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**International
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Date: **11 April 2012**

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

Joint Response by the Office of the Prosecutor and the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus to the “Requête aux Fins de Divulgateion aux Représentants Légaux Communs d’Eléments Confidentiels et d’Eléments Expurgés du Dossier de l’Affaire Le Procureur c/ Banda & Jerbo”

Sources: Office of the Prosecutor
Defence Team of Abdallah Banda Abakaer Nourain
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. For the convenience of the Chamber, this filing is jointly submitted by the Office of the Prosecutor ("OTP") and the Defence for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus ("Defence") (jointly, "Parties") in response to the Common Legal Representatives' request for disclosure of documents ("Request").¹
2. In their Request, the Common Legal Representatives ("CLR") seek disclosure of 20 confidential or confidential and *ex parte* annexes previously attached to five separate filings in this case.² The CLR argue that the confidential or confidential and *ex parte* status of these documents is not justified³ and that their content is of material relevance to the victims' interests.⁴
3. The Parties together oppose the CLR request to access the unredacted version of the "Rule 69 Agreement" attached as Confidential Annexure "A" to the "Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons" of 16 May 2011 ("Joint Submission")⁵ and submit that the confidential status of the document should be maintained.
4. The Defence further oppose the disclosure to the CLR of the other 19 annexes. Their current classification is justified and should be maintained.

¹ ICC-02/05-03/09-310. An official English translation has yet to be distributed. Due to the ambiguous and at times confusing language of the Request in French, the Defence reserve their right to make additional submissions in response to the Request when the official English translation is issued.

² See Request, para. 2. The Annexes are ICC-02/05-03/09-146-Conf-AnxA, ICC-02/05-03/09-146-Conf-AnxB, ICC-02/05-03/09-146-Conf-AnxC, ICC-02/05-03/09-146-Conf-AnxD, ICC-02/05-03/09-146-Conf-AnxE, ICC-02/05-03/09-146-Conf-AnxF, ICC-02/05-03/09-146-Conf-AnxG, ICC-02/05-03/09-146-Conf-AnxH, ICC-02/05-03/09-148-AnxA-Conf, ICC-02/05-03/09-234-Conf-AnxA, ICC-02/05-03/09-234-Conf-AnxB, ICC-02/05-03/09-234-Conf-AnxC, ICC-02/05-03/09-251-Conf-AnxA, ICC-02/05-03/09-251-Conf-AnxB, ICC-02/05-03/09-274-Conf-AnxC, ICC-02/05-03/09-274-Conf-AnxF, ICC-02/05-03/09-274-Conf-AnxG, ICC-02/05-03/09-274-Conf-AnxH, ICC-02/05-03/09-274-Conf-AnxJ, ICC-02/05-03/09-274-Conf-AnxL, and ICC-02/05-03/09-274-Conf-AnxN.

³ Request, para. 4.

⁴ Request, para. 24.

⁵ ICC-02/05-03/09-148-AnxA-Red.

II. Background

5. On 11 May 2011, the Defence submitted the “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” and accompanying confidential Annexures D and G and confidential and *ex parte* Annexures A, B, C, E, F and H.⁶
6. On 16 May 2011, the Parties submitted the Joint Submission and its related confidential Annexure A.⁷
7. On 26 May 2011, pursuant to the Trial Chamber’s instructions, the Parties submitted their “Joint Observations by the Office of the Prosecutor and the Defence regarding access by Participants to Confidential Annexure ‘A’ of the ‘Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons’”.⁸
8. On 22 June 2011, the Trial Chamber requested observations from the legal representatives and ordered the Parties to file a public redacted version of Annexure A.⁹ Thereafter, with the Trial Chamber’s approval, the Parties filed the public redacted version.¹⁰
9. On 8 August 2011, the legal representatives filed observations.¹¹

⁶ ICC-02/05-03/09-146 (“First AU Application”) and annexes.

⁷ ICC-02/05-03/09-148 and Annexure A.

