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No.: ICC-02/05-03/09
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PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

**Public Document
with Public Annexures A, B, C and D**

Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan

Sources: Defence Team of Abdallah Banda Abakaer Nourain
Defence Team of Saleh Mohammed Jerbo Jamus

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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. In this application Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“the accused”) respectfully request the Pre-Trial Chamber to seek co-operation from the Government of Sudan, pursuant to Article 57(3)(b) of the Statute.
2. The accused request that the Pre-Trial Chamber require the Government of Sudan to provide the following assistance:-
 - a) grant visas to members of the Defence team so as to enable them to enter Sudan; and
 - b) allow those members of the Defence team access to Sudan, including but not limited to the following locations: Khartoum, Jebel Adola (Southern Darfur State), and the following locations in Northern Darfur state: Gargar (Kutum locality, Korní, Um Baru and Tina rural council), Debri (Kutum locality, Korní, Um Baru and Tina rural council), Togai (Kutum locality, Korní, Um Baru and Tina rural council), Abu Leha (Kutum locality, Korní, Um Baru and Tina rural council), Kutum (Kutum locality, Kutum rural and Fata Borno rural council), Kafod (Al Fasher locality, Tawila and Korma rural council), Sarafaya (Al Fasher locality, Al Fasher and Kuma rural council), Al Fasher (Al Fasher locality, Al Fasher & Kuma rural council), Dar es Salam (Al Fasher locality, Dar es Salam rural council), Wada’ah (Al Fasher locality, Dar es Salam rural council), Umm Katkoot (Um Kadada locality, Al Tawisha rural council), Haskanita (Um Kadada locality, Al Lait rural council), Dalil Babiker (Um Kadada locality, Al Lait rural council), Sigeir Umm (Um Kadada locality, Al Tawisha rural council), and Usban (Um Kadada locality, Al Tawisha rural council) in order to conduct investigations relevant to the *Prosecutor v Abdallah Banda Abakaer Nouran & Saleh Mohammed Jerbo Jamus* (ICC-02/05-03/09); and

- c) permit Defence investigations that shall be unhindered and unmonitored by the Government of Sudan or any agency of the state, and which shall include, but shall not be limited to:-
- i. visiting the localities listed in 2(b) above;
 - ii. meeting individuals present in Sudan with a view to their being called as Defence witnesses or in order to establish investigative needs;
 - iii. interviewing any putative witnesses or other persons identified by the Defence;
 - iv. recording evidence (by means of video, photography, audio or other means) whilst in Sudan;
 - v. receiving documents, photographs and other evidence material to the preparation of the defence;
- d) respond to this request within a period of four weeks from the date of any order.

II. Background

3. On 27 August 2009, Pre-Trial Chamber I issued its Second Decision on the Prosecutor's Application under Article 58¹, in which it issued summonses to appear for the accused.
4. The accused voluntarily submitted to the jurisdiction of the Court in answer to the summonses issued. This led to their first appearance before the Court on 17 June 2010. On that occasion, the Pre-Trial Chamber scheduled that the confirmation of charges hearing would start on 22 November 2010. On 22 October 2010, Pre-Trial Chamber I issued its Decision², postponing the commencement of the confirmation hearing from 22 November 2010 to 8 December 2010.

¹ ICC-02/05-03/09-1.

² ICC-02/05-03/09-81.

5. On 19 October 2010, the Office of the Prosecutor filed the Document Containing the Charges³. This indicated that the accused were charged with offences under Article 8(2)(c)(i), Article 8(2)(e)(iii) and Article 8(2)(e)(v) of the Statute. All the charges relate to an attack on MGS Haskanita which occurred on 29 September 2007.
6. In order to properly prepare their case the Defence need to visit various locations within Sudan in order to conduct investigations and locate and interview witnesses.
7. On 1 September 2010, the Defence wrote to the Registry of the International Criminal Court (Annexure A) seeking assistance in arranging a mission to Sudan, including, inter alia, support and assistance with logistics, security and travel documents. In that letter the Defence indicated that it needs to visit:

