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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
with Confidential Annex**

Defence Request to Lift Redactions to Prosecution Witness Statements and Related Documents

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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I. Introduction

1. The Defence respectfully request the Trial Chamber to lift certain redactions applied to statements and photographs disclosed to the Defence and to order the Office of the Prosecutor (“Prosecutor” or “Prosecution”) to immediately disclose this information unredacted to the Defence.

2. Much of the information sought by the Defence relates to the names and identities of persons present at MGS Haskanita during the attack on 29 September 2007 and/or at key events relevant to the lawfulness of the attack. As such, this information is critical to the contested issues¹ and a necessary starting point for even a minimally responsible defence investigation to prepare for trial. The information is also likely to contain or lead to evidence that will exonerate Mr. Banda and Mr. Jerbo. Thus, the information sought is information that the Prosecutor is obliged to disclose under Article 67(2) of the Rome Statute (“Statute”) and Rule 77 of the Rules of Procedure and Evidence (“Rules”).

3. The Defence submit that, whatever the basis on which these redactions were originally imposed, they can no longer be justified at this advanced stage in proceedings. The fair trial rights of Mr. Banda and Mr. Jerbo outweigh any concern for witness security given the absence of any objectively justifiable risk to the safety of the persons concerned from disclosure of the information to the Defence and the direct relevance of the information to the contested issues. Continuing non-disclosure is prejudicial to the Defence’s preparation for trial and also inconsistent with the right to a fair and impartial trial.

¹ Decision on the Joint Submission regarding the contested issues and the agreed facts, 29 September 2011, ICC-02/05-03/09-227, para. 46.

II. The Imposition of the Redactions

4. This application concerns redactions to the statements of nine witnesses, namely 0315, 0326, 0355, 0416, 0419, 0420, 0439, 0446 and 0447.² The redactions were applied pursuant to the following decisions issued in the case of *Prosecutor v. Bahar Idriss Abu Garda* (“*Abu Garda* case”) and these proceedings.
5. On 20 August 2009, Pre-Trial Chamber I in the *Abu Garda* case authorized redactions, *inter alia*, to the witness statements of witnesses 0326, 0355, 0416, 0419 and 0420.³ The Defence were not provided with the specific legal basis, nor with any factual basis, for each redaction, but understand that the redactions were generally sought pursuant to Rules 81(2) and 81(4).
6. On 7 September 2009, again in the *Abu Garda* case, Pre-Trial Chamber I authorized redactions, *inter alia*, to the statements of witnesses 0446, 0447, 0315 and 0419.⁴ The Defence were not provided with the specific legal basis, nor with any factual basis, for each redaction, but understand that the redactions were generally sought pursuant to Rules 81(2) and 81(4).
7. On 29 June 2010, Pre-Trial Chamber I in this case ordered that the redactions applied in the *Abu Garda* case continue to have full force in relation to these proceedings. Materials which were disclosed in redacted form in the *Abu Garda* case, including the above witness statements, were, therefore, disclosed to the Defence in the same redacted form.⁵
8. On 29 July 2010, Pre-Trial Chamber I in these proceedings authorized redactions to the witness statements of witnesses 0315, 0355, 0446 and 0439

² In the present filing, the Defence will omit the prefix “DAR-OTP-WWWW” when referring to Prosecution witnesses and refer to them by their number only.

³ *Prosecutor v. Bahar Idriss Abu Garda*, Public Redacted Version of the “First Decision on the Prosecution’s Requests for Redactions” issued on 14 August 2009, 20 August 2009, ICC-02/05-02/09-58.

⁴ *Prosecutor v. Bahar Idriss Abu Garda*, Second Decision on the Prosecutor’s Requests for Redactions, 7 September 2009, ICC-02/05-02/09-85.

⁵ Decision on Issues related to Disclosure, 29 June 2010, ICC-02/05-03/09-49, paras. 11 and 12.

pursuant to Rules 81(2) and 81(4).⁶ On this occasion, the Prosecution was ordered to “clearly identify the legal basis and the reasons supporting each redaction, including by reference to the categories identified in [the] decision” to the Defence.⁷ This information was provided, although the factual basis for each redaction was very broad.

9. From the above, it is clear that the factual basis for all the redactions at issue in this application has not been subject to judicial review and oversight since either August / September 2009 or July 2010 and the majority have been imposed without the Defence being able effectively to challenge the specific basis for individual redactions.

