



Original: **English**

No.: ICC-02/05-03/09
Date: **20 October 2011**

TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

**Defence Request for Disclosure of Documents in the Possession of the Office of
the Prosecutor**

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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Other

I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") request the Trial Chamber order the Prosecutor to disclose¹ to the Defence material previously submitted by the Office of the Prosecutor ("Prosecutor" or "Prosecution") in support of the Prosecutor's Application under Article 58 of the Rome Statute ("Statute") for the arrest of Omar Hassan Ahmad Al Bashir in the Situation in the Darfur ("*Al Bashir* Application").²
2. The *Al Bashir* Application material patently falls within the Prosecutor's disclosure obligations under Article 67(2) of the Statute in that, combined with evidence from Prosecution witnesses in this case, it "shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused."
3. Further, pursuant to Rule 77 of the Rules of Procedure and Evidence ("Rules"), the *Al Bashir* Application supporting documents are material to the defence preparation for the trial in this case on the three contested issues, namely:
 - (a) Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;
 - (b) 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
 - (c) Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.

¹ In terms of modalities, the Defence suggest that electronic disclosure of the requested material, rather than separate inspection for Rule 77 material and disclosure for Art. 67(2) material, is the preferred and most efficient procedure.

² Public Redacted Version of the Prosecutor's Application under Article 58, 14 July 2008, ICC-02/05-157-AnxA ("*Al Bashir* Application"). While the Defence have access to this public document, much of the evidence cited is redacted. Further, all of the material submitted to the Pre-Trial Chamber in support of the *Al Bashir* Application is confidential and therefore not accessible to the Defence.

4. To assist in making this trial efficient and expeditious, the Defence wish to work towards limiting the amount of evidence which needs to be disclosed and that the Defence will present at trial. Therefore, at this time, the Defence do **not** request any statements of victims from the *Al Bashir* Application and agree that all names and identifying information of other witnesses who have expressed security concerns should be redacted by the Prosecution before being given to the Defence.³

II. Applicable Law

5. Article 67(2) provides that:

“In addition to any other disclosure provided for in the Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”

6. Rule 77 provides in part that:

“The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence [...].”

7. The *Lubanga* Trial Chamber ruled that the Prosecution’s disclosure obligations under Rule 77 include “not only material that may undermine the prosecution case or support a line of argument of the defence, but also anything substantive that is relevant, **in a more general sense**, to defence preparations. This means

³ The term “victim” for the purposes of this Request is intended to be interpreted liberally to include any individual from Darfur who was the victim of a crime, or whose family, friends or neighbors were victims of crimes believed by the Prosecutor to have been perpetrated by the Government of Sudan or its allied “Janjaweed” militias. Witnesses who express security concerns would include not only members of the Government of Sudan political or military structure, but also journalists, international observers, and other persons whose statements or evidence appears in the *Al Bashir* Application and who have expressed concerns for the safety of themselves or their family members or whose ability to continue to safely carry out their professional functions would be compromised if the fact that they provided such information was disclosed publically.

that the prosecution are to communicate to the defence any material in its possession that may significantly assist the accused in understanding the incriminatory and exculpatory evidence, **and the issues, in the case.**"⁴

III. Defence Submissions

A. THE REQUEST SEEKS TO NEITHER DELAY, NOR PROLONG THE TRIAL

8. Messrs. Banda and Jerbo, have already demonstrated that they seek neither to delay, nor to prolong these proceedings. By entering into an agreement with the Prosecutor on agreed facts, including the acknowledgement of their participation in the attack on MGS Haskanita on 29 September 2007, they have knowingly removed the Prosecutor's burden to prove these facts and narrowed the issues for the trial.⁵ Further, both have agreed to lessen the Prosecutor's burden to translate all the transcripts of witness interviews and the Prosecutor's List of Evidence.⁶