⁸ ICC-02/05-03/09-151.

⁹ “Order requesting observations from the legal representatives on the agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence”, ICC-02/05-03/09-165, para. 7.

¹⁰ ICC-02/05-03/09-167 and ICC-02/05-03/09-148-AnxA-Red.

¹¹ “Observations du Représentant Légal sur l’accord relatif aux éléments de preuve en application de la Règle 69 du Règlement de Procédure et de Preuve”, ICC-02/05-03/09-190; “Observations by the Legal Representatives for Victims a/1646/10 and a/1647/10 on the ‘Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons’ and the ‘Agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence between the Defence of Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus and the Office of the Prosecutor’”, ICC-02/05-03/09-194.

10. On 28 September 2011, the Trial Chamber issued the “Decision on the Joint Submission regarding the contested issues and the agreed facts”.¹²
11. On 20 October 2011, the Defence submitted the “Second 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” with confidential Annexures A, B and confidential and *ex parte* Annexure C.¹³
12. On 20 October 2011, the “Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor” was filed.¹⁴
13. On 10 November 2011, the “Prosecution’s Response to Defence Request for Disclosure” with confidential Annexes A and B was submitted.¹⁵
14. On 6 January 2012, the Defence submitted their request for a temporary stay of proceedings, including confidential Annexures C, J, L and N and confidential and *ex parte* Annexures F, G and H.¹⁶
15. On 30 January 2012, the CLR submitted their “Observations en réponse aux requêtes d’arrêt temporaire des procédures et une audition orale”.¹⁷
16. On 30 January 2012, both the OTP and the CLR filed responses to the “Defence Request for a Temporary Stay of Proceedings”. The OTP filed a public redacted version of its response on 1 February 2012.¹⁸

¹² ICC-02/05-03/09-227.

¹³ ICC-02/05-03/09-234 (“Second AU Application”) and annexes.

¹⁴ ICC-02/05-03/09-235 (“Disclosure Request”).

¹⁵ ICC-02/05-03/09-251 (“Disclosure Response”) and annexes.

¹⁶ ICC-02/05-03/09-274 (“Stay Request”) and annexes.

¹⁷ ICC-02/05-03/09-285.

¹⁸ ICC-02/05-03/09-286-RED.

17. On 2 February 2012, the CLR filed their “Requête aux fins d’être autorisés a soumettre un Addendum”.¹⁹
18. On 21 February 2012, with the Trial Chamber’s permission,²⁰ the “Defence Reply to the ‘Prosecution Response to the Defence Request for a Temporary Stay of Proceedings and to the Defence Request for an Oral Hearing’ filed on 30 January 2012 was submitted.”²¹
19. On 5 March 2012, the CLR filed their request for leave to reply to the Defence reply to the OTP response to the Defence Stay Request.²²
20. On 6 March 2012, the Trial Chamber rejected the CLR request to file an addendum. The Chamber stated that “given the extensive scope of the filings” already made, any additional submissions are “unnecessary”.²³
21. The Defence submitted their response to the CLR request for leave to reply to the Defence reply to the OTP response to the Defence request for a temporary stay of proceedings on 19 March 2012.²⁴

¹⁹ ICC-02/05-03/09-287.

²⁰ ICC-02/05-03/09-294-RED.

²¹ A public redacted version was filed on 22 February 2012. See ICC-02/05-03/09-300-RED.

²² A corrigendum to the Request was filed on 9 March 2012. See ICC-02/05-03/09-303-Corr.

²³ ICC-02/05-03/09-304, para. 6.

²⁴ ICC-02/05-03/09-309.

III. Classification and Disclosure of 20 Confidential and Confidential *Ex Parte* Annexes

22. The CLR argue that the classification of the 20 annexes is not justified.²⁵

Furthermore, according to the CLR, their content is of material relevance to the victims' interests.²⁶ In fact, the CLR claim that in order to effectively participate in these proceedings the victims need access to "all evidence".²⁷

23. The Parties consider that the question of classification (confidential or *ex parte*) of documents is different from the matter of access to or disclosure of material. The two issues will, therefore, be addressed separately.