III. Settled Appeals Chamber Jurisprudence on Redactions

10. The Appeals Chamber has held that:-

“the overriding principle is that full disclosure should be made. It must always be borne in mind that the authorization of non-disclosure of information is the exception to this general rule.”⁸

11. Where redactions are sought pursuant to Rule 81(2) or Rule 81(4), the Trial Chamber must consider each redaction on a “case-by-case basis” to see whether the requirements of those rules are met.⁹ The burden is on the Prosecutor to establish that the redactions are warranted.¹⁰

12. In relation to Rule 81(2), the Appeals Chamber has, thus far, held that Rule 81(2) is capable of justifying redactions to the names of potential prosecution

⁶ First Decision on the Prosecutor’s Requests for Redactions, 29 July 2010, ICC-02/05-03/09-58.

⁷ *Ibid.*, p. 9.

⁸ *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-475, para 70.

⁹ *Prosecutor v. Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-476, para 52.

¹⁰ ICC-01/04-01/07-475, para. 97.

witnesses¹¹ and the names and identities of Prosecution and Victims and Witness Unit (“VWU”) staff.¹²

13. The Appeals Chamber has further held that the same general factors apply to consideration of redaction requests made pursuant to Rules 81(2) and 81(4):-

*“a thorough consideration of the danger that the disclosure of the information may cause; the necessity of non-disclosure, including whether it is the least intrusive measure necessary to avoid prejudice to the investigations of the Prosecutor; and the fact that any measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.*¹³

14. Having reviewed the Appeals Chamber jurisprudence, in a recent decision this Trial Chamber concluded that:-

*“the requirements that have to be met for a Chamber to authorise the non-disclosure of information are the following: (i) the existence of an “objectively justifiable risk” to the safety of the person concerned or which may prejudice further or ongoing investigations; (ii) the risk must arise from disclosing the particular information to the accused; (iii) the infeasibility or insufficiency of less restrictive protective measures; (iv) an assessment as to whether the redactions sought are “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” and (v) the obligation to periodically review the decision authorising the redactions should circumstances change.”*¹⁴

¹¹ ICC-01/04-01/07-476, para. 49.

¹² ICC-01/04-01/07-475, paras. 91 and 93.

¹³ ICC-01/04-01/07-476, para. 59; also *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, ICC-01/04-01/06-773, paras. 21 and 33-34.

¹⁴ Public Redacted Decision on the prosecution’s request for non-disclosure or redactions of material relating to Witnesses 304, 305, 306 and 312, 28 February 2012, ICC-02/05-03/09-265-Red, para. 29 relying on ICC-01/04-01/07-475, para. 71. This case specifically related to Rule 81(4) but it is clear that the same approach applies equally to Rule 81(2): ICC-01/04-01/07-476, para. 60 amongst others.

15. The above Appeals Chamber guidance on pre-trial proceedings is *“of high relevance to trial proceedings.”*¹⁵ But this does not mean that an identical approach applies during trial proceedings. The reason is that, unlike a trial, the confirmation hearing does not determine guilt or innocence. Different considerations, therefore, apply during the trial phase. The result, as the Appeals Chamber put it is that: *“it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial”*.¹⁶

IV. The Redacted Information Sought

16. The information which the Defence seek is itemised in the Annex hereto.¹⁷ The information which the Defence believes is most probably contained in the material redacted¹⁸ concerns the names, photographs and identifying information about persons who were:

- a. official representatives of the Government of Sudan (“GoS”) forming part of the military observer (MILOB) mission of the African Union at MGS Haskanita;
- b. located at the base and the subject of a complaint to AMIS by Movement personnel concerned by his activities for the government;¹⁹ and
- c. present at MGS Haskanita during the attack on the base on 29 September 2007 or during key events preceding and subsequent to the attack, which events include: (i) the GoS bombing and military attacks

¹⁵ Decision on the prosecution's application for redactions ICC-02/05-03/09-206-Conf-Exp, 16 December 2011, ICC-02/05-03/09-266-Conf, para. 7.

¹⁶ ICC-01/04-01/07-475, para. 68.

¹⁷ The annex as classified as confidential as it discusses Prosecution evidence that is classified as such.

¹⁸ The Defence are faced with the obvious limitation attempting to explain the relevance of the information redacted from witness statements as it can only surmise from the context of where the redaction appears what kind of information is likely contained in the portions redacted.