Khartoum, Jebel Adola (Southern Darfur State), and the following locations in Northern Darfur state: Gargar (Kutum locality, Korní, Um Baru and Tina rural council), Debri (Kutum locality, Korní, Um Baru and Tina rural council), Togai (Kutum locality, Korní, Um Baru and Tina rural council), Abu Leha (Kutum locality, Korní, Um Baru and Tina rural council), Kutum (Kutum locality, Kutum rural and Fata Borno rural council), Kafod (Al Fasher locality, Tawila and Korma rural council), Sarafaya (Al Fasher locality, Al Fasher and Kuma rural council), Al Fasher (Al Fasher locality, Al Fasher & Kuma rural council), Dar es Salam (Al Fasher locality, Dar es Salam rural council), Wada'ah (Al Fasher locality, Dar es Salam rural council), Umm Katkoot (Um Kadada locality, Al Tawisha rural council), Haskanita (Um Kadada locality, Al Lait rural council), Dalil Babiker (Um Kadada locality, Al Lait rural council), Sigeir Umm (Um Kadada locality, Al Tawisha rural council), and Usban (Um Kadada locality, Al Tawisha rural council).

³ ICC-02/05-03/09-79.

8. On 21 September 2010, the Registry replied to the Defence (Annexure B). It indicated that “taking into account the volatile security situation” it was not in a position to provide the requested assistance.
9. On 24 September 2010, the Defence wrote to the Embassy of the Republic of the Sudan in The Hague to request permission to visit Sudan in order to investigate the accuseds’ case. The Embassy refused to accept this letter and it was returned to the Defence unopened (Annexure C).
10. On 12 October 2010, at or around 10.00am, two members of the Defence team visited the Embassy of the Republic of the Sudan in The Hague in an attempt to deliver the letter. A consular official at the Embassy indicated that the Embassy would not accept any letter from the Defence, or indeed any documentation coming from or relating to the International Criminal Court. An affidavit describing this visit is annexed to this application (Annexure D).

III. Security Council Referral

11. On 31 March 2005, the United Nations Security Council adopted Resolution 1593/2005. In this Resolution the Security Council:-

- 1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;*
- 2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.*

IV. Relevant Provisions

12. Article 57(3) provides that:-

In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a)...

(b) *Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence...*

13. Rule 116(1) provides that:-

the Pre-Trial Chamber shall issue an order or seek co-operation under article 57(3)(b) where it is satisfied:-

(a) that such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person's defence; and

(b) In a case of cooperation under Part 9, that sufficient information to comply with article 96, paragraph 2, has been provided.

14. The Defence respectfully submit that the effect of these provisions, read with Security Council Resolution 1593/2005, is to confer upon the Pre-Trial Chamber the power to require the relevant cooperation from Sudan in the circumstances of this case.

V. The Threshold for granting an Order pursuant to Article 57(3)(b)

15. Article 57(3)(b) enables the Pre-Trial Chamber to issue such orders as "*may be necessary to assist the person in the preparation of his or her defence*". Article 57(3)(b) is complemented by Rule 116(1)(a)⁴, which provides that the Pre-Trial Chamber shall seek cooperation where it is satisfied that this "*would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person's defence*". Accordingly the Pre-Trial Chamber should determine this application on the basis of

⁴ *Prosecutor v Katanga and Chui*, Decision on the Defence Application pursuant to Article 57(3)(b) of the Statute to seek the cooperation of the Democratic Republic of Congo, 25 April 2008, ICC-01/04-01/07-444, p. 5.

whether the relief sought would facilitate the collection of evidence which may be material to the proper preparation of the defence. If so, the Pre-Trial Chamber “shall” issue the requested order.

16. The proper preparation of the defence is an aspect of the right to a fair hearing enshrined in Article 67 of the Statute. Article 67(1)(b) guarantees to an accused the right to “adequate time and facilities for the preparation of the defence” and Article 67(1)(e) guarantees to an accused the right to “present other evidence” at trial.
17. The Defence submit that Article 57(3)(b) exists to correct the imbalance that exists between the investigatory powers of the Prosecutor and the Defence⁵. It achieves this by allowing the Defence to request the Court to issue appropriate orders⁶.