A. Submissions on Classification of the Documents

24. When filing the annexes in question, the Parties made submissions as to the factual and legal basis for each classification pursuant to Regulation 23 *bis* of the Regulations of the Court ("Regulations"). The Parties maintain that the factual and legal situation has not changed and the classifications are justified.

(a) Joint Submissions

25. As to the Rule 69 Agreement, the Parties previously submitted that "[t]he contents of Annexure 'A' constitute evidence akin to the witness-related evidence the Prosecution classified as 'confidential' for the purposes of the confirmation hearing, and contain information currently classified by the

²⁵ Request, para. 4.

²⁶ Request, para. 24.

²⁷ Request, para. 5. The CLR refer to "accès à tous les éléments de preuve du dossier de l'affaire." The annexes in question cannot be considered "evidence" and the Trial Chamber has yet to rule on the disclosure of Defence evidence for trial to the OTP and the CLR. In support of their arguments, the CLR refer to the *Katanga* jurisprudence providing that "in order to promote effective participation of victims in the trial, the Legal Representatives must be able to consult all of the public and confidential decisions and documents in the record of the case, with the exception of any document classified as *ex parte*". Thus, it is assumed that in this context the CLR argue that in order to effectively participate in these proceedings they need access to all documents, including the relevant annexes, rather than all evidence. See *Prosecutor v. Katanga and Ngudjolo*, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, para. 121.

Parties as confidential. Accordingly, the Parties have classified Annexure 'A' as 'confidential' [...]."²⁸

26. As stated in paragraph 8, the Parties filed, pursuant to the Trial Chamber's instructions, an approved redacted public version of Annexure A. The Parties oppose any reclassification to public of the unredacted confidential version of Annexure A since it contains witness-related and other sensitive information that should not be made public at this time. The Parties note that the Trial Chamber already adjudicated on the Joint Submission and the Rule 69 Agreement and did not request a reclassification of the unredacted Annexure A.

b) Defence Submissions

27. Regarding the confidential and *ex parte* Annexures A, B, C, F and H to the First AU Application,²⁹ the Defence previously submitted "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 [...] which requires the Defence to disclose such information. Moreover, to do so might prejudice the Defence investigation."³⁰ The CLR fail to refer to any legal provision which requires the Defence to reveal such information in a public document (or in a filing classified "confidential") at this stage of the proceedings.

28. The "confidential" classification of Annexures D and G to the First AU Application, is justified since the documents contain a signature and a business email of a third party, as previously submitted by the

²⁸ ICC-02/05-03/09-148, fn. 5.

²⁹ ICC-02/05-03/09-146.

³⁰ ICC-02/05-03/09-146, para. 2.

Defence.³¹ Furthermore, they contain information on the Defence's investigative steps.

29. The Defence maintain that the status attributed to the confidential Annexures A and B and confidential and *ex parte* Annexure C to the Second AU Application³² is justified. The Defence submitted previously that the classification of confidential Annexure A and confidential and *ex parte* Annexure C“ is appropriate because the list of documents reveals the direction and focus of the defence investigation. There is nothing in the Statute or in the Rules [...] to require the Defence to disclose such information. Moreover, to do so might prejudice the defence investigation.”³³ The same justification applies to confidential Annexure B. Annexure A is a request for disclosure addressed to the OTP and Annexure B the OTP's response. The Defence chose to reveal limited and preliminary information on defence investigation contained in Annexure A in order to obtain disclosure of relevant exculpatory material in the possession of the OTP. However, no provision of the Statute or the Rules requires the Defence to reveal this information in a public filing. As to Annexure C, it contains submissions on specificity and relevance in respect of each document, which the Defence seek to obtain and was, or are likely to be, in the possession of the African Union (“AU”). These submissions are for the consideration of the Trial Chamber. The Defence is not required to submit the information contained in Annexure C in a public or confidential filing.

