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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

Public Redacted Version of “Defence Request for Termination of Proceedings”

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
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I. Introduction

1. The defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") submit that all charges against Mr. Banda and Mr. Jerbo should be dismissed due to the failure of the Office of the Prosecutor ("OTP") to disclose exonerating evidence that was highly relevant to the contested issues in this case.

2. Disclosure made to the Defence on 2 May 2013 – nearly 3 years after the material was collected and two and half years after the confirmation of charges hearing – reveals that exonerating evidence which directly contradicted OTP submissions was not put before the Pre-Trial Chamber ("PTC") during confirmation. This failure "cloud[s] the proceedings with doubt".¹ In addition, the OTP have failed to fulfil their obligation under Article 54(1)(a) of the Rome Statute ("Statute") to investigate exonerating and incriminatory circumstances equally; failed to disclose exculpatory evidence to the Defence as soon as practicable; and failed to disclose other evidence material to the preparation of the defence.

3. The Defence submit that the OTP's failures have violated Mr. Banda and Mr. Jerbo's fundamental fair trial rights and irreparably prejudiced these proceedings. By failing to disclose exonerating evidence, the OTP deprived the Defence of the opportunity to place that evidence before the PTC and, thus, prevented the PTC from knowing, in full, the results of the OTP's investigations. This conduct is odious to the administration of justice. The effect was to mislead the PTC which, in turn, made factual findings directly contradicted by the evidence withheld by the OTP. Further, late disclosures and a failure to investigate exonerating

¹ *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Pikis, 21 October 2008, ICC-01/04-01/06-1486, para. 46.

circumstances equally have prejudiced the ability of the Defence to properly investigate the facts of this case, in circumstances where the investigative capacity of the Defence is severely compromised by their inability to travel to the *locus in quo* and the inability of the Court to provide any protective measures to potential Defence witnesses inside Sudan.

4. A mere reprimand will not remedy this damage. This case was never properly investigated and arrived at this stage in proceedings only after the OTP misled the PTC about the results of their own limited investigations. In order to uphold the credibility of the Statute's guarantee of fundamental rights to all accused and to enforce the expectation that the OTP will properly discharge their basic statutory and ethical obligations, all charges against Mr. Banda and Mr. Jerbo should now be dismissed.

II. Procedural Background

5. On 16 June 2010, pursuant to summonses issued by the Court, Mr. Banda and Mr. Jerbo voluntarily appeared before Pre-Trial Chamber I.
6. In preparation for the confirmation hearing, the OTP were ordered to disclose to the Defence all material covered by Article 67(2) of the Statute by no later than 9 July 2010.²
7. At a status conference held on 16 August 2010, the OTP referred to the statement of Witness 0467, which had not been disclosed, and submitted that "it does not contain any PEXO [potentially exonerating material], so we are not going to use that".³ The Defence asked the OTP to consider

² ICC-02/05-03/09-49, para. 10.

³ ICC-02/05-03/09-T-7, page 5, line 25 – page 6, line 2.

whether the statement might fall within Rule 77 of the Rules of Procedure and Evidence (“Rules”) and, specifically, whether it was in any way inconsistent with other evidence upon which the OTP intended to rely.⁴ The OTP submitted unequivocally that “the material is not relevant to the preparation of the defence. We have made the assessment and made that conclusion.”⁵ The OTP further submitted “it is not material to the preparation of the defence [...] there is no reason to disclose the statement [...] there is no doubt in our minds that this statement does not contain PEXO or Rule 77 material”.⁶ The PTC, accepting these clear submissions in good faith, made no order in relation to the disclosure of the statement.

8. On 19 October 2010, the OTP filed the Document Containing the Charges (“DCC”).⁷ The DCC addressed a critical issue – whether MGS Haskanita was a lawful target because intelligence information was leaking from it to the Government of Sudan (“GoS”), *inter alia*, through one Captain Bashir – by submitting that, following a complaint made by the revolutionary movements to MGS Haskanita on 10 September 2007, “soon afterwards, an AMIS helicopter was dispatched and Captain Bashir was removed from the MGS Haskanita in the presence of rebel troops”.⁸
9. On 22 October 2010, the OTP provided the Defence with its List of Evidence. In support of the above submission that Captain Bashir was removed from MGS Haskanita by AMIS, the OTP relied on the evidence of Witnesses 0446 and 0419.⁹

⁴ ICC-02/05-03/09-T-7, page 16, line 24 to page 17, line 2.