9. Messrs. Banda and Jerbo appeared voluntarily in response to a court summons in order to answer the charges in this case and have called on all those charged with crimes by the International Criminal Court to come to the Court in order for justice to take its course.⁷ Although both lack formal education and neither is an expert in international criminal law, they continue to believe that the attack on MGS Haskanita was justified based on what they knew at the time. The actions they took at MGS Haskanita on 29 September 2007 were made within the context of a long and brutal military campaign by the Government of Sudan against the civilian population of Darfur which Messrs. Banda and Jerbo endeavoured to protect. Messrs. Banda and Jerbo's lives were changed by this military campaign and each was conscious of the pattern of conduct of the Government of Sudan at

⁴ ICC-01/04-01/06-2624, para. 16 (emphasis added).

⁵ See 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.

⁶ See ICC-02/05-03/09-195.

⁷ See Initial Appearance, ICC-02/05-03/09-T-4-ENG ET WT, page 8, lines 4 to 11 and page 11, lines 16 to 22.

the time they participated in the attack on MGS Haskanita. As explained below, in order for the Trial Chamber to have all relevant and necessary information regarding the mental and factual elements in the contested issues in this case, Messrs. Banda and Jerbo's conduct on 29 September 2007 must be placed within the context of the conflict in Darfur and the particular situation surrounding the AMIS base at Haskanita.

10. The Defence do not seek access to the *Al Bashir* Application in order to delay the proceedings or expand the trial beyond the contested issues at the trial. Rather, from the Defence's knowledge of the facts of this case and public filings by both the Prosecutor and Pre-Trial Chamber⁸ in the *Al Bashir* case, it is clear that the Prosecutor is in possession of material about the context of the Darfur conflict that is material for the defence preparation and in fact "tends to show the innocence of the accused", when combined with other facts known about the attack on the MGS Haskanita base on 29 September 2007.

11. In fact, the Defence attempted to work with the Prosecution to avoid the necessity of presenting this evidence by offering to enter into a further stipulation on agreed facts under Rule 69.⁹ The Prosecution declined the Defence's offer to expand the agreed facts to include those relevant to the Government of Sudan's campaign of violence directed against the civilian population in Darfur.¹⁰ The proposed agreed facts which the Prosecution declined to admit were taken from the *Al Bashir* Application, the Pre-Trial Chamber I Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir dated 12 July 2010,¹¹ statements by the Prosecutor to the United Nations Security

⁸ See ICC-02/05-01/09-3 and ICC-02/05-01/09-94.

⁹ Defence E-mail "Proposed Additional Rule 69 Agreement as to Evidence" to the Prosecution, 21 June 2011.

¹⁰ Prosecution's response to the Defence E-mail "Proposed Additional Rule 69 Agreement as to Evidence" to the Prosecution, 6 July 2011.

¹¹ ICC-02/05-01/09-95.

Council and even facts alleged by the Prosecution in the Document Containing the Charges in the present case.¹²

12. The Prosecution subsequently refused to disclose to the Defence evidence in their possession concerning the Government of Sudan's campaign of violence against the civilian population in Darfur opposed to the regime under either Article 67(2) or Rule 77.¹³ This was despite the fact that all of the events, including the "ceasefire" and "peace" agreements described in the Decision on Confirmation of Charges in this case,¹⁴ occurred in the midst of this campaign of killings, rapes, torture, displacements and genocide of the civilian population. The Prosecutor's refusal to either stipulate to facts from his own allegations or disclose this evidence necessitates the relief sought in this Request.

