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TRIAL CHAMBER IV

Before:

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

**with Confidential and *Ex Parte* Annexures A, B, C, F and H available only to the
Defence, Confidential Annexures D and G and Public Annexure E**

**Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an
order for the preparation and transmission of a cooperation request to the African
Union**

**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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**Unrepresented Applicants
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Ms. Silvana Arbia

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Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully request the Trial Chamber to ask the African Union to provide documents to the accused pursuant to Article 57(3)(b), Article 64(6)(a) and Article 87(6) of the Statute.
2. The Defence request the Trial Chamber to ask the African Union to provide the documents listed in the attached confidential and *ex parte* Annexure (confidential and *ex parte* Annexure A). The Defence submit that this classification is appropriate because the list of documents reveals the direction and focus of the Defence investigation. There is no duty, obligation or requirement in either the Statute or the Rules of Procedure and Evidence ("Rules") which requires the Defence to disclose such information. Moreover, to do so might prejudice the Defence investigation.¹

II. Background

3. On 7 March 2011, Pre-Trial Chamber I issued its decision on the confirmation of charges.² It confirmed three charges against the accused:-
 - a. Attacking the Haskanita Military Group Site ("MGS Haskanita") on 29 September 2007 and killing eight African Union peacekeepers and attempting to kill twelve African Union peacekeepers in violation of Article 8(2)(c)(i) of the Statute;
 - b. Intentionally directing attacks against AMIS peacekeeping personnel, installations, materials, units and vehicles at MGS Haskanita in violation of Article 8(2)(e)(iii); and
 - c. Appropriating property belonging to AMIS and its personnel in the course of the attack on MGS Haskanita in violation of Article 8(2)(e)(v) of the Statute.

¹ For the same reasons the Defence submit that Annexures B, C, F and H should also be classified confidential and *ex parte* available only to the Defence.

² ICC-02/05-03/09-121.

4. All three charges arise from an attack on the African Union base at MGS Haskanita. The African Union possesses reports specifically about the attack and other documents about the operation of MGS Haskanita in the period prior to the attack. These documents are material to the proper preparation of the Defence case.
5. On 7 October 2010, the Defence wrote to the African Union to request copies of a list of relevant documents (confidential and *ex parte* Annexure B).
6. On 7 October 2010, the Defence also wrote to the United Nations Department of Peacekeeping Operations to request copies of relevant documents (confidential and *ex parte* Annexure C).
7. On 20 October 2010, Djeneba Diarra of the Office of the Legal Counsel of the African Union replied to the Defence to say that “your request has been forwarded to the Ag. Director of Peace & Security Department for his necessary action” (confidential Annexure D³).
8. On 4 January 2011, the Defence wrote again to the United Nations Department of Peacekeeping Operations to chase a response to its first letter (Annexure E).
9. On 10 January 2011, the Defence wrote once again to the African Union to request copies of further relevant documents and to seek a substantive response to their earlier letter (confidential and *ex parte* Annexure F).
10. On 11 January 2011, two members of the Defence team telephoned Djeneba Diarra at the Office of the Legal Counsel of the African Union at their headquarters in Addis Ababa. They were told that Ms. Diarra was away from her office. They were given an email address for Ms. Diarra. On 11 January 2011, the Defence transmitted the letter dated 10 January 2011 to Ms. Diarra by email. An affidavit describing these events is annexed to this application (confidential Annexure G⁴).

³ Annexure D is classified as “confidential” because it displays the signature of a third party.

⁴ Annexure G is classified as “confidential” because it contains the personal business email address of a third party.

11. On 22 February 2011, Alain Le Roy, the Under Secretary-General for Peacekeeping Operations, wrote to the Defence (confidential and *ex parte* Annexure H). The letter confirms that the United Nations is not “in possession of any documentation of the kinds” sought by the Defence. It suggests that the Defence direct its requests for documentation to the African Union.
12. On numerous occasions, the Defence team have telephoned Ms. Diarra and the African Union headquarters. The African Union has not provided any update on the status of their response to the above letters. These telephone calls are described further in confidential Annexure G.
13. As set out above, the Defence have tried every available means to gain access to the documents. It is left with no alternative but to make this application for the Trial Chamber’s assistance.

III. Security Council Referral

14. 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

15. 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..."

16. 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

(c) information to comply with article 96, paragraph 2, has been provided."

17. Article 87(6) provides that:-

"The Court may ask any intergovernmental organization to provide information or documents."

18. Article 64(6) provides that:-

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

(a) Exercise any function of the Pre-Trial Chamber referred to in article

61(11)..."

19. Article 61(11) provides that:-

"once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which...may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings."

20. The Defence respectfully submit that the effect of these provisions is to confer upon the Trial Chamber the power to ask the African Union to provide documents in the circumstances of this case.

