registry on translation issues, 7 September 2011, ICC-02/05-03/09-211. See also Prosecution's Response to the Trial Chamber's Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, 14 April 2011, ICC-02/05-03/09-131, paragraph 10.

<sup>35</sup> ICC-02/05-03/09-165, paragraph 6.

presented, it is argued that issue (iii) – whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations – should be listed first, as the two other issues are contingent upon the finding as to the first issue.<sup>36</sup>

28. In the view of the Chamber, the parties have not submitted that evidence on the contested issues will be presented in chronological order. Notably, when discussing the scope of the initial questioning of a witness, the only limitation the parties have jointly suggested is that the questioning should be limited to the matters relevant to the three contested issues.<sup>37</sup> Be that as it may, the question for the Chamber is whether a more complete presentation of the evidence, regardless of the order, is required in the interests of the victims. The order in which the contested issues have been listed in the Joint Submission has no bearing on, and therefore cannot influence the Chamber's determination on, whether a more complete presentation of the alleged facts in the case is required in the interests of the victims.

29. The legal representative also objects to the substance of the proposed contested issues, arguing that their restricted scope affects the victims' right to know the full facts of the case and the level of the accused persons' responsibility. In particular, it is noted that neither the Joint Submission nor the Agreement contain any reference to the alleged facts and circumstances of the unarmed persons who were killed and/or injured.<sup>38</sup> According to the legal representative:

One of them was lying prone in a trench where he had taken refuge when the attackers shot him in the back, and another was under his bed when the same attackers went to kill him with a burst of gunfire.<sup>39</sup>

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<sup>36</sup> ICC-02/05-03/09-190-tENG, paragraph 20.

<sup>37</sup> Joint Submissions by the Office of the Prosecutor and the Defence regarding the Procedures to be Adopted for the Presentation of Evidence, 27 June 2011, ICC-02/05-03/09-166 paragraph 13.

<sup>38</sup> ICC-02/05-03/09-190-tENG, paragraph 17.

<sup>39</sup> ICC-02/05-03/09-190-tENG, paragraph 17.

30. The legal representative argues that the killing of unarmed persons in these circumstances constitutes a war crime.

31. As noted in a different context, in line with other Trial Chambers' findings and under the Statute, the Decision on the Confirmation of the Charges is the relevant document for defining the scope of the trial proceedings.<sup>40</sup>

32. Second, the Chamber notes that the jurisprudence of the Appeals Chamber has defined what should be considered to be the factual element of the charges:

In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67(1)(a) of the Statute.

33. The allegations advanced by the legal representative, serious as they are, were not discussed by the Pre-Trial Chamber in the Decision on the Confirmation of the Charges ("Confirmation Decision").<sup>41</sup> The circumstances in which AMIS personnel were killed or wounded by the attackers were not sufficiently "identified" in the Confirmation Decision so as to give the accused adequate notice for the purposes of trial in accordance with Article 67(1)(a) of the Statute. Therefore, those allegations cannot be asserted against the accused at trial. It is true that the Confirmation Decision refers to witnesses' statements, submitted by the prosecution for the purposes of the confirmation of the charges, and that those witnesses gave evidence

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<sup>40</sup> Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, 12 September 2011, ICC-02/05-03/09-205, paragraph 33 and footnote 86.

<sup>41</sup> Corrigendum of the "Decision on the Confirmation of Charges", 7 March 2011, ICC-02/05-03/09-121-Conf-Corr.

on the facts put forward by the legal representative.<sup>42</sup> However, the Confirmation Decision does not describe with sufficient clarity and detail the particular circumstances in which some of the individuals were killed or wounded to satisfy the requirements of Article 67(1)(a) of the Statute, as interpreted by the Appeals Chamber.

34. In addition, focusing on the second objective element of the crime of “violence to life”<sup>43</sup> confirmed as Count 1, the Confirmation Decision considered whether, at the time of the commission of the crime, the victims were taking no active part in the hostilities,<sup>44</sup> as follows:

102. In the Abu Garda Decision, the Chamber noted that under the Statute personnel involved in peacekeeping missions enjoy protection from attack unless and for such time as they take a direct part in hostilities or in combat-related activities. It also concluded that the protection does not cease if such persons only use armed force in exercise of their right to self-defence and that any determination as to whether a person is directly participating in hostilities must be carried out on a case-by-case basis. The Chamber reiterates these findings for the purposes of this decision.