13. Based on the public version of the *Al Bashir* Application, it is reasonable to believe that materials submitted confidentially with the *Al Bashir* Application will provide relevant evidence about the Government of Sudan's long violent campaign targeting the civilian population in Darfur, including in 2007. This evidence is relevant to the following issues discussed below:

- (a) The character and motives of Messrs. Banda and Jerbo;
- (b) Whether AMIS was a peacekeeping mission in accordance with the United Nations Charter;
- (c) Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; and

¹² The Defence made the offer to enter into a Rule 69 Agreement on these facts purely in the interest of expediting the presentation of the evidence. Tactically, the Defence realise that the evidence is certain to be more effective and more precisely relevant to these issues if witnesses testify who can be heard and questioned by the Trial Chamber on the aspects of the pattern of conduct by the Government of Sudan most relevant to the issues in this case, such as the use of Antonov aircraft for indiscriminate bombing of civilians and civilian objects in Darfuri villages and the role of Sudanese army intelligence officers in the genocide campaign. The Defence remain committed to presenting the evidence of this widespread campaign affecting hundreds of thousands of victims in the most efficient way possible, and is therefore open to agreement on joint experts with the Prosecution or an appointment of experts by the Trial Chamber.

¹³ Prosecution response on 2 September 2011 to Defence E-mail "Defence Request for disclosure" dated 19 July 2011, as well as follow-up Email on 15 August 2011.

¹⁴ See ICC-02/05-03/09-121-Conf-Corr, paras. 24 IV and V, para. 72,

(d) Whether Messrs. Banda and Jerbo were aware of the factual circumstances that established the unlawful nature of the attack.

14. Since the Prosecutor is unwilling to stipulate to these facts and unlikely to present this evidence as it so deeply undermines the Prosecutor's allegations, it will be up to the Defence to put the facts before the Trial Chamber. It would be both inefficient and a fundamental violation of the fair trial rights of Messrs. Banda and Jerbo to require the Defence to duplicate the Prosecutor's investigation of the crimes of the Government of Sudan in the Darfur situation. The Prosecutor has had over six years to investigate the crimes with vastly greater resources and access to material from governments, international organisations, and experts in the field.¹⁵

15. Many defence arguments regarding the contested issues are premised on this contextual evidence. The Defence could not announce that it is ready for trial before assembling evidence which fully and accurately reflects the reality of the context in which the events which are the subject of the charges in this case took place. The Prosecution are delaying the case by denying the Defence with access to material it has already assembled.

B. THE EVIDENCE IS RELEVANT TO THE CHARACTER AND MOTIVES OF MESSRS. BANDA AND JERBO

16. The character of an accused can be relevant to the *mens rea* pursuant to Article 30 of the Statute and reasons for the actions of the accused and can potentially be considered either as exonerating evidence or as evidence in mitigation. Article 67(2) requires the Prosecutor to disclose evidence which would mitigate guilt and the jurisprudence provides that an accused person's character is relevant in mitigation.

¹⁵ The United Nations Security Council referred the situation in Darfur to the Prosecutor on 31 March 2005. See S/RES/1593 (2005).

17. Evidence of the context of the conflict in Darfur is necessary in order to understand the characters of Messrs. Banda and Jerbo, why they have taken up an armed struggle and why each risked their own life by operating under such difficult circumstances for so many years.¹⁶ They each were soldiers dedicated to resisting the violence directed against the people of Darfur and liberating Sudan from a government intent on violent, brutal and genocidal policies. Their decision to resort to violent resistance of the Government must be understood in light of the fact, as the Prosecutor wrote in paragraph 17 of the Document Containing the Charges in this case:

From March 2003, the Sudanese People's Armed Forces ("GoS Armed Forces"), supplemented by the Popular Defence Force (PDF), the Popular Police Force (PPF), the Border Intelligence Unit (BIU), and members of the Militia/Janjaweed who were integrated into these forces, began implementing the GoS' massive campaign of killings, rapes, tortures and forced displacement of the local population throughout the Darfur region that was considered to support the armed groups opposing the GoS.