V. The Trial Chamber has the Power to Grant this Application

21. In order to carry out its functions, the Statute vested the Trial Chamber with certain powers. The Defence submit that the effect of Article 64(6)(a) read with Article 61(11) is to allow the Trial Chamber to exercise “any” function of the Pre-Trial Chamber. This must include the functions specified in Article 57.⁵

22. The only restrictions that the Statute places on the functions that the Trial Chamber may exercise are that the function must be “relevant” and “capable of application”. Neither restriction applies. Article 57(3)(b) exists to “assist the person in the preparation of his or her defence”. Assisting the accused in the preparation of his or her defence is just as relevant at the trial stage as at the pre-trial stage. Moreover, there is no reason why the order sought is not capable of being granted at this stage in proceedings.

23. Furthermore, the Trial Chamber’s role at trial is to search for the truth, as indicated by Article 69(3) of the Statute. The Defence submit that searching for the truth entails receiving and hearing evidence to enable the Trial Chamber to form a full and proper picture of the matters to be decided at trial and to properly determine the contested issues. Justice is served if the Chamber is able to fully access evidence which will assist in establishing the truth. Therefore, the order requested in this application is in line with the Trial Chamber’s role in seeking the truth.

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

24. Article 57(3)(b) enables the Pre-Trial Chamber, and pursuant to Article 61(11) the Trial Chamber, to issue such orders as “may be necessary to assist the

⁵ Triffterer comments that “the wording used is very broad and covers all of the functions of the Pre-Trial Chamber described in Part V of the Statute (p1212 paragraph 20 of Commentary on the Rome Statute of the International Criminal Court, 2nd edition, by Triffterer). Terrier, writing in Cassese Gaeta and Jones, the Rome Statute of the International Criminal Court, specifically notes that these functions include Article 57 (p1270 Volume 2).

person in the preparation of his or her defence". Article 57(3)(b) is complemented by Rule 116(1)(a),⁶ which provides that the relevant 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 Trial Chamber should determine this application on the basis of whether the relief sought would facilitate the collection of evidence which may be material to the proper preparation of the defence. If so, the Trial Chamber "shall" issue the requested order.

25. For the avoidance of doubt, the Defence submit that the test in Article 57(3)(b) requires the Defence to establish that asking the African Union to provide documents 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. Since this application establishes that these documents are material to the proper preparation of the Defence, the Trial Chamber need not consider whether the documents are also material to the issues being adjudicated, though the Defence submit that this test is also satisfied.

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

26. The Defence submit that asking the African Union to provide documents would plainly facilitate the collection of evidence which may be material to the proper preparation of the Defence case. Thus, the requirements in Article 57(3)(b) and Rule 116(1)(a) are met.
27. The specific documents sought are detailed in confidential and *ex parte* Annexure A. As is detailed in that annexure, all the documents have been, or are likely to be, in the possession of the African Union. It is submitted that these documents are plainly material to the proper preparation of the Defence

⁶ *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.

case. They are either directly related to the very events that form the subject matter of the trial, concerning which events they are likely to contain relevant factual information, or they are related to establishing the necessary context to those events.

28. It is necessary to make this application because the Defence have no other means of gaining access to these documents. Firstly, the Defence have asked the African Union to disclose these documents. It has not provided the access requested. This application is the only way for the Defence to obtain the documents from the African Union. Secondly, the Defence cannot get the documents from any other source. The Defence cannot obtain these documents from either the Prosecutor or the United Nations, since neither possesses the documents.⁷

VIII. This Application is Necessary to Protect a Fair Hearing

29. The Defence submit that this application is a necessary step in providing for a fair hearing. The right to a fair hearing is enshrined in Article 67 of the Statute.

30. The accused have, as a “minimum guarantee”, the right to “adequate time and facilities for the preparation of the defence” by Article 67(1)(b). This provision is similar to Article 6(3)(b) of the European Convention on Human Rights and Article 14(3)(b) of the International Covenant on Civil and Political Rights. “Adequate facilities” under the International Covenant on Civil and Political Rights is generally understood to comprise “access to the documents, records, etc, necessary for the preparation of the defence”⁸. The European Court of Human Rights also considers that “adequate facilities” includes the disclosure of documents, including the disclosure of potentially exonerating material.⁹ The Defence submit that Article 67(1)(b) protects the accused’s right to access these documents.

⁷ Although some of the documents are referred to by Witness DAR-OTP-WWWW-0315 and Witness DAR-OTP-WWWW-0355, these documents were not gathered by the Prosecutor. Confidential and *ex parte* Annexure H makes it clear that the UN does not have the documents.

⁸ Nowak, CCPR Commentary 2nd revised edition, p332 paragraph 50.

⁹ *Natunen v. Finland* ECHR Application Number 21002/04, *Can v. Austria* 9300/81 at paragraph 53 Series A Volume 96, *Rowe and Davis v. United Kingdom* Application Number 28901/95.

31. The accused also have, as a “minimum guarantee”, the right to “present other evidence” at trial. In reliance on this right, the accused intend to present the documents provided by the African Union (depending on their contents) as evidence at trial. They cannot exercise this right unless the documents are first provided to the Defence.