VI. This Application Satisfies Article 57(3)(b)

18. The Defence submit that the cooperation sought (i.e. Defence investigative missions to Sudan) would plainly facilitate the collection of evidence which may be material to the proper preparation of the defence. Thus the requirements in Article 57(3)(b) and Rule 116(1)(a) are met.
19. The importance of conducting investigations in Sudan is that the alleged war crimes stem from an attack against MGS Haskanita, which is located in Northern Darfur state. Inevitably, a significant number of witnesses to the attack and to the broader situation in the region are located in Darfur. In order to carry out even the most basic investigation into this case, it is essential that the Defence visit the *locus in quo*, and it is essential that the Defence are able to

⁵ Triffterer comments that “subparagraph 3(b) attempts to balance the situation of the accused person and the Prosecutor at the pre-trial stage, by providing – even if imperfectly – some degree of ‘equality of arms’ during the procedural phase”. Commentary on the Rome Statute of the International Criminal Court (2008), p. 1124, para. 18.

⁶ Triffterer describes this as a procedural right and notes that it is through article 57(3)(b) that the Statute gives effect to the accused person’s right to “adequate time and facilities” under article 67(1)(b) at the pre-trial stage. Ciampri also links article 57(3)(b) to the right of the accused to “present other evidence” under article 67(1)(e) of the Statute, concluding that “[f]urthermore the Court should issue a request for assistance on behalf of the accused so as to ensure respect of his or her right to prepare and present evidence in his or her defence, including by obtaining the attendance and examination of witnesses”. Ciampri, “Other Forms of Cooperation”, in Cassese, Gaeta and Jones, *The Rome Statute of the International Criminal Court*, Volume 2, p. 1741.

locate and interview witnesses in Sudan. The Defence cannot divulge the specific lines of enquiries that they wish to undertake. To do so would be to reveal its strategy in advance of trial to the detriment of the accused. There is nothing within the provisions of Article 57(3)(b) and Rule 116(1) that requires such disclosure in order for the present application to be granted.

20. This application is necessary because the Defence have exhausted other possibilities. It has sought assistance from the Registry. After proper deliberations, the Registry concluded that it cannot help. The Defence can ask no more of the Registry. As set out above, the Defence have conscientiously tried to contact the Government of Sudan directly, but to no avail. In the circumstances this application is the only option remaining to the Defence⁷.

21. It is no answer to this application to suggest that the Defence should utilise investigators or local resource persons. It is submitted that any investigator who is part of the Defence team will find it impossible to obtain a visa to access Sudan, for the reasons set out at paragraphs 7 – 10 above. Nor can the Defence utilise local resource persons from Darfur. The Defence cannot be expected to utilise individuals that they have not met or vetted for vital tasks such as looking for witnesses. The Defence cannot go into Darfur to meet, interview and select such individuals. Furthermore, even if the Defence identified a suitable local person, by cooperating with the International Criminal Court that person would be at risk of harassment and attack by the Government of Sudan⁸. These risks are wholly unacceptable.

⁷ In considering whether granting orders for cooperation relating to the disclosure of documents was necessary, under Rule 54 of its Rules of Procedure and Evidence, the International Criminal Tribunal for Rwanda has considered what steps the Defence should take prior to making such an application. Delivering a letter to the relevant State which went unanswered sufficed. *Prosecutor v Karemera et al*, ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Request for Cooperation of Government of Rwanda: Statements of Witness BDW, 25 July 2007, para. 7. Similarly, evidencing the relevant State's general policy of not cooperating with non-obligatory requests also sufficed. *Prosecutor v Ndindliyimana et al*, ICTR-00-56-T, Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of The Netherlands Pursuant to Article 28 of the Statute, 13 February 2006, para. 7.

⁸ The Prosecutor's own filing in *Prosecutor v Harun and Ali Kushayb*, 19 April 2010, ICC-02/05-01/07-48-Red, indicates at paragraphs 33 – 36 that "the Government of Sudan is actually harassing and attacking any person suspected of cooperating with the Court".

22. Likewise, it is no answer to suggest that the Defence seek protective measures and interview witnesses outside of Darfur. Some potential witnesses have been identified and spoken to from the evidence disclosed by the Prosecutor and / or by the independent efforts of the Defence. However, following investigations, the Defence has reason to believe that there are persons of interest to the Defence, including putative witnesses, present in Darfur. It is believed that these individuals could provide material evidence to the Defence and / or cast doubt on or otherwise clarify aspects of the Prosecutor's case. It is simply not possible to discover the identity of such critical witnesses unless the Defence can enter Darfur.