30. The classification of confidential Annexures C, J, L and N, and confidential and *ex parte* Annexures F, G, H and K to the Stay Application³⁴ is justified. As

³¹ ICC-02/05-03/09-146, fns.3 and 4.

³² ICC-02/05-03/09-234.

³³ ICC-02/05-03/09-234, fns.1 and 11.

³⁴ ICC-02/05-03/09-274.

previously submitted, Annexure C contains confidential information from the United Nations,³⁵ Annexures F and G contain the declarations of potential defence witnesses,³⁶ Annexure H comprises names of and information on potential defence witnesses,³⁷ Annexure K contains names of potential defence witnesses, who are presumed dead,³⁸ Annexure J describes communications between the Defence and Mr. Banda, as well as the details of Registry interactions with the Chadian government,³⁹ Annexure L contains the names of VWU staff members,⁴⁰ and Annexure N includes details of a Defence Disclosure Request.⁴¹ Furthermore, Annexures C and L contain information as to issues related to the defence investigation.

31. Lastly, the classification of confidential Annex A to the OTP Disclosure Response⁴² is justified since it contains information revealing the direction and focus of the defence investigation. Annex B is part of an *inter partes* correspondence, which the Defence consider confidential. A reclassification of these documents to public would be prejudicial to the Defence.

32. Contrary to the suggestion of the CLR,⁴³ the classification as confidential or confidential and *ex parte* is not limited to documents containing sensitive national security information, witness-related information or information as to the OTP's on-going investigation.

³⁵ ICC-02/05-03/09-274, fn. 17.

³⁶ ICC-02/05-03/09-274, fn. 21.

³⁷ ICC-02/05-03/09-274, fn. 22.

³⁸ ICC-02/05-03/09-274, para. 16.

³⁹ ICC-02/05-03/09-274, fn. 31.

⁴⁰ ICC-02/05-03/09-274, fn. 48.

⁴¹ ICC-02/05-03/09-274, fn. 73.

⁴² ICC-02/05-03/09-251.

⁴³ Request, para. 50.

B. Submissions on Disclosure of the Documents

33. The Parties oppose the CLR request to access the unredacted version of the Rule 69 Agreement. The Defence further object to the disclosure to the CLR of the other 19 annexes,⁴⁴ since the victims' interests are not affected by their content at this stage of the proceedings and the disclosure would be prejudicial to the Defence and in violation of Mr. Banda and Mr. Jerbo's fair trial rights.

34. In their Request, the CLR refer to *Lubanga*,⁴⁵ *Katanga*,⁴⁶ and *Bemba*⁴⁷ decisions in which the respective Trial Chambers laid down the modalities for trial. These references are obviously premature given that this Trial Chamber has yet to rule on the modalities of victim participation at trial. The Parties note that the decisions on modalities by the other Trial Chambers were issued either after a trial date was set, as in the *Lubanga* case,⁴⁸ shortly before the trial commenced, as in *Bemba*, or after the trial already started, as in *Katanga*.

35. The Parties will present their arguments as to the participation of the victims when requested by the Trial Chamber to do so. In the current context and in the absence of a decision on victim participation, any access to confidential or *ex parte* material should be determined on a case-by-case basis.

⁴⁴ ICC-02/05-03/09-146-Conf-AnxA, ICC-02/05-03/09-146-Conf-AnxB, ICC-02/05-03/09-146-Conf-AnxC, ICC-02/05-03/09-146-Conf-AnxD, ICC-02/05-03/09-146-Conf-AnxE, ICC-02/05-03/09-146-Conf-AnxF, ICC-02/05-03/09-146-Conf-AnxG, ICC-02/05-03/09-146-Conf-AnxH, ICC-02/05-03/09-234-Conf-AnxA, ICC-02/05-03/09-234-Conf-AnxB, ICC-02/05-03/09-234-Conf-AnxC, ICC-02/05-03/09-251-Conf-AnxA, ICC-02/05-03/09-251-Conf-AnxB, ICC-02/05-03/09-274-Conf-AnxC, ICC-02/05-03/09-274-Conf-AnxF, ICC-02/05-03/09-274-Conf-AnxG, ICC-02/05-03/09-274-Conf-AnxH, ICC-02/05-03/09-274-Conf-AnxJ, ICC-02/05-03/09-274-Conf-AnxL and ICC-02/05-03/09-274-Conf-AnxN.