¹⁹ See Annex, p. 6.

in the Haskanita area from July 2007 until the first week of October 2007; (ii) the looting of MGS Haskanita by GoS military and intelligence personnel and *Janjaweed* soldiers after the attack; (iii) the repeated visits by various Movement representatives to the MGS Haskanita; (iv) the 6 September 2007 demonstration by civilians from the Haskanita area outside the MGS Haskanita; (v) the 10 September battle and subsequent visit of Movement representatives to the MGS Haskanita; (vi) the landing of a helicopter and purported removal of a GoS representative on or about 16 or 17 September 2007; (vii) the events of 29 September 2007 preceding the attack, including the GoS' attack on Dalil Babikir and the village of Haskanita.

V. The Redacted Information is Crucial to Defence Investigations

17. From the Prosecution evidence and its own evidence, the Defence have good reason to believe that the MGS Haskanita provided a definite military advantage to the GoS' military offensive against the non-signatory Movements and the GoS' violent criminal campaign against the civilian population of Haskanita. The Prosecution's own evidence in this case shows that prior to the 29 September 2007 attack on the MGS Haskanita, the Movements had made numerous complaints to the MGS Haskanita command that intelligence was coming from the base, including targeting information being used to direct aerial bombing attacks in the Haskanita area.
18. The Movements specifically complained about the presence of GoS representatives among the AMIS forces, naming "Captain Bashir" in particular. Clearly, all evidence of the presence of GoS representatives and spies in the MGS Haskanita, their exact identity and evidence of their background, chains of command including names, ranks, assignments and other information about their superior officers, their reporting channels, their communications equipment, procedures and practices, and their activities in

the MGS Haskanita, are relevant to the contested issues and the factual determinations that the Trial Chamber will have to make in this case.

19. Furthermore, all personnel present at the MGS Haskanita, from the beginning of the GoS' military offensive in the Haskanita area from about July 2007, through the end of September 2007, are persons of interest to the defence investigation because they may have information about these issues or could themselves have been persons assisting or providing intelligence information to the GoS.

20. As to the other individuals whose names and / or identifying information have been redacted, they are of critical importance to the case because they would be likely to assist with:-

- a. evidence supporting the Defence's assertion that Mr. Banda and Mr. Jerbo were not aware of the facts that established that the MGS Haskanita was entitled to the protection afforded to civilians under the laws of war, but rather held the belief that the base was providing a definite military advantage to the GoS by providing targeting and other military and political intelligence to the Government.
- b. evidence supporting the defence case that between August 2007 and the date of the attack, several individuals from various revolutionary Movements informed the MGS Haskanita command that GoS agents within their ranks were providing intelligence to assist the Government's military and criminal campaign and provided warnings that the Movements considered the base a military target and would attack the base the next time the Government attacked the Movements or the civilian population.
- c. evidence concerning the 6 September 2007 demonstration at the MGS Haskanita by civilians from the Haskanita area. These civilians, facing

an imminent attack by forces engaged in a systematic criminal campaign against civilian populations, demanded that AMIS leave the area. This evidence is relevant to the issue of whether the MGS Haskanita was a “peacekeeping mission in accordance with the Charter of the United Nations” and whether the soldiers at the base were entitled to the same protection afforded to civilians.

- d. evidence of the activities of the MGS Haskanita that are relevant to whether AMIS was a “peacekeeping mission in accordance with the Charter of the United Nations.” All those who were living or regularly at the base during the period August through the end of September 2007 would likely have: information about the activities of the base; the mandate of the mission as interpreted by the base command; how that mandate was or was not actually implemented at the base; the relationship between AMIS and the GoS and its military forces and proxy militias; the role of the GoS representatives at the base, their integration into the base and particularly the MILOB mission, their use of base facilities and communication equipment, and the extent to which they were under the protection of the armed element of AMIS at the MGS Haskanita.
- e. evidence that Mr. Banda and Mr. Jerbo were not present and were never informed that any GoS representative had been removed from the MGS Haskanita; evidence that there was never any notification to the non-signatory Movements that any GoS representative had been removed from the MGS Haskanita, nor any guarantees that the removed representative would not return or be replaced by another GoS representative or intelligence agent.
- f. evidence about the conduct of the actual attack, the instructions and reasons which were given for the attack and the humane treatment of

civilians and disarmed soldiers by the attacking forces from the Movements of the Accused. This evidence is relevant to the contested issues because it will support the Defence position that the motive for the attack was in fact the military value of the base to enemy forces and the protection of a civilian population threatened with imminent attack by forces intent on conducting a criminal campaign against the revolutionary Movements and civilian population in the Haskanita area.