⁵ ICC-02/05-03/09-T-7, page 18, lines 6-8.

⁶ ICC-02/05-03/09-T-7, page 15, lines 7-13.

⁷ ICC-02/05-03/09-79.

⁸ *Ibid.*, para. 56.

⁹ ICC-02/05-03/09-84-ConfAnx, row 137.

10. On 6 December 2010, the OTP filed their written submissions in support of confirmation. These included the following key submissions:

a. [REDACTED];¹⁰

b. [REDACTED]¹¹

11. Relying on these submissions and the limited evidence selected by the OTP which fit these inaccurate assertions, the PTC repeated the findings made in the earlier confirmation decision in *Abu Garda* that “[Captain Bashir] was removed from the compound well before the attack”.¹²

12. On 6 January 2012, the Defence requested a temporary stay of proceedings on the basis that its inability to investigate in Sudan rendered an effective defence investigation impossible.¹³ In rejecting the Defence’s request, the Trial Chamber suggested counter-balancing measures to remedy the unfairness to the Defence including “revealing one line of argument to the prosecution in order to facilitate the search for, and disclosure of, relevant evidence and the investigation thereof”.¹⁴

13. On 2 May 2013, the deadline imposed by the Trial Chamber for the completion of disclosure,¹⁵ the OTP revealed for the first time to the Defence that they had all along been in possession of the following information directly contradicting their submissions that AMIS had

¹⁰ ICC-02/05-03/09-112-Conf-AnxA, para. 80.

¹¹ *Ibid.*, para. 81.

¹² ICC-02/05-03/09-121-Conf, para. 69. In the earlier confirmation decision, the finding that Captain Bashir was removed from MGS Haskanita before the attack was indeed based solely on the evidence of Witnesses 0446 and 0417. See ICC-02/05-02/09-243-Red, para. 141.

¹³ ICC-02/05-03/09-274.

¹⁴ ICC-02/05-03/09-410, para. 113.

¹⁵ ICC-02/05-03/09-455, para. 25 (iii) and (iv).

removed Captain Bashir from the AMIS base at Haskanita in response to the complaints about his intelligence activities:

- a. The statement of Witness 0467, [REDACTED]¹⁶ –
on 28 May 2010, Witness 0467 told the OTP that:
 - i. [REDACTED];¹⁷
 - ii. [REDACTED];¹⁸
 - iii. [REDACTED];¹⁹
 - iv. [REDACTED] (emphasis added).²⁰
- b. The Statement of Witness 0471, [REDACTED] – on 29 November 2010, 0471 told the OTP that:
 - i. [REDACTED];²¹ and
 - ii. [REDACTED]²²

14. In addition, long after confirmation, the OTP disclosed evidence which would have assisted the Defence investigation of pivotal issues. On 17 September 2012, the OTP lifted some redactions to the witness statement of Witness 0419 to reveal that the source of his information about [REDACTED].²³ On the same day, redactions lifted to the statement of Witness 0446 revealed that AMIS had long been told [REDACTED].²⁴ Since disclosure of this important information, the Defence have tried to investigate this crucial witness. [REDACTED].

¹⁶ DAR-OTP-0176-0063, para. 33

¹⁷ DAR-OTP-0176-0065, para. 51.

¹⁸ DAR-OTP-0176-0066, para. 52.

¹⁹ *Ibid.*, para. 53.

²⁰ *Ibid.*, para. 56.

²¹ DAR-OTP-0180-0354, para. 56.

²² *Ibid.*, para. 57

²³ DAR-OTP-0168-0168, paras. 10 – 11.

²⁴ DAR-OTP-0169-0808, para. 84. Disclosed 17 September 2012 (Incrim Package 34).

15. Further, on 2 May 2013, the OTP lifted the remaining redactions to the statement of Witness 0419 revealing [REDACTED].²⁵ The Defence have attempted to call [REDACTED] on these numbers on various occasions without success.