⁴⁵ *Prosecutor v. Lubanga*, 18 January 2008, ICC-01/04-01/06-1119. See also Request, fn 2.

⁴⁶ *Prosecutor v. Katanga and Ngudjolo*, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG. See also Request, fn 1.

⁴⁷ *Prosecutor v. Bemba*, Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr. See Request, fn. 3.

⁴⁸ On 9 November 2007, the *Lubanga* Trial Chamber decided that the trial will start on 31 March 2008. See ICC-01/04-01/06-1019.

36. Article 68(3) provides for three criteria for victims and their legal representatives to be able to present their views and concerns: (1) the personal interests of the victims must be affected, (2) the Court must deem the stage of the proceedings appropriate, and (3) the victim participation may not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁴⁹

37. Indeed, the *Bemba* Trial Chamber provided that victims are “afforded access to the confidential material” which is “relevant to their views and concerns”.⁵⁰

38. Therefore, the question here is whether at this stage of the proceedings the personal interests of victims are affected by the information sought and whether the disclosure of the information would cause prejudice to or be inconsistent with the rights of Mr. Banda and Mr. Jerbo and a fair and impartial trial.

(a) Joint Submissions on Annexure “A” containing the Rule 69 Agreement

39. The Parties jointly oppose the disclosure to the CLR of the unredacted version of confidential Annexure A to the Joint Submission.⁵¹ The CLR have not made a showing of need for the unredacted information.

40. Pursuant to the modalities set by the Trial Chamber, the Legal Representatives already had, and exercised, the opportunity to make observations on the Rule 69 Agreement. The Trial Chamber thereafter ruled on the Joint Submission and the Rule 69 Agreement, having considered the Legal Representatives’ observations.⁵²

⁴⁹ The Defence note that Rule 131(2) referred to by the CLR in paragraph 49 of their Request does not apply here since it clearly refers to the “[r]ecord of the proceedings transmitted by the Pre-Trial Chamber”. The annexes in question were filed with the Trial Chamber, not the Pre-Trial Chamber.

⁵⁰ *Supra* note 47, para. 47.

⁵¹ ICC-02/05-03/09-148-AnxA-Conf.

⁵² ICC-02/05-03/09-227.

41. The Parties point out that, in response to the Legal Representatives' prior objection that the restricted scope of the contested issues contained in the Rule 69 Agreement affects the victims' right to know the full facts of the case, the Trial Chamber reiterated that the "Decision on the Confirmation of the Charges" ("Confirmation Decision") is the relevant document for defining the scope of the trial proceedings.⁵³ The CLR's current application in effect constitutes a request for reconsideration of that Decision.

42. There is no extraordinary reason that would justify the requested reconsideration. With the leave of the Trial Chamber,⁵⁴ the redactions were applied to information which if revealed might place Mr. Banda and Mr. Jerbo at risk or impact on defence investigations. Furthermore, additional redactions were applied to ensure consistency with the public redacted version of the Document Containing the Charges.⁵⁵ The Parties are unaware of any change in circumstances justifying the lifting of those previously approved redactions. The Parties submit that at this stage of the proceedings the victims' interests are not affected by the redacted information. Moreover, the Defence assert that disclosure remains prejudicial to the Defence and would continue to pose a risk to Mr. Banda and Mr. Jerbo.