21. These issues have been obvious from the commencement of the investigation of this case, and have been expressly referred to in numerous Defence filings.²⁰ The Defence have consistently maintained that the MGS Haskanita was a legitimate military objective because the base was an intelligence asset providing the GoS military and its proxy *Janjaweed* militia forces with a definite military advantage in their criminal campaign against the revolutionary Movements and civilian population in the Haskanita area. The issues above are, therefore, directly relevant to the lawfulness of the attack, which is one of the contested issues.
22. In order to assist the Trial Chamber, the relevance of the material hidden by each specific redaction is addressed further in the Annex to this application, which itemises each redaction challenged.
23. The Trial Chamber is aware that the defence investigation in this case is severely hampered. Specifically, the Defence team is unable to obtain any documents or other form of cooperation from the GoS, and even unable to enter the country where the events that are the subject of the charges took place and where most of the witnesses reside. The defence investigation is already fatally constrained, and the effect of these redactions is to further constrain those limited investigations which the Defence are able to carry out.

²⁰ See e.g. ICC-02/05-03/09-264, paras. 24 – 26 and ICC-02/05-03/09-235, paras. 18 – 19 and 26 – 35.

As a result, the Defence submit that continuing to impose these redactions prejudices the right to a fair trial and endangers the Trial Chamber's ability to determine the truth after hearing from all relevant witnesses.

VI. There is no Justification for these Redactions

24. The Defence have never been informed of the basis, even by category, for many of the specific redactions identified in this application.²¹ As a result, it is impossible for the Defence to address the specifics of whether the justifications offered by the Prosecution were or continue to be valid. All of the redactions were applied during the pre-confirmation stage of proceedings on the basis that either disclosure would compromise continuing Prosecution investigations or that the redaction was necessary to protect third parties affected by the activities of the Court. Neither justification is valid at this advanced stage in proceedings.

25. The redactions cannot continue to be justified by concern for "further or ongoing investigations" pursuant to Rule 81(2). First, while exceptions will be made when necessary, the presumptive position is that the Prosecutor will complete his investigation prior to the confirmation of charges.²² In this case, almost one year has passed since the confirmation of charges. At the July 2011 status conference,²³ the Prosecution indicated that they planned to interview or re-interview a total of six persons, including one expert witness. It appears that all of these interviews other than the expert witness should have been

²¹ See submissions in Section II above.

²² See the Appeals Chamber decision in *Prosecutor v. Lubanga*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, para. 54 "it would be desirable for the investigation to be complete by the time of the confirmation hearing". This Trial Chamber has further confirmed that "[i]t would also be desirable, in the view of this Chamber, that post confirmation of charges investigations be completed as soon as possible": Decision on the re-interviews of six witnesses by the prosecution, 6 June 2011, ICC-02/05-03/09-158, para. 13.

²³ Status Conference, 12 July 2011, ICC-02/05-03/09-T-12-ENG, pp. 4-5, 6.

completed last year.²⁴ The Prosecutor's investigations are, therefore, complete and there are no "further or ongoing investigations" which would satisfy Rule 81(2). Second, none of the redactions challenged in this application appear to relate to individuals who would fall within Rule 81(2).²⁵ They do not relate to the identities of Prosecution or VWU staff. Nor, to the knowledge of the Defence, do they relate to Prosecution witnesses.²⁶ The redactions, therefore, do not fall within Rule 81(2).

26. In relation to third parties affected by the activities of the Court, this exception to the rule of full disclosure was never meant to apply to persons who may reasonably be expected to have information about issues that are not only in dispute but central to the guilt or innocence of the Accused. Persons who were present and have information about the key events in this case are all potential Defence witnesses, but only if the Defence can learn their names. The Defence note that the label "*innocent* third parties" is particularly inapt when discussing redactions made concerning the GoS' representatives at the MGS Haskanita, whose intelligence activities both facilitated the systematic criminal campaign of the GoS in the Haskanita area and fatally compromised any claim that the base was entitled to the protection afforded civilians and not a legitimate military objective.