18. Further, the evidence is relevant to understand the motive for Messrs. Banda and Jerbo's participation in the attack on the AMIS base. The *Al Bashir* Application states:

AL BASHIR retained direct control over the intelligence system. The NISS, which has an elaborate structure with a network of representatives at both state and locality levels, played a significant role, not just by covering up the crimes committed in Darfur, but also by providing intelligence information which facilitated the commission of the crimes charged in this Application.¹⁷

¹⁶ See e.g. *Prosecutor v. Naser Orić*, IT-03-68-T, Judgement, 30 June 2006. At the International Criminal Tribunal for the former Yugoslavia, Naser Orić was convicted by the Trial Chamber of the war crimes of murder and cruel treatment and sentenced to two years imprisonment (he was later acquitted on appeal). In evaluating his sentence, paragraph 767 of the Judgment states: "In the past, Trial Chambers have used the difficult circumstances in which a convicted person had to operate as a mitigating factor [footnote omitted]. The Trial Chamber considers this to be the pivotal consideration for the purpose of establishing the sentence that should be meted out to the Accused."

¹⁷ *Al Bashir* Application, para. 251 d. (emphasis added).

19. The evidence will demonstrate that the Government of Sudan placed intelligence officers at AMIS bases, including the MGS Haskanita and were using the AMIS base as intelligence tool in its campaign of violence against the civilian population in Darfur. The evidence from the *Al Bashir* Application is expected to provide context so that this Trial Chamber can understand the reasons why Messrs. Banda and Jerbo took up arms. It is necessary in order for this Trial Chamber to understand that their participation in the attack against MGS Haskanita was not motivated by any desire for material gain or greed,¹⁸ but rather by their desire to protect their own communities from a regime targeting the Darfuri people. As the Defence will show at trial, the attack on MGS Haskanita was seen by Messrs. Banda and Jerbo as but one battle in a long war that sought to protect their communities and to allow them to live in a just state.

C. THE EVIDENCE IS RELEVANT TO WHETHER AMIS WAS A PEACEKEEPING MISSION IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS

20. One of the contested issues for the trial is: “Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.” It is necessary to understand the context of what was occurring in Darfur during the existence of AMIS (AMIS existed from July 2004 through December 2007) in order for the Trial Chamber to make this determination.

21. The Defence dispute the Prosecution contention that AMIS was a “peacekeeping mission” within the meaning of the Rome Statute. Further, the Defence contend that the evidence, if fully and fairly presented, will show that AMIS was not acting “in accordance with the United Nations Charter” within the meaning of the Rome Statute.

¹⁸ For OTP allegations, see e.g. ICC-02/05-03/09-112-Conf-AnxB, para. 132.

22. It is not the intention of this Request to fully argue those issues. They are both legal and factual in nature and must, therefore, be decided by the Trial Chamber only after presentation of all the relevant evidence. It is certainly relevant to the Trial Chamber's evaluation to consider that Omar Al Bashir, the President of Sudan, was engaged in a campaign of genocide beginning before AMIS was established in Darfur and continuing long beyond the time AMIS was replaced by UNAMID. It is reasonable to expect that the material presented for the *Al Bashir* Application will provide evidence that the Government of Sudan was engaged in a massive criminal campaign involving forced displacement, killings, torture and sexual violence directed against the civilian population of Darfur and committed with the intent to destroy ethnic groups in whole or in part throughout the time that AMIS existed in Darfur.

23. The evidence is relevant to show that the Government of Sudan not only violated all ceasefire, peace and humanitarian agreements during the existence of AMIS, but that throughout this period, the Government of Sudan never intended to comply with any peace agreement as the real intent remained to destroy the targeted ethnic groups from certain territories in Sudan. For example, the *Al Bashir* Application noted that the Government committed itself in the Darfur Peace Agreement to recognise and uphold traditional land rights, but that "Al Bashir instead of upholding his promises of respect for traditional land rights and facilitating returns, created conditions to prevent any possible return."¹⁹ The Application also noted that "[f]rom 2004 onwards, Al Bashir also promised falsely to disarm the Militia/Janjaweed."²⁰

24. This evidence is relevant to the Trial Chamber's eventual deliberations as to whether AMIS was a "peacekeeping mission" when in fact there was no peace in Darfur, but rather an on-going campaign of genocide. As the Prosecutor clearly knows, as shown by his public statements that genocide continues even up to

¹⁹ *Al Bashir* Application, para 391.