43. The Parties also recall that, in response to the previous Legal Representatives' challenge to the redactions of the Rule 69 Agreement the Trial Chamber reiterated that the Confirmation Decision indeed made reference to these facts and that, "in due course, the participating victims may be permitted to advance their views and concerns on this issue, should it arise at trial, upon

⁵³ ICC-02/05-03/09-227, paras. 29 to 31.

⁵⁴ Email Response by the Trial Chamber's Legal Officer to Email entitled "Defence and Prosecution's Submission of a proposed public redacted version of the Agreed Facts", dated 29 June 2011.

⁵⁵ ICC-02/05-03/09-79-Red.

demonstrating that their personal interests are engaged. However, the Joint Submission and the Agreement do not, as such, have a bearing on the completeness of the presentation of the facts alleged by the victims.”⁵⁶

44. The Trial Chamber also held that “at this stage, a more complete presentation of this fact is not required in the interests of the participating victims. In any event, the Trial Chamber is not limited by the terms of the Agreement and it may request any additional evidence it considers necessary for the determination of the truth or which may be relevant to the Chamber's assessment of the harm suffered by victims.”⁵⁷ The Parties, therefore, submit that the CLR do not demonstrate that the lack of access to the unredacted version of the Rule 69 Agreement directly affects the victims’ interests.

(b) Defence’s Submissions

No Statutory Defence Obligation to Disclose Preliminary Information on On-going Investigation and Strategy, as well as Information on Potential Witnesses or Evidence Contained in Nineteen Annexes; and Defence Prejudice if Required to Disclose

45. Out of the 19 remaining annexes, ten⁵⁸ reveal the direction and focus of the defence investigation. They contain detailed information on documents the Defence seek to obtain and how these documents are relevant for their case. These documents are related to the issue of the protected status of MGS Haskanita or to the Government of Sudan campaign of violence in Darfur.

46. Two further annexes,⁵⁹ which are connected to these ten documents, reveal information on investigative steps taken by the Defence.

⁵⁶ ICC-02/05-03/09-227, paras. 38-39.

⁵⁷ ICC-02/05-03/09-227, para. 39.

⁵⁸ ICC-02/05-03/09-146-Conf-AnxA, ICC-02/05-03/09-146-Conf-AnxB, ICC-02/05-03/09-146-Conf-AnxC, ICC-02/05-03/09-146-Conf-AnxF, ICC-02/05-03/09-146-Conf-AnxH, ICC-02/05-03/09-234-Conf-AnxA, ICC-02/05-03/09-234-Conf-AnxB, ICC-02/05-03/09-234-Conf-AnxC, ICC-02/05-03/09-251-Conf-AnxA, ICC-02/05-03/09-274-Conf-AnxN.

⁵⁹ ICC-02/05-03/09-146-Conf-AnxD and ICC-02/05-03/09-146-Conf-AnxG.

47. The CLR fail to demonstrate how, at this stage of the proceedings, the victims are affected by the information and arguments submitted in the 12 annexes,⁶⁰ including on the nature, content and relevance of documents investigated by the Defence. The issue identified is not whether the content of the documents, which are sought by the Defence, may be affecting the victims' interests. Therefore, contrary to the submissions in the Request,⁶¹ it is irrelevant whether similar documents are already in the record and available to the CLR. Furthermore, the "right to know"⁶² referred to by the CLR does not include access to confidential Defence information. The annexes do not contain "facts and evidence",⁶³ but rather information as to matters investigated by the Defence. They do not affect the victims' right to access to justice or to obtain reparations.⁶⁴

48. The Defence recall that they are not yet in the possession of the documents sought. In the event the Defence intend to use in court any material eventually obtained, they will be required to allow OTP inspection pursuant Rule 78 and to notify the OTP before presenting it in court pursuant to the modalities which will be established by the present Trial Chamber. Equally, at the relevant stage during trial, the CLR will be permitted, if the Trial Chamber deems appropriate, to present arguments and evidence as to the protected status of MGS Haskanita or the Government of Sudan's violent campaign in Darfur and in response to any arguments and evidence submitted by the parties in court, including any of the documents presently sought by the Defence, in a manner to be determined by the Trial Chamber.