27. These redactions do not satisfy Rule 81(4) and the test set out in paragraph 14 above. The Defence submit that: (i) there is no objectively justifiable risk; (ii) which arises from disclosing the information to the Defence; and (iii) in any event the importance of the redacted information to the preparation of the Defence requires either full disclosure or dismissal of the charges due to the inability to afford Mr. Banda and Mr. Jerbo a fair trial.

²⁴ In relation to the re-interviews of 0442 and 0307, see update given by the Prosecution in Prosecution's update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses, 1 September 2011, ICC-02/05-03/09-205.

²⁵ See para. 15 above.

²⁶ See para. 37 below. Even if the redactions do relate to the names of Prosecution witnesses, there is no objectively justifiable risk in lifting the redaction because lifting the redaction would not reveal to the Defence that the individuals are Prosecution witnesses.

28. First, the Defence submit that there is no objectively justifiable risk to many of the relevant individuals. The names and information redacted appear to concern the identities of persons with the revolutionary Movements, Darfuri civilians working at the MGS Haskanita, interpreters and language assistants from Sudan, AMIS, United Nations or other international personnel working in Darfur in 2007 and official GoS representatives or covert GoS agents working at the MGS Haskanita. The Defence address each category below.

29. In so far as the redactions relate to AMIS and other international personnel or indeed civilians who are no longer in Darfur, it is unreasonable to envisage any scenario where the disclosure of their names to the Defence would put these individuals at risk. There is no basis, still less an “objectively justifiable” basis, to believe that Mr. Banda and Mr. Jerbo or any of their sympathisers within the Movements are capable let alone motivated to harm anyone outside of Sudan. There must be some limitation to the imagination of those concerned with the security of persons affected by the activities of the Court.

30. There is also no reason to believe that Sudanese civilians who worked at the MGS Haskanita or were in the vicinity of the base and, thus, may be witnesses to relevant events for this trial would be put at risk by the mere non-public disclosure of their names to the Defence.

31. A more reasonable concern might be in relation to disclosure of the names and identities of both the official and covert GoS personnel who were located at the MGS Haskanita base during the relevant period in 2007. The Defence acknowledge that the Movements are likely to view these agents as combatants, which is exactly how international law would classify such persons. However, the Defence note that these individuals would only be at risk if they were located in areas controlled by or contested by the Movements.

It is not clear whether these individuals remain in Sudan, or even whether they remain alive.²⁷

32. Second, no risk arises from the disclosure of this information to the Defence.

Whilst the Defence acknowledge that the security situation in Sudan is “volatile”,²⁸ this alone does not establish that a risk arises from disclosure of information to the Defence. To the knowledge of the Defence, no witness or potential witness has been threatened in this case. The Defence are, thus, not aware of any evidence to suggest that any risk will arise from disclosure of the information to the Defence.²⁹

33. Third, in any event, any objectively justifiable risks that the Trial Chamber identifies must be weighed against the prejudice that the redactions cause to the Defence. Simply, if the Trial Chamber takes the position that the Defence are not entitled to know the names and identities of these persons, it effectively means that the Defence are prohibited from carrying out a comprehensive investigation. This would fatally compromise the fair trial rights of Mr. Banda and Mr. Jerbo.

34. In particular, the names and identities of official and covert GoS personnel who were located at MGS Haskanita are vital to the preparation of the Defence. The fact that there were persons present within the MGS Haskanita aiding the GoS’ military and criminal campaign in the Haskanita area goes to the very heart of the issues in this case. Even if the Trial Chamber finds that the Movements incorrectly, but sincerely, believed that GoS official personnel or covert agents inside the base were providing the GoS with military intelligence, this finding would exonerate Mr. Banda and Mr. Jerbo of all

²⁷ The Defence suggest that the Prosecutor has a duty to inform the Trial Chamber of any information or indication it has that any redaction relate to a person who may be deceased or no longer in Sudan as this would surely impact on the Trial Chamber’s evaluation of the validity of the redactions.

²⁸ As the Trial Chamber held at ICC-02/05-03/09-265-Red, para. 43, amongst others.