²⁰ *Al Bashir* Application, para. 290.

this year,²¹ the Government of Sudan's agreement to allow AMIS into Darfur was not in the interests of peace, but rather an expedient tactic intended to prevent any effective international intervention from disturbing its criminal campaign against the civilian population in Darfur opposed to the regime.

25. Unless the Prosecutor's evidence of Government of Sudan crimes is ignored, the resolution of this issue will require the Prosecutor to answer certain essential questions, including:

- (a) Can an international intervention be considered a "peacekeeping mission" in the terms of the Statute of this Court when there is no peace between the parties and the conflict has been on-going for years?
- (b) Can an international intervention be considered a "peacekeeping mission" when it is simply observing a campaign of genocide?
- (c) Is an international intervention that is never given either the proper mandate or minimal essential resources to protect civilians from this campaign of violence, "acting in accordance with the Charter of the United Nations"?
- (d) Shamed by its failure to act in Rwanda and Srebrenica to prevent genocides, the United Nations has recognised the "responsibility to protect" vulnerable civilian populations from massive crimes of violence and genocide. Following this commitment, is yet another force, with neither the resources nor mandate to stop the violence, cooperating with, rather than confronting the perpetrators, acting "in accordance with the UN Charter"?
- (e) Is the intervention of a regional force serving as a fig leaf for inaction by the major world powers unwilling to confront the government inflicting

²¹ Thirteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR1593 (2005), para. 81.

this violent campaign on its own population, a “peacekeeping mission acting in accordance with the Charter of the United Nations”?

D. THE EVIDENCE IS RELEVANT TO THE ISSUE OF WHETHER THE ATTACK ON MGS HASKANITA WAS UNLAWFUL

26. A key contested issue in this case is whether the attack on the AMIS personnel and facilities at MGS Haskanita on 29 September 2007 was unlawful. The Defence contend that the attack was not unlawful, as the MGS Haskanita base was used by the Government of Sudan in its military campaign directed at the civilian population in Darfur, making the base a legitimate military target. Not only were Messrs. Banda and Jerbo and other resistance forces who were not signatories to the 2006 Darfur Peace Agreement the target of this government military campaign, but rather the campaign also targeted the civilian population living in the Haskanita area, supposedly non-sympathetic to the government.
27. The Prosecutor’s evidence disclosed in the present case shows that in the months and weeks preceding the attack on the MGS Haskanita, the Government of Sudan, aided by intelligence coming from the AMIS base, conducted a bombing campaign of villages in the area. This bombing of civilian locations exactly fits into the pattern of evidence that the Prosecutor has presented in its application for the arrest of President Al Bashir. In Paragraph 14 of that Application the Prosecution noted:

The attacks against villages have followed a common pattern for a period of more than five years from March 2003 up to the time of filing this Application. The Armed Forces, acting in concert with Militia/Janjaweed, surround a village and then enter that village or town and attack the civilian inhabitants. In many cases helicopters or aircraft dropped bombs on the town or village either before or during the attack. Ground forces kill men, women, children and the elderly; they subject women and girls to massive rapes. Farms are destroyed and grain stores are looted or set on fire. The attackers burn residential dwellings and community facilities including schools, mosques and hospitals.

28. The Prosecutor's own evidence shows that attacks against opposition forces in the Haskanita area were being directed from Government of Sudan agents within the AMIS base. Given the recurring pattern of such crimes explained in the *Al Bashir* Application, it was reasonable to expect that if the offensive in the Haskanita area aided by intelligence from the AMIS base was successful, the exact same crimes would be inflicted on the civilian population of the Haskanita area. The Defence contend that given this fact, the base was a legitimate military target and the attack on the base was lawful.