23. The Defence submit that this application contains all the information that the Defence would be required to provide in a request for assistance pursuant to Article 96(2)⁹. It therefore also satisfies Rule 116(1)(b).

VII. What Cooperation can the Pre-Trial Chamber Request?

24. Normally invitations to provide assistance, addressed to States not party to the Rome Statute, would be based upon an ad hoc arrangement or agreement pursuant to Article 87(5)(a)¹⁰. However, the Defence submit that the Court is not so limited on this occasion. The obligation of the Government of Sudan to cooperate with the Court stems directly from the Charter of the United Nations¹¹. Security Council Resolution 1593/2005 obliges the Government of Sudan to "cooperate fully with and provide any necessary assistance to the Court"¹².

⁹ In the event that the Pre-Trial Chamber is not satisfied that the application contains sufficient evidence to satisfy article 96(2), the Defence invites the Chamber to assist the Defence in finding the missing information. Triffterer indicates at page 1125, paragraph 24, that "the Chamber may, however, assist the Defence in obtaining the missing information, if the defence meets with disproportional difficulties to obtain it".

¹⁰ Article 87(5)(a), which is within Part 9 of the Statute, provides that "the court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis".

¹¹ *Prosecutor v Harun and Ali Kushayb*, Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, 25 May 2010, ICC-02/05-01/07-57, p. 6.

¹² This was affirmed by the President of the Security Council in a Statement made on 16 June 2008, which stated that "the Council urges the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with the Court, consistent with resolution 1593 (2005)".

25. There is nothing in the terms of this Resolution to indicate any restrictions on the Government of Sudan's obligation to cooperate. Nor is the obligation to cooperate expressly limited to the forms of cooperation set out in Part 9 of the Statute. Accordingly, the Defence submit that the Pre-Trial Chamber can grant this request for relief pursuant to the terms of the Security Council Resolution itself¹³.

26. Furthermore the Defence submit that the relief sought is consistent with the forms of cooperation that the Court could request from State Parties. These forms of cooperation are listed in Article 93(1) which provides that:

"States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

...

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court".

27. The Defence rely on Article 93(1)(l). It is respectfully submitted that this provision is deliberately broad¹⁴. No limitation to it appears either in the

¹³ The Security Council Resolution is binding upon the Government of Sudan. It is a Member State of the United Nations. Article 25 of the United Nations Charter provides that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Triffterer summarises the point: "the Security Council – acting under Chapter VII of the UN Charter – may oblige all UN Member States to cooperate with the Court in a given case. The binding nature of such a cooperation regime for States not Parties to the Statute would then stem from the UN Charter which – according to article 103 of the UN Charter – takes priority". (p. 1523, para. 19) This is supported by Schabas in *The International Criminal Court* at page 982: "Non-party States may also be required to cooperate with the Court by virtue of a Security Council Resolution, at least where the situation has been referred by the Council pursuant to article 13(b) of the Rome Statute". He goes on to give the referral of the situation in Darfur as an illustration of this point.

¹⁴ Triffterer describes article 93(1)(l) as a catch-all and notes that "the State Parties are obligated to grant any type of assistance to the International Criminal Court that is not prohibited by their national law". (p. 1579, para. 32) Schabas too describes article 93(1)(l) as a residual clause, noting that "States Parties must honour requests covered by the first eleven subparagraphs, but in addition they must also respond to the extent that other types of assistance are 'not prohibited'". (p. 1019)

Statute or in the Rules. It is broad enough to encompass facilitating visits to the locations set out above¹⁵.

28. Similarly the relief requested is consistent with that which the Court may invite a State not party to the Statute to provide. The phrase “provide assistance under this Part” in Article 87(5)(a) indicates that the forms of cooperation which the Pre-Trial Chamber may request from a State not party to the Statute are equivalent to those forms of cooperation listed in Part 9¹⁶.