16. On 2 May 2013, the OTP also disclosed to the Defence a series of screening notes from telephone interviews with other potential witnesses, which contained exonerating evidence.

17. On 18 July 2013, the Defence sought clarification from the OTP on a number of issues arising from this disclosure.²⁶ On 14 August 2013, the OTP confirmed that it has made no attempt to telephone [REDACTED], nor did the OTP carry out further interviews with the individuals identified in the screening notes.²⁷

III. Applicable Law

18. Article 54(1) of the Statute provides that:

“The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute, and in doing so, investigate incriminating and exonerating circumstances equally.”

19. Article 54(1)(a) was intended to be a significant provision. It makes clear that the aim of the OTP’s investigation is not partisan but is to “establish the truth” by investigating “all facts and evidence relevant” to the

²⁵ DAR-OTP-0165-0489, paras. 60, 61 and 63.

²⁶ E-mail from the Defence to the OTP dated 18 July 2013 entitled “Requests Arising out of 2 May 2013 disclosure”.

²⁷ E-mail from the OTP to the Defence dated 14 August 2013, entitled “Additional Responses”.

potential charges and to investigate exonerating circumstances “equally” to incriminating circumstances. Triffterer correctly identifies that “this provision places a high responsibility on the Prosecutor.”²⁸ The Trial Chamber recently “remind[ed] the prosecution of its duties under Article 54(1) of the Statute to establish the truth and take appropriate measures to ensure effective investigation”.²⁹

20. Article 67(2) of the Statute provides in part that:

“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.”

21. Article 67(2) protects a fundamental right. In *Bemba*, Pre-Trial Chamber III reminded the OTP that disclosure of exculpatory material “is of upmost importance for the preparation of the defence, on an ongoing basis and as soon as practicable”.³⁰ In *Lubanga*, Trial Chamber I went further saying that “the Chamber has unhesitatingly concluded that the right to a fair trial – which is without doubt a fundamental right – includes an entitlement to disclosure of exculpatory material. This is established not only by the provisions of Article 67(2) of the Statute, but also by a review of the relevant international jurisprudence”.³¹

22. This obligation applies at the confirmation stage, as noted by His Honour, Judge Pikis in *Lubanga*:

²⁸ Triffterer, Commentary on the Rome Statute, p. 1080, para. 11.

²⁹ 28 August 2013, ICC-02/05-03/09-500-Conf, para. 8.

³⁰ ICC-01/05-01/08-241, para. 17.

³¹ ICC-01/04-01/06-1401, para. 77.

*"The failure of the Prosecutor to bring forth and disclose evidence tending to exonerate the accused is not confined to the trial, but extends to the confirmation hearing too, where disclosure of exculpatory evidence to the person under investigation is also assured as his/her fundamental right [...] Evidence tending to exonerate a person of the charges levied against him/her could have a bearing on the sufficiency of evidence before the Pre-Trial Chamber for the purpose of determining whether the standard for the confirmation of charges has been satisfied [...] Knowledge of the existence of exonerating evidence not put before the Trial Chamber [or Pre-Trial Chamber] would cloud the proceedings with doubt, rendering them a priori inconclusive."*³²

23. Rule 77 of the Rules provides that:

"The Prosecutor shall [...] 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".

24. The Appeals Chamber recently emphasised the importance of Rule 77 disclosure, holding that "the disclosure process is essential in ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms".³³

25. Article 85(3) of the Statute provides that:

"In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention

³² ICC-01/04-01/06-1486, paras. 43, 46.

³³ ICC-02/05-03/09-OA4, para. 34.

following a final decision of acquittal or a termination of the proceedings for that reason."

26. Trial Chamber V held that the language of Article 85(3) logically suggests proceedings may be terminated in cases of serious violations of fair trial rights.³⁴ The same test is expressed in the Court's jurisprudence on stay of proceedings.³⁵ The Court has expressly recognised that proceedings may be terminated on these grounds where the OTP violate the fundamental right to the disclosure of exculpatory evidence.³⁶

IV. Blatant Violation of Disclosure Obligations

27. The OTP's failure to disclose the statements of witnesses 0467 and 0471 prior to the confirmation of charges hearing is a flagrant violation of their obligations under Article 67(2) and a serious violation of the fair trial rights of Mr. Banda and Mr. Jerbo.