29. While the Prosecutor refuses to concede that the Government of Sudan agents (one was named Captain Bashir) were passing information, he argues as an alternate position, that he "does not concede loss of protection during the presence of Bashir. The presence of one GoS representative passing information which he did not receive from AMIS activities does not render the entire camp a target; and it certainly does not justify an armed attack **of this scale ...**".²² In essence, the Prosecutor is arguing the attack was a disproportionate response to the risk posed by Government of Sudan representative's intelligence activities at the base.

30. The attack on the base resulted in the unfortunate deaths and injuries to AMIS soldiers and members of the attacking forces. The Government of Sudan placed their lives in danger by misusing the AMIS base for intelligence to further a violent campaign against the civilian population in the Haskanita area. It is expected that the evidence in the *Al Bashir* Application will demonstrate that the attacks against civilians in the Haskanita area in 2007 fit into a consistent pattern of attacks that were each part of a campaign of rapes, torture, forced displacements, killings and genocide directed by the Government of Sudan

²² ICC-02/05-01/09-112-Conf-AnxA, para. 91 (emphasis added).

against the civilian population of Darfur perceived as opposed to the ruling clique.

31. It is the position of the Defence that the attack against the AMIS base was justified by military necessity given the very real risk the Government of Sudan's military offensive in the Haskanita area posed to the lives of thousands of civilians. Messrs. Banda and Jerbo were well aware of this military campaign against civilians by the Government of Sudan and understood the risk that the intelligence activities in support of the government's military offensive posed to the civilian population of the Haskanita area. The Defence must be allowed to present these relevant facts to the Trial Chamber. One cannot understand the direct risk posed to thousands of civilians by the intelligence activities emanating from the AMIS base without understanding the long pattern of the Government of Sudan targeting the civilian population in Darfur.

32. The Defence believe it will likely be demonstrated by the Prosecution evidence submitted in support of the *Al Bashir* Application, that by the time of the attack in September 2007, hundreds of thousands of innocent civilians had already been victimised by this campaign. It is reasonable to believe that the AMIS command was aware of this on-going campaign. Thus, the Government of Sudan campaign against the civilian population is also relevant to the decisions of the AMIS command to protect a person, Captain Bashir, whom they knew was himself contributing to this criminal enterprise. The act of harbouring this member or tool of the criminal enterprise is relevant to the issue of whether the base was a legitimate military target and thus the lawfulness of the attack.

E. THE EVIDENCE IS RELEVANT TO WHETHER MESSRS. BANDA AND JERBO WERE AWARE OF THE FACTUAL CIRCUMSTANCES THAT ESTABLISHED THE UNLAWFUL NATURE OF THE ATTACK

33. The evidence from the *Al Bashir* Application is relevant to the *mens rea* of Messrs. Banda and Jerbo and whether they were aware of facts that could make the attack on MGS Haskanita unlawful. According to the Elements of Crimes of the Court, the fourth and fifth element of the crime of attacks on peacekeepers pursuant to Article 8(2)(e)(iii) are:

4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.

and

5. The perpetrator was aware of the factual circumstances that established that protection.

34. Messrs. Banda and Jerbo did not have the luxury of months or years to investigate the facts surrounding the AMIS mission and MGS Haskanita. Rather, they had to make life-and-death battlefield decisions. For the Trial Chamber to fully understand the decisions they made, it is critical to understand the context in which they occurred: an on-going campaign of violence directed against the civilian population in Darfur resulting in the forced displacement, rape or killing of hundreds of thousands of civilians. These civilians, as demonstrated by the Prosecutor's submissions in the *Al Bashir* Application, received no effective protection from AMIS. The evidence in this case will in fact show that the MGS Haskanita base knowingly or unwittingly, became a tool of the campaign of genocide, serving as an intelligence post for a military campaign directed against civilians.