103. The Chamber recalls its findings made earlier in the present Decision that there are substantial grounds to believe that AMIS was a peacekeeping mission established in accordance with the Charter of the United Nations, that it was impartial and its personnel was not allowed to use force except in self-defence and that AMIS personnel was entitled to the protection afforded to civilians at all the times relevant to the present case. Furthermore, the Chamber recalls its previous findings that there is no evidence suggesting that prior to the attack or at the time of the attack AMIS personnel took any direct part in hostilities or used force beyond self-defence. On the contrary, the evidence adduced in the present case gives the Chamber substantial grounds to believe that, when faced with hostilities from different rebel groups present in the area, AMIS personnel reduced their activities and promptly accommodated the wishes of the rebels, in order to avoid any type of conflict with them.

104. On this basis, the Chamber is satisfied that there are substantial grounds to believe that the individuals who were murdered and severely injured (amounting to attempted murders) within the context of the attack on the MGS Haskanita, enjoyed the protection

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<sup>42</sup> Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Conf-Corr, paragraphs 92 and 94.

<sup>43</sup> According to the Elements of Crimes, the objective elements are: (i) the perpetrator killed one or more persons; and (ii) such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.

<sup>44</sup> ICC-02/05-03/09-121-Conf-Corr, paragraph 101.



afforded to persons taking no active part in hostilities, within the meaning of article 8(2)(c)(i) of the Statute.<sup>45</sup>

35. In the view of the Chamber, the factual allegations identified by the Pre-Trial Chamber in support of the requirement that none of the victims of the crimes in Count 1 were taking active part in the hostilities, do not include the factual allegations raised by the legal representative, and they have not otherwise been *clarified* or *detailed* in the Confirmation Decision. The Pre-Trial Chamber found that the crime of violence to life in the form of murder (whether committed or attempted) requires, as (a second) objective element, that the victims were taking no active part in the hostilities.<sup>46</sup> The Pre-Trial Chamber found that this element was established exclusively based on the fact that AMIS personnel were protected as part of a peacekeeping mission not taking active part in the hostilities or using force beyond self-defence.<sup>47</sup> The Confirmation Decision did not rely on the particular circumstances surrounding some of the alleged killings as described by the legal representative at paragraph 29 above in order to conclude that the individuals were taking no active part in the hostilities.<sup>48</sup> Therefore, it is the scope of the Confirmation Decision, not the limitations that flow from the Joint Submission, that prevent the factual allegations raised by the legal representative from being adjudicated at trial.

36. The legal representative further objects to the Joint Submission on the basis that there is no reference to the “pillage of goods of a nature strictly personal and

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<sup>45</sup> ICC-02/05-03/09-121-Conf-Corr.

<sup>46</sup> ICC-02/05-03/09-121-Conf-Corr, paragraph 101.

<sup>47</sup> ICC-02/05-03/09-121-Conf-Corr, paragraphs 102 to 104.

<sup>48</sup> ICC-02/05-03/09-121-Conf-Corr, paragraph 75 discussed the fact that AMIS personnel did not take direct part in hostilities before or during the attack and any force that was used did not go beyond self-defence. This too is related to the protected status of peacekeeping personnel. Other circumstances to be considered in the determination of an unlawful killing are not described in the relevant paragraph.

civilian, having no link with the functioning of the mission, (salaries shoes, etc.)”.<sup>49</sup>

In the view of the Chamber, the legal representative’s assertion is unfounded.

37. The Agreement in its confidential version in fact encompasses the allegation that items unrelated to the functioning of the mission were pillaged by the attackers, which it is submitted were overlooked.<sup>50</sup> Hence, at this stage, a more complete presentation of this fact is not required in the interests of the participating victims. In any event, the Chamber is not limited by the terms of the Agreement and it may request any additional evidence it considers necessary for the determination of the truth or which may be relevant to the Chamber’s assessment of the harm suffered by victims.