28. Both statements are patently exculpatory as they expressly contradict the position which the OTP advanced at the confirmation stage.³⁷ Further, the statements impeach the credibility of the most critical Prosecution witness, Witness 0419, [REDACTED]. *Inter alia*, Witness 0467 says that [REDACTED],³⁸ directly contradicting Witness 0419's statement that

³⁴ ICC-01/09-02/11-728, para. 74.

³⁵ "Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped." ICC-01/04-01/06-772, paragraph 37 cited with approval by the majority of Trial Chamber IV at ICC-02/05-03/09-410, para. 81.

³⁶ A stay was imposed on these grounds in *Lubanga* (see ICC-01/04-01/06-1401) and upheld on appeal (see ICC-01/04-01/06-1486).

³⁷ Contrary to the Prosecution submission set out at paragraph 10 above, Witness 0467 says explicitly that [REDACTED]. Witness 0471 says that [REDACTED]. See paragraphs 13(a)(iv) and 13(b)(i) above.

³⁸ *Ibid.*

[REDACTED].³⁹ Witness 0467 says that [REDACTED],⁴⁰ again directly contradicting Witness 0419 who [REDACTED].⁴¹

29. Pursuant to Article 67(2), the OTP were obliged to disclose these statements “as soon as practicable”. It is astounding that they were not disclosed until 2 May 2013, the deadline imposed by the Trial Chamber for completion of all disclosure which was nearly three years after the OTP obtained the statements and two and a half years after the confirmation hearing. Further, the OTP ignored the plain exonerating nature of the information and when it finally disclosed the statements classified them as primarily Rule 77 material.⁴² Not only was this classification wrong for the reasons set out above, but no explanation was provided to account for the OTP’s express and misleading statement on 16 August 2010 that the statement of Witness 0467 did not fall within Rule 77.

V. Misleading the Pre-Trial Chamber

30. Contrary to statutory obligations, the OTP misled the PTC on two critical occasions. First, the OTP avoided the obligation to disclose the statement of Witness 0467 by submitting that there was “no doubt” that the statement contained no PEXO or evidence material to the preparation of the defence. As set out above, this submission was misleading because the statement did contain PEXO and was material to the preparation of the Defence.⁴³ Moreover, the Defence expressly asked the OTP to consider whether the statement was inconsistent with the statements of other

³⁹ DAR-OTP-0165-0499, para. 46.

⁴⁰ DAR-OTP-0176-0066, para. 53.

⁴¹ DAR-OTP-0176-0065-66, paras. 45 – 46.

⁴² The OTP stated that the statements of the two witnesses were disclosed on the basis that they were “both interviewed in the context of the present case, and provided information that is relevant to the attack on MGS Haskanita” (Disclosure Note to Rule 77 Package 12).

⁴³ As the OTP belatedly acknowledged by disclosing the material on 2 May 2013.

Prosecution witnesses.⁴⁴ Despite the blatant inconsistencies between the statement of 0467 and the statement of 0419, the OTP repeated that they had reviewed the statement and determined that there was no need to disclose it.

31. Second, having misled the PTC and the Defence so that the statement of Witness 0467 was not before the Court at confirmation, the OTP expressly submitted that [REDACTED].⁴⁵ At the time that the OTP made that submission, it was in possession of the statements from Witnesses 0467 and 0471 which established that, [REDACTED]. By failing to disclose the statements and then making a submission, which the OTP's own interviews established was untrue, the OTP misled the Court about the fundamental results of its own investigations. Whether this deception was intentional or not, the result is the same – the OTP failed in its duty to accurately reveal the results of this investigation to the Defence and the PTC and both were misled on a critical issue. The false facts and assertions of the OTP were fully relied upon by the PTC and played a critical role in the decision to confirm the charges in this case.⁴⁶

32. The harm inflicted well over two years ago cannot now be remedied. The Trial Chamber has no appellate jurisdiction over the confirmation decision and any review of its validity can only be a "*prima facie* analysis".⁴⁷ As a result, the Defence have permanently lost the opportunity to challenge OTP evidence and hence potentially to prevent the charges from being confirmed.