²⁹ The Defence acknowledge that it is possible that the Prosecutor has made submissions on this point to the Chamber in relation to these and other witnesses. If this is the case, these submissions have been entirely redacted from the versions of Prosecution filings available to the Defence or otherwise not disclosed to the Defence, so that the Defence are entirely unable to respond to these submissions in any meaningful way.

charges in this case as the necessary *mens rea* for the crime of attacking a peacekeeping mission would not be established. Because of their high relevance to the case, the Trial Chamber should not permit the Prosecutor to withhold their identifying information if alternative measures exist to effectively protect these persons. The Defence would not object to the Trial Chamber allowing the Prosecutor to attempt to contact these individuals beforehand to inform them that their names are going to be disclosed in order to ensure that they avoid being in areas of Sudan controlled by or contested by the Movements.³⁰

VII. Redactions of Identifying Information of Persons because they are Prosecution Witnesses

35. The Defence recognise the duty of the Prosecution to protect the names and identifying information pre-trial of witnesses who are genuinely at risk if this information is disclosed at this time. However, even if persons who are anticipated to be Prosecution witnesses are mentioned by other witnesses or appear in photographs documenting events relevant to the trial, there is no reason to redact this information from these statements or photographs as nothing in that information would reveal that the person mentioned is a witness. Moreover, in this case, according to the Prosecution's current list of witnesses,³¹ only one person is expected to testify whose identity has not yet been revealed, Witness 0307.

VIII. Disclosure is Required despite the Defence Request for a Temporary Stay of Proceedings

36. The Defence acknowledge that due to the practical difficulties severely limiting the Defence's ability to conduct investigations – specifically, the inability of the Defence to enter Sudan or interview anyone inside Sudan, and

³⁰ The Haskanita area has remained under the control of the GoS since 30 September 2007.

³¹ ICC-02/05-03/09-189.

the practical difficulties and inherent dangers in asking witnesses to meet the Defence outside the country, the Defence may in fact not be able to follow-up and investigate the information it now seeks from these redactions until the situation in Sudan changes to allow an unhindered Defence investigation. If the request for a temporary stay of the case now pending before this Chamber is granted, there may be a rational basis to withhold for now information about witnesses inside Darfur.

37. However, any further delay in disclosing this information to the Defence increases the risk that the value of the information may be lost forever. Witnesses now available may not be available at a later time. Darfur remains a violent and dangerous place and particularly those involved in the revolutionary Movements know that their lives are always at risk. Already, during the life of this case, many persons of key interest to the Defence investigation have died. Potential witnesses may flee and be impossible to locate or, for a variety of reasons, those now available for interview and willing to testify may be unable or unwilling to be interviewed in the future. Furthermore, in all cases as time passes, memories may fade and documents now available may be lost. Accordingly, whether the Chamber grants the Defence one month or one year to conduct their investigations following the lifting of the redactions in question, this may not mitigate the significant prejudice to the Defence resulting from these redactions, as persons whom the Defence might wish to speak to based upon the redacted information may simply be unavailable to the Defence by that time.

IX. Narrowing the Issues does not mean Waiving the Right to a Fair Trial

38. The Defence wish to take this opportunity to anticipate and respond to one meritless argument repeatedly put forward by the Prosecutor whenever the Defence have sought to assert their clients' right to a fair trial.³² The fact that

³² See ICC-02/05-03/09, second unnumbered paragraph; ICC-02/05-03/09-251, paras. 11, 12 and 16.

Mr. Banda and Mr. Jerbo agreed with the Prosecutor to limit this trial to three contested issues and to file with the Trial Chamber a motion on agreed facts that includes Mr. Banda's and Mr. Jerbo's acknowledgment that they participated in the attack on MGS Haskanita should in no way be used to compromise their right to a fair trial on the issues that remain in dispute.

39. For the avoidance of doubt, the information sought that has been redacted from the Prosecution's witness statements provided to the Defence directly relates to the three contested issues: whether the AMIS mission at the MGS Haskanita was a "peacekeeping mission in accordance with the Charter of the United Nations"; whether the attack was unlawful; and whether Mr. Banda and Mr. Jerbo were aware of the factual circumstances establishing the unlawful nature of the attack. Disclosure of this information now is necessary for the fair trial of Mr. Banda and Mr. Jerbo, a right neither has ever waived and which they trust this Trial Chamber to preserve.

X. Request for Relief

40. The Defence respectfully request the Trial Chamber to order the Prosecutor to lift the redactions itemised in the Annex and applied to statements and photographs disclosed to the Defence and, thereafter, to immediately disclose this unredacted material to the Defence.

Respectfully Submitted,



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for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus



Mr. Nicholas Koumjian
Co-Lead Counsel

Dated this 9th Day of March 2012

At The Hague, The Netherlands

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