38. The first challenge made by the legal representatives of victims a/1646/10 and a/1647/10 reads as follows:

*First*, given the extensive redactions, the victims do not know whether the parties have agreed any facts about the local Sudanese civilians who were present in the camp when it was attacked, and who included the two victims. The Prosecution had stated in the Document Containing Charges that local Sudanese civilians in the camp may have collaborated with the rebel forces who attacked the camp. The victims deny any such allegation and will show at trial that there is no evidence at all to support such an allegation. The victims reserve the right to submit observations on this topic in the event that it is covered in the Agreement of Facts, once de-redacted.<sup>51</sup>

39. A review of the Agreement shows that no reference is made to local Sudanese civilians in the camp having collaborated with the rebel forces who attacked the camp. However, the Confirmation Decision makes reference to these facts.<sup>52</sup> In due course, the participating victims may be permitted to advance their views and concerns on this issue, should it arise at trial, upon demonstrating that their

<sup>49</sup> ICC-02/05-03/09-190, paragraph 17.

<sup>50</sup> ICC-02/05-03/09-148-Conf-AnxA, paragraph 25.

<sup>51</sup> ICC-02/05-03/09-194, paragraph 4.

<sup>52</sup> ICC-02/05-03/09-121-Conf-Corr, paragraph 82.

personal interests are engaged. However, the Joint Submission and the Agreement do not, as such, have a bearing on the completeness of the presentation of the facts alleged by the victims.

40. Second, the legal representatives submit that their clients were present at the camp when it was attacked and were targeted themselves. The legal representatives have summarised the events witnessed by their clients which, they assert, may assist the Trial Chamber in determining whether the attack was lawful and whether the accused persons knew that the attack was lawful.<sup>53</sup>

41. The Chamber considers that such evidence falls within the scope of the contested issues. Following the approach set out above in paragraph 39, the Chamber notes that the Joint Submission does not limit the victims' ability to request a more complete presentation of the alleged facts. If the Chamber finds that such evidence is necessary for the determination of the truth, it will request the submission of that evidence, pursuant to Article 69(3) of the Statute.

42. Finally, the legal representatives refer to three additional victim applicants who may have pertinent evidence to offer related to attacks on civilians within the camp by armed rebel forces.<sup>54</sup> In addition, other persons who applied to participate in the proceedings were present in Haskanita when the camp was attacked. The applicants described in their victim applications how the attack on the camp spread to the village. Although, the Pre-Trial Chamber rejected these applications on the basis that the harm the victims suffered was not directly linked to the charges,

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<sup>53</sup> ICC-02/05-03/09-194, paragraphs 5 and 6.

<sup>54</sup> ICC-02/05-03/09-194, paragraphs 6 and 7.

according to the Legal Representatives, the evidence that they could provide may assist the Trial Chamber.<sup>55</sup>

43. Since the filing of the legal representatives' submissions, two of the applications referred to have been transmitted to the Chamber.<sup>56</sup> However, the Chamber will consider only those observations made on behalf of individuals (i) whose applications to participate in the proceedings as victims have been granted by a Chamber; and (ii) who have been allowed to present their views and concerns on the Joint Submission by the Chamber, namely participating victims who consented to lift their anonymity towards the defence and the prosecution. It follows that these observations will not be considered.

#### IV. Conclusions

44. In light of the above, the Chamber concludes that the procedures proposed in the Joint Submission will facilitate the fair and expeditious conduct of the proceedings.

45. Further, the Chamber is of the view that, at this stage, a more complete presentation of the alleged facts in the case is not required in the interests of justice.

46. For the reasons set out above, and without limiting its powers to request additional evidence or submissions, the Chamber takes note of the Agreement as to the facts and evidence and decides that:


- i. the trial will proceed only on the basis of the contested issues; and
- ii. the parties shall not present evidence or make submissions other than on the issues that are contested.

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<sup>55</sup> ICC-02/05-03/09-194, paragraphs 8 and 9.

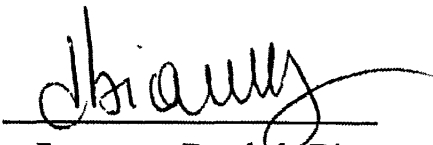
<sup>56</sup> See paragraph 14 above.

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



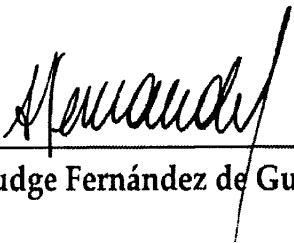
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**Judge Joyce Aluoch**



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**Judge Fatoumata Dembele Diarra**



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**Judge Fernández de Gurmendi**

Dated this 28 September 2011

At The Hague, The Netherlands