⁴⁴ This is significant because such inconsistencies would plainly fall within Article 67(2) of the Statute which requires the OTP to disclose as soon as practical all evidence that "may affect the credibility of prosecution evidence."

⁴⁵ See paragraph 10 above.

⁴⁶ See paragraph 11 above.

⁴⁷ ICC-01/09-02/11-728, para. 100.

VI. Failure to Investigate Exonerating Information Equally

33. From the outset of this case, the OTP have not investigated exonerating circumstances.⁴⁸ The following examples illustrate this systemic failure:

a. The second statement of Witness 0419 reveals that [REDACTED].⁴⁹ The most basic follow up questions were simply not asked. [REDACTED];

b. Witness 0419 provided the OTP with the telephone numbers of [REDACTED] all of whom would likely have exonerating evidence. The OTP never called those telephone numbers;

c. The OTP had a screening interview on 27 July 2009 with [REDACTED]. In the course of the interview he said that [REDACTED].⁵⁰ Moreover, the same witness added that [REDACTED].⁵¹ The OTP did not ask the witness [REDACTED]. The OTP did not interview this witness again.

d. Another individual screened by the OTP reported that [REDACTED].⁵² This was exonerating because it suggests a pattern of abuse by GoS representatives and raises questions regarding the impartiality of AMIS, particularly if it tolerated such abuse. No further investigation was carried out by the OTP and the individual was not interviewed.

⁴⁸ This is an ongoing issue which the Defence first raised on 6 January 2012. See ICC-02/05-03/09-274, paras. 36-39.

⁴⁹ DAR-OTP-0168-0171, paras. 10 – 11.

⁵⁰ DAR-OTP-0186-0301.

⁵¹ This same information is confirmed by another witness at DAR-OTP-0173-0032, who the OTP screened but did not ask about [REDACTED].

⁵² DAR-OTP-0186-0312.

34. These examples suggest a systemic problem, rather than isolated failures or individual errors. The Defence have openly and consistently repeated their position that the attack on the Haskanita base was not unlawful as the base was being used by the GoS as an intelligence asset assisting both their military offensive against the revolutionary movements and their criminal campaign against thousands of civilians in the Haskanita area. The OTP have not investigated this exonerating circumstance equally or at all. Instead, the OTP treated these facts as an inconvenient truth, to be ignored whenever possible.

35. This pattern of OTP conduct demonstrates that the Defence and the Chamber cannot in any respect rely on the OTP's investigations, as proposed by the Trial Chamber in rejecting the Defence's request for a temporary stay of proceedings,⁵³ as a counter-balancing measure to the severe prejudice to the Defence arising from their inability to investigate in Sudan. Indeed, as detailed in this request, the OTP take a very narrow view of what information might be material to the preparation of the defence and have consistently failed to appreciate – in abrogation of their statutory obligations – the exonerating nature of evidence and their duty to investigate the same.

36. If this case is allowed to proceed to trial despite the failure to investigate exonerating circumstances, Article 54(1)(a) of the Statute will lose all meaning – it will become a “dead letter” – because there will be no way that the obligation to investigate exonerating material can be enforced. This cannot have been the intention of the Statute's drafters. Rather, in

⁵³ ICC-02/05-03/09-410, para. 113.

cases where there have been egregious violations of Article 54(1)(a) the Court must have the option to terminate the case.

VII. Impact of Delayed Disclosure of Material / Failure to Investigate Exonerating Material Equally on the Preparation of the Defence

37. In addition, by delaying the disclosure of material which was necessary for the preparation of the Defence until 2 May 2013, and failing to investigate exonerating material timeously, the Prosecutor severely prejudiced the Defence investigation.

38. First, withholding telephone numbers of [REDACTED] effectively denied the Defence the chance to talk to these individuals as the OTP are aware that the Defence are unable to travel to Sudan and, thus, required to rely heavily on telephone interviews.⁵⁴ This complaint is not merely speculative: since redactions were lifted, the Defence have tried to contact [REDACTED], but to no avail. Had their details been provided earlier, there was a better chance that these individuals could have been contacted.