⁶⁰ See *supra* notes 58 and 59.

⁶¹ Request, paras.41 and 50.

⁶² Request, para. 56.

⁶³ *Ibid.* The Request refers to "éléments de faits et de preuve".

⁶⁴ See Request, para. 56.

49. The Defence also note that the annexes are not “specific questions in dispute in the proceedings” as the CLR suggest in paragraph 8 of their Request. The alleged illegality of the attack⁶⁵ is an issue that will be addressed at trial. At this stage of the proceedings, the issue is only addressed by the Defence to provide context and information on the specificity and relevance of the material investigated by the Defence. The CLR will have ample opportunity, with the leave of the Trial Chamber, to submit arguments and evidence regarding this issue at trial.

50. As with the 12 annexes discussed above,⁶⁶ ICC-02/05-03/09-251-Conf-AnxB falls into the category of documents revealing defence investigations.

51. At any stage of the proceedings, the Defence may decide to reveal part of their investigative steps to the OTP, for instance in order to obtain Article 67(2) or Rule 77 documents believed to be in the possession of the OTP. Equally, the Defence may choose to submit more detailed information as to the content of the material investigated to the Trial Chamber in support of their request for assistance in the matter or to demonstrate the difficulties encountered in their investigation. However, pursuant to the Statute or the Rules, the Defence are under no obligation to disclose to the OTP or the CLR such information at this stage of the proceedings.

52. Requesting the Defence to reveal the content of 13⁶⁷ annexes to the CLR, amounts to premature, improper and unjustified defence disclosure in violation of the Statute and the Rules.⁶⁸ This would prejudice the on-going

⁶⁵ See Request, para. 13ff.

⁶⁶ See *supra* notes 58 and 59.

⁶⁷ See *supra* notes 58 and 59 and paragraph 50.

⁶⁸ The rights of access of the victims can by no means exceed those access rights granted by the Statute and the Rules to the Prosecution. See *mutatis mutandis*, *Prosecutor v. Lubanga*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, para. 88.

defence investigations and constitute a violation of Mr. Banda and Mr. Jerbo's fundamental right to remain silent pursuant to Article 67(1)(g).

53. In addition, five annexes⁶⁹ contain sensitive information related to potential defence witnesses. The affected persons and/or their families reside in Sudan and are beyond the protection of the Court. Unless and until the Defence decide to call these witnesses and protective measures are in place, the Defence object to the disclosure of any information contained in the annexes, including in summary or redacted form. Furthermore, the annexes also reveal information as to on-going investigations. As stated above, premature disclosure violates Mr. Banda and Mr. Jerbo's rights. Most importantly, this information in no way directly affects the interests of the victims at this stage.

54. One annex⁷⁰ contains privileged information pursuant to Rule 73(1) since it refers to communications made in the context of the professional relationship between Mr. Banda and his counsel (in this particular case an assistant to counsel). The document also reveals details of interactions between the Registry and the Chadian government.

55. Moreover, the CLR fail to show how the content of this document directly affects the victims' interests. In paragraph 15 of the Stay Application, the CLR were given a description of the content of this annex. The CLR were given the opportunity by the Trial Chamber to comment on this issue and submitted their observations in response to the Stay Application on 30 January 2012.

56. In fact, the submissions in the Request regarding all 19 annexes are nothing more than another thinly veiled attempt by the CLR to address matters, which

⁶⁹ ICC-02/05-03/09-274-Conf-AnxC, ICC-02/05-03/09-274-Conf-AnxF, ICC-02/05-03/09-274-Conf-AnxG, ICC-02/05-03/09-274-Conf-AnxH and ICC-02/05-03/09-274-Conf-AnxL.