Relief Requested

1. Based on the above submissions, the Defence respectfully request the Pre-Trial Chamber to require the Government of Sudan to provide the following assistance:-

- a) grant visas to members of the Defence team so as to enable them to enter Sudan;
- b) allow those members of the Defence team access to Sudan, including but not limited to the following locations: Khartoum, Jebel Adola (Southern Darfur State), and the following locations in Northern Darfur state: Gargar (Kutum locality, Korní, Um Baru and Tina rural council), Debri (Kutum locality, Korní, Um Baru and Tina rural council), Togai (Kutum locality, Korní, Um Baru and Tina rural council), Abu Leha (Kutum locality, Korní, Um Baru and Tina rural council), Kutum (Kutum locality, Kutum rural and Fata Borno rural

¹⁵ Moreover the obligation to cooperate extends to providing access to persons for interviews. The *Ndindylimana* Trial Chamber, in interpreting Rule 54 of the ICTR Rules of Procedure, the wording of which is similar to Article 57(3)(b) of the Statute, ruled that the Chamber is competent to direct a request for cooperation to a State to facilitate a meeting between a party and a person in that State. (*Prosecutor v Ndindylimana et al*, ICTR-00-56-T, Decision on Nzuwonemeye’s Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium, 9 November 2005, para. 9) Furthermore, the same Trial Chamber ruled that in instances where the defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet with the witness and assess his testimony. (*Prosecutor v Ndindylimana et al*, ICTR-2000-56-T, Decision on Nzuwonemeye’s Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute, 7 June 2006, para. 8). This must apply *a fortiori* in circumstances where the Defence is not afforded access to a territory to identify certain witnesses.

¹⁶ “[T]he phrase ‘to provide assistance under this Part’ indicates that the ad hoc cooperation regime between the Court and a non-State Party shall reflect the cooperation regime of Part 9”. Triffterer, p. 1524, para. 21.

council), Kafod (Al Fasher locality, Tawila and Korma rural council), Sarafaya (Al Fasher locality, Al Fasher and Kuma rural council), Al Fasher (Al Fasher locality, Al Fasher & Kuma rural council), Dar es Salam (Al Fasher locality, Dar es Salam rural council), Wada'ah (Al Fasher locality, Dar es Salam rural council), Umm Katkoot (Um Kadada locality, Al Tawisha rural council), Haskanita (Um Kadada locality, Al Lait rural council), Dalil Babiker (Um Kadada locality, Al Lait rural council), Sigeir Umm (Um Kadada locality, Al Tawisha rural council), and Usban (Um Kadada locality, Al Tawisha rural council) in order to conduct investigations relevant to Prosecutor v Banda and Jerbo ICC-02/05-03/09;

- c) permit Defence investigations that shall be unhindered and unmonitored by the Government of Sudan or any agency of the state, and which shall include, but shall not be limited to:-
 - i. visiting the localities listed in 2(b) above;
 - ii. meeting individuals present in Sudan with a view to their being called as Defence witnesses or in order to establish investigative needs;
 - iii. interviewing any putative witnesses or other persons identified by the Defence;
 - iv. recording evidence (by means of video, photography, audio or other means) whilst in Sudan;
 - v. receiving documents, photographs and other evidence material to the preparation of the defence;
- d) respond to this request within a period of four weeks from the date of any order.

2. The Defence request the Pre-Trial Chamber to order, in accordance with articles 87, 93 and 96 of the Statute, and rules 176(2) and 177 of the Rules, the Registrar to, as soon as practicable:
- a) prepare the necessary cooperation request, which shall include all information required by articles 93 and 96 of the Statute; and
 - b) transmit to the relevant authorities of the Government of Sudan such cooperation request through the proper channels of communication as provided for in Article 87 of the Statute and Rule 177 of the Rules.¹⁷

Respectfully Submitted,



Mr Karim A. A. Khan

Defence Counsel for Abdallah Banda Abakaer Nourain and
Saleh Mohammed Jerbo Jamus

Dated this 10th Day of November 2010

At The Hague, The Netherlands

¹⁷ This would follow the practice of the Pre-Trial Chamber. See *Prosecutor v Katanga and Chui*, Decision on the Defence Application pursuant to Article 57(3)(b) of the Statute to seek the cooperation of the Democratic Republic of Congo, 25 April 2008, ICC-01/04-01/07-444, p. 10.