

Annexure O

CONSTITUTIONAL COURT OF SOUTH AFRICA

December 30, 2011

Karim A. A. Khan QC
Lead Counsel
Defence Teams of Abdallah Banda and Saleh Jerbo before the ICC
The Hague
The Netherlands

Dear Karim:

Subject: Defence Application for a Temporary Stay of Proceedings in *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus* (ICC-02/05-03/09)

I write to you in support of the Application for a temporary stay of proceedings (“Application”) that the Defence teams of Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“Defence”) intend to file. The factual circumstances and legal issues raised by the Defence in the Application go to the core of the fair trial rights of accused persons guaranteed by Article 67(1) of the Rome Statute and basic international human rights principles. It is for this reason – my conviction that all trials must be fair – that I write this letter and hereby consent that it be appended as an annexure to your Application.

As noted in the Application, accused persons – whether before domestic or international judicial bodies – have the fundamental right to conduct investigations at the locations where crimes are alleged to have taken place. As set out in the Application, at present the Defence is barred from entering the territory of the state in which the alleged crimes are said to have occurred, let alone being able to enter the specific areas of interest to the Defence investigation.

In my experience as Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, there have been instances of witnesses fundamental to a case only being discovered by, or coming forward to, prosecution

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investigators when such investigators have been on the ground conducting investigations in the places where crimes are alleged to have occurred. To conduct trial proceedings in circumstances where the Defence is denied this investigative opportunity – through no fault of its own – is, in my view, a breach of an accused's rights to such an extent as to render a fair trial not possible.

As a former judge, it is difficult for me to imagine conditions under which such a violation of an accused's rights may be remedied by anything short of facilitating the necessary *in situ* defence investigations. As the Application states, while the Defence has been able to meet with certain potential witnesses outside of Darfur, it is unable to conduct investigations within Darfur to locate and speak to other persons of interest identified as a result of its own investigations and its review of Prosecution disclosure. More important, it is unable to conduct the basic on-the-ground investigations necessary to the discovery of hitherto unknown potential witnesses who may be essential to the Defence case and the Trial Chamber's truth-finding role. Reliable, detailed and relevant documentary evidence, even if made available to the Defence, could not fully fill this investigative lacuna.

Messrs. Banda and Jerbo have voluntarily surrendered to the Court from a state that is unequivocally opposed to the legitimate exercise of the ICC's jurisdiction pursuant to United Nations Security Council Resolution 1593 (2005). Were the trial against them to proceed under the circumstances set out in the Application, these accused would be placed in a position not faced by any of the four accused persons arrested and brought to trial before the Court, nor, to my knowledge, any other accused brought to trial before the various internationalised and hybrid judicial institutions.

To be clear, it is primarily the legal obligation of the Sudanese authorities to cooperate with the Court and permit the Defence to conduct legitimate investigations within Sudan. Failing this, it is the responsibility of the international community as a whole, and in particular the Security Council and states and regional organisations involved in the Darfur situation, to impose on Sudan through diplomatic and other means the conditions necessary to permit proper on-the-ground investigations by both the Office of the Prosecutor and the Defence. This entails ensuring the authorisation to conduct investigations in Sudan and addressing the security and operational concerns raised in the Application with respect to investigators and potential witnesses.

I do not give my support lightly to this application for a *temporary* stay of proceedings. After a lifetime of working in the areas of human rights and international humanitarian law, I

wholeheartedly support and have strived towards the solemn goal expressed in the Preamble to the Rome Statute that impunity must end for the perpetrators of the most egregious crimes under international law. It would be inimical to this lofty purpose if the fundamental fair trial rights of accused persons are not strictly adhered to in pursuing justice on behalf of the world community.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R. Goldstone', with a horizontal line underneath the name.

Richard J. Goldstone

Justice of the Constitutional Court (retired)