39. Second, the delay in disclosing the name of [REDACTED] may have prejudiced the Defence, because as set out above he appears now to be unwilling to talk to the Defence. There is no way to know whether he would have cooperated with the Defence had the OTP provided his details timeously. The OTP should not benefit because it is impossible for the Defence to prove what would have happened had the information been

⁵⁴ There was no justification for withholding this information. First, redacting telephone numbers could not protect a witness' security – it could only block a potential Defence avenue of inquiry. Second, [REDACTED] cannot properly be described as individuals at risk on account of the activities of the Court – [REDACTED]. It is especially galling that the words “mobile telephone number” were likewise redacted in the relevant paragraphs of the witness's statement. The Defence accordingly did not have notice of the type of information redacted, which would have allowed the Defence to challenge these improper redactions at an early stage of proceedings.

provided two years ago as it should have been. Rather, the burden should be on the OTP to prove no prejudice resulted from their failure to fulfil their obligations.

40. Third, the Prosecutor delayed disclosing references to the key role played by [REDACTED] in the Ceasefire Commission established to handle the reports of ceasefire violations gathered by the representatives in the AMIS bases until 2 May 2013.⁵⁵ [REDACTED] was killed [REDACTED].⁵⁶ This late disclosure has thus permanently precluded the Defence from interviewing a key individual who could have shed light on relevant issues including the relationship between AMIS, the non-signatory movements and the GoS personnel serving on the AMIS bases.

41. Faced with the OTP's flagrant violation of its disclosure obligations, the Trial Chamber cannot blithely assume that the Defence can investigate without prejudice. Years have passed since this information should have been disclosed. With the passage of time memories fade, documents are lost or destroyed, witnesses who might have been agreeable to cooperate may no longer be so willing and some key individuals are now deceased. The prejudice in this case is amplified because of the precarious security situation in Darfur, which was recently graphically illustrated by the death of Mr. Jerbo and which means that the Court can do nothing to protect witnesses resident in Darfur and their families. The resulting constraints on Defence investigations render any lost investigative opportunities more acute.

⁵⁵ DAR-OTP-0180-0342, para 41; DAR-OTP-0181-0257, para. 28; DAR-OTP-0181-0352, para. 31 and DAR-OTP-0164-1159, paras 34 – 36, 39 – 40 and 43 and 84.

⁵⁶ [REDACTED]

42. Further, the fact that the OTP wrongly classified obviously exonerating evidence as being primarily material relevant to the preparation of the defence is a cause for serious concern.⁵⁷ Given the OTP's failure to appreciate even at this late date that this evidence was exculpatory, it would be naive for either the Defence or the Trial Chamber to have confidence that all exonerating evidence which might assist the Defence investigation has been disclosed.

VIII. Relief Requested

43. In breach of their statutory obligations, the OTP misled the PTC and the Defence at confirmation, failed to disclose exculpatory evidence as soon as practicable and failed to investigate exonerating circumstances. These failures have significantly prejudiced the administration of justice and the ability of the Defence to investigate.

44. Alternative counterbalancing measure cannot restore the rights that have been compromised. Whilst the Court could impose sanctions on the Prosecutor⁵⁸ or even a formal reprimand,⁵⁹ these measures would not redress the prejudice to Mr. Banda and Mr. Jerbo. The opportunity to investigate evidence while it is fresh and to put exonerating material before the PTC cannot now be recreated. The cumulative effect of these breaches is that it would be repugnant to the administration of justice to proceed with this trial. The case is only before the Trial Chamber because the OTP misled the PTC as to the results of its investigation, concealing inconvenient truths that raised serious issues as to the legality of the attack on MGS Haskanita. The OTP should not profit and Mr. Banda and Mr. Jerbo should not suffer from this failure to comply with basic obligations

⁵⁷ See Disclosure Note to Rule 77 Package 12 and paragraph 29 above.

⁵⁸ Rules 23 – 25 of the Rules of Procedure and Evidence.

⁵⁹ ICC-01/09-02/11-728 para. 97.

under the Statute. Accordingly, the Defence submit the case should be terminated.

Respectfully Submitted,



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Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 5th Day of September 2013
At The Hague, the Netherlands

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