32. Asking the African Union to provide these documents is necessary so that the Defence have adequate facilities and so that the Defence are able to present evidence at trial. In order to ensure that the trial is fair, the Defence respectfully submit that it is necessary to grant this application.¹⁰

IX. What Cooperation can the Court seek under Article 87(6)?

33. Article 87(6) allows the Court to seek cooperation from “*any intergovernmental organization*”.

34. The Defence submit that the African Union is plainly an intergovernmental organization because it operates between the governments of African States. The Court has itself referred to the African Union as an intergovernmental organization.¹¹

35. Further, the Defence submit that it is clear that Article 87(6) was intended to apply to peacekeeping organisations of the nature of AMIS. The Defence’s right to seek cooperation under Part 9 of the Statute mirrors the Prosecutor’s right to seek cooperation in Part 5 of the Statute¹². The Draft Statute provided for the Prosecutor to seek cooperation from “any peacekeeping force that may be present in the territory where an investigation is taking place”¹³ pursuant to Article 54(4)(f). This draft became Article 54(3)(c), which is within Part 5, and refers to “any State, intergovernmental organization or arrangement”. The inclusion of the word “arrangement” was intended to reflect the inclusion of

¹⁰ The Trial Chamber, of course, is obliged to ensure that “a trial is fair” pursuant to Article 64(2) of the Statute.

¹¹ See for example paragraph 103 of the Report of the International Criminal Court to the United Nations for 2009 / 2010.

¹² This is no mere matter of words. It is the equivalence between Part 9 and Part 5 that ensures that there is equality of arms between the Prosecutor and the Defence, and thus that the accused’s right to a fair hearing is respected.

¹³ UN Doc A/Conf.183/2/Add.1 p91.

peacekeeping organisations. Thus, the Prosecutor could plainly seek cooperation from the African Union pursuant to Article 54(3)(c). The Defence submit that although the word arrangement is omitted from Article 87(6), this omission was not deliberate.¹⁴ As a result, the Chamber should interpret Article 87(6) so that it is consistent with Article 54(3)(c) and so that it includes arrangements such as peacekeeping.¹⁵

36. Further, this application is consistent with the above Security Council Resolution, which “urges” intergovernmental organisations like the African Union to “cooperate fully” with the Court. It is also consistent with the practice of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) which, within the limits of the powers conferred by its Statute, has ordered various intergovernmental organisations to provide documents.¹⁶

37. As a result, applying the first sentence of Article 87(6), it is clear that the Court can ask the African Union to provide “information and documents” in the terms of this application.

¹⁴ Triffterer p1527 para 30.

¹⁵ This is supported by Triffterer, “the complementary rules in Part 5 and Part 9 must be coherent. The Court is thus in a position to cooperate with all kinds of peacekeeping forces within the latter’s mandate” (paragraph 30 page 1527). Triffterer also addresses the point at p1506 para 3 “as a matter of treaty interpretation, the following conclusion can be drawn: In so far as a legal problem of cooperation arises that is directly interrelated with issues covered in Parts 2 and 5 and that is not specifically dealt with in Part 9, it appears advisable to resort to a systematical interpretation that guarantees the coherency between the solution found in Part 9 and the relevant rule(s) in Part 2 and / or 5”. The same point is made in Ciampri in “the Obligation to Cooperate” at p1621 of Cassese, Gaeta and Jones, the Rome Statute of the International Criminal Court.

¹⁶ In *Prosecutor v. Milutinović*, Decision on the Request by North Atlantic Treaty Organisation for Review 15 May 2006, the Appeals Chamber of the ICTY noted that the Trial Chamber of the ICTY had successfully ordered the Presidency of the European Union Council and the Commission of the European Union to produce documents in *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Order for the Production of Documents by the European Community Monitoring Mission and Its Member States, issued *ex parte* and partly confidential on 4 August 2004, p. 3. The Trial Chamber of the ICTY also ordered SFOR to secure certain documents and information in *Prosecutor v. Simić*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be provided by SFOR and Others, 18 October 2000.

Relief Requested

38. Based on the above submissions, the Defence respectfully request the Trial Chamber to ask the African Union to :-

- a) provide the information and documents listed in confidential and *ex parte* Annexure A to the Defence; and
- b) respond to this request within a period of 28 days from the date of any order.

39. The Defence respectfully request the Trial Chamber to order, in accordance with Article 87 of the Statute, and Rules 176(2) and (4) and 177(2) of the Rules, the Registrar to, as soon as practicable:

- a) prepare the necessary cooperation request; and
- b) transmit to the relevant officials of the African Union such cooperation request through the proper channels of communication as provided for in Article 87 of the Statute and Rule 177(2) of the Rules.

Respectfully Submitted,



Mr Karim A. A. Khan QC

Defence Counsel for Abdallah Banda Abakaer Nourain and

Saleh Mohammed Jerbo Jamus

Dated this 11th Day of May 2011

At Nairobi, Kenya