35. The evidence of the Government of Sudan's campaign is relevant to Messrs. Banda and Jerbo's *mens rea*. It is relevant to whether they were aware of facts that

would show that the AMIS mission was itself a “peacekeeping mission acting in accordance with the United Nations Charter.” It is also relevant to the risk they perceived from Government of Sudan representatives at the MGS Haskanita directing bombing campaigns and directly assisting a military offensive in the area and the objective reasonableness of their assumptions. It also goes to the trust they could place in any representations about the Government of Sudan’s activities at the base or its intentions and the trust they could reasonably place in AMIS to protect civilians in this on-going campaign. For these reasons, the evidence sought is exonerating within the meaning of Article 67(2) of the Statute and certainly would “mitigate the guilt of the Accused” if they were guilty of the current charges for which, the Defence submit, the evidence will clearly show they are not.

F. THE EVIDENCE IN THIS CASE IS UNIQUE TO THIS CONTEXT

36. The events that are the subject of this trial occurred in Darfur in July to September 2007. This context is critical to the facts, the actions of Messrs. Banda and Jerbo and their reasonableness. If a government representative were sending intelligence from a UNAMSIL base in Sierra Leone in 2000, from a UNFICYP base in Cyprus in 2005 or from a UNAMET base in East Timor in 1999, these are all different situations and what would be a reasonable or lawful response would likely differ due to the very different contexts in which these missions operated at the relevant times. The attack on the MGS Haskanita, which had been used to supply intelligence to the Government of Sudan military, occurred in the context of a very real, on-going, massive campaign of violence directed against innocent civilians in Darfur. These facts lie at the heart of the contested issues in this case and the Prosecutor cannot ignore his statutory obligation to disclose such exonerating evidence to the Defence.

G. THIS REQUEST IS REASONABLE AND LIMITED

37. As demonstrated above, the evidence of the Government of Sudan's long, violent campaign against civilians in Darfur is directly relevant to the contested issues in this case and material to the defence preparations under Rule 77, and under Article 67(2), would both mitigate guilt and is potentially exonerating for each of the three contested issues for the trial. Any one of these reasons alone would require disclosure of this information. In fact, all of these reasons justify the granting of this request. It is reasonable to expect that such evidence exists in the *Al Bashir* Application. While the Prosecution undoubtedly possess much more material concerning the Government of Sudan's crimes in Darfur, the Defence seek to lessen the burden of a full search of Prosecution archives by making a limited request to examine the supporting material already assembled for the *Al Bashir* Application, with victim statements removed and names and identifying information of insider witnesses redacted.

38. The Defence understand that they are asking for *less* material than our clients are legally entitled to receive from the Prosecution, but they do so in compliance with Messrs. Banda and Jerbo's instructions to cooperate fully with the Prosecution and the Trial Chamber to ensure a fair and efficient trial. The disclosure of the *Al Bashir* Application material will speed the defence preparations for trial and increase the efficiency of these proceedings. The Defence fully appreciate the need to maintain the confidentiality of this information and pledge to do so.

H. THIS REQUEST CALLS FOR AN ORAL HEARING

39. Because this Request goes to the heart of the defence case on all of the contested issues for trial, if it is opposed by the Prosecution, the Defence request an oral hearing before the Trial Chamber deliberates in order to give each party an opportunity to fully respond to the other and explain its arguments.

Relief Requested

For the reasons set out above and pursuant to Article 67(2) of the Statute and Rule 77 of the Rules, the Defence respectfully request the Trial Chamber

- (a) to order the Office of the Prosecutor to disclose to the Defence all material previously submitted by the Prosecutor in support of the *Al Bashir* Application, other than statements of victims, and with all names and identifying information of insider witnesses redacted and with express instructions to the Defence to maintain the confidentiality of the information; and
- (b) to hold an oral hearing before deliberating on the Request in order to allow the parties to present their arguments.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 20th Day of October 2011
At The Hague, The Netherlands

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