⁷⁰ ICC-02/05-03/09-274-Conf-AnxJ.

are either already adjudicated or under consideration by the Trial Chamber after receiving submissions by the parties and the participants. In fact, in one particular case, namely the Stay Application, the Trial Chamber already decided plainly that further submissions are “unnecessary”.⁷¹

57. The non-disclosure of the 19 annexes has not prevented the CLR from making submissions as to the substance of the filings these annexes were attached to. On closer look, the CLR chose not to seek to submit any observations in response/reply to the two Defence AU applications and the OTP Disclosure Response. The CLR did not argue at the relevant stage that they were prevented from making observations because of the confidential or confidential and *ex parte* nature of the relevant annexes. From this silence, it may even be inferred that, at the time, the CLR did not believe that the victims’ interests were affected by these three filings. This further weakens the request for disclosure and effectively reveals that the CLR seek premature defence disclosure.

58. The attempt by the CLR to access information concerning defence investigations and potential witnesses before the opening of the trial and considerably in advance of the closing of the OTP’s case-in-chief is of concern and constitutes a direct attack on the fair trial rights of Mr. Banda and Mr. Jerbo. Furthermore, disclosure of this type of information may potentially affect the integrity of the evidence to be heard by the Trial Chamber, since the CLR may discuss the information with victims, who may then testify as witnesses if granted dual victim-witness status.

⁷¹ ICC-02/05-03/09-304. para 6.

CLR Arguments Regarding the Abu Garda Case Are Prejudicial

59. The Request strays beyond the proper confines of an application of this nature. The CLR make repeated reference to the *Abu Garda* case, including references to factual submissions and evidence presented at the confirmation hearing,⁷² as well as to factual findings of the Pre-Trial Chamber in that case.⁷³ These arguments are irrelevant and prejudicial. Mr. Banda and Mr. Jerbo were not present or represented at the confirmation stage in *Abu Garda*. In *Abu Garda*, the Pre-Trial Chamber unanimously found that the evidence presented was wholly inadequate to prove any link between Abu Garda and the attack on MGS Haskanita.⁷⁴ For this reason, Judge Tarfusser did not join any of the majority's further legal or factual findings regarding the legality of the attack, as these were unnecessary to the finding and, thus, *obiter dicta*.⁷⁵ By citing factual findings from the *Abu Garda* confirmation, the CLR are, in essence, requesting the Trial Chamber to take judicial notice of adjudicated facts from another case. There are no provisions in the Statute or the Rules that permit judicial notice of adjudicated facts in this Court. Even at the *ad hoc* tribunals, where such notice is permitted, the Chamber will not take notice if the facts in question require legal conclusions or are disputed between the parties.⁷⁶ The references to *Abu Garda* made by the CLR are either legal conclusions, are disputed between the parties in the instant case or, in most instances, both. Moreover, the CLR are relying on findings from a

⁷² Request, para. 17.

⁷³ Request, paras. 18 and 19.

⁷⁴ ICC-02/05-02/09-243-Red.

⁷⁵ See ICC-02/05-02/09-243-Red, Separate opinion of Judge Cuno Tarfusser, paras. 5ff.

⁷⁶ The ICTY Appeals Chamber found that adjudicated facts "are merely presumptions that may be rebutted with evidence at trial." See *Prosecutor v. Dragomir Milošević*, IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007, para. 16. See also *Prosecutor v. Karemera et al.* Appeal Decision on Judicial Notice, para. 42; *Momir Nikolić v. Prosecutor*, IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, para. 11; *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4.

confirmation hearing where the burden of proof is that there are “substantial grounds to believe”, a standard far short of proof beyond a reasonable doubt.

Relief Requested

For the reasons set out above, the Parties respectfully request that the CLR Request to obtain access to the non-redacted version of the Rule 69 Agreement be denied and the confidential status of this version be maintained.

The Defence further request that the Trial Chamber maintain the classification of the remaining annexes listed in paragraph 2 of the CLR Request and deny the CLR Request for disclosure of these annexes.

Respectfully Submitted,



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Dated this 11th Day of April 2012
At The Hague, The Netherlands

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