

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-03/09

Date: 1 July 2011

**TRIAL CHAMBER IV**

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

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR *v.* ABDALLAH BANDA ABAKAER NOURAIN  
AND SALEH MOHAMMED JERBO JAMUS**

**Public**

**Decision on "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 Government of the Republic of the Sudan"**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*,

to:

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

**Counsel for the Defence**

Mr Karim A.A. Khan

Mr Nicholas Koumjian

**Legal Representatives of Victims**

Mr Brahim Koné

Ms Hélène Cissé

Mr Akin Akinbote

Mr Frank Adaka

Sir Geoffrey Nice & Mr Rodney Dixon

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

No. ICC-02/05-03/09

2/18

1 July 2011

Trial Chamber IV ("Chamber") of the International Criminal Court ("Court" or "ICC") pursuant to Articles 57(3)(b), 64(6)(a), 93, 96(2)(a) of the Rome Statute ("Statute"), and Rule 116(1) of the Rules of Procedure and Evidence ("Rules") renders the following Decision on "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 government of the Republic of the Sudan":

## **I. Background and Submissions**

1. On 10 November 2010, the defence filed an application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan.<sup>1</sup> On 17 November 2010, the defence's application was rejected by a single judge from Pre-Trial Chamber I. The single judge held that the defence application had failed to elaborate on the reasons which would make the requested order by the Chamber "necessary" at this stage of the proceedings, in particular in light of the strategy pursued by the defence in respect of the then forthcoming confirmation hearing.<sup>2</sup> He further held that any investigative step which might be taken, as well as any evidentiary material which might be collected, following an order issued pursuant to Article 57(3)(b) would serve no purpose for the pre-trial phase of the case, namely in respect of the confirmation hearing which will conclude it.<sup>3</sup> Finally, the single judge held that the proper addressee of the application was the Trial Chamber in the event the charges would be confirmed.<sup>4</sup>

<sup>1</sup> Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan, 10 November 2010, ICC-02/05-03/09-95.

<sup>2</sup> Decision on "Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan", 17 November 2011, ICC-02/05-03/09-80, paragraph 3.

<sup>3</sup> ICC-02/05-03/09-80, paragraph 4.

<sup>4</sup> ICC-02/05-03/09-80, paragraph 5.

2. On 7 March 2011, the Pre-Trial Chamber confirmed the charges against the accused.<sup>5</sup>
3. On 11 May 2011, the defence filed a motion requesting the Chamber to seek cooperation from the Government of Sudan pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute.<sup>6</sup> The defence seek to visit the territory of Sudan in order to accomplish, *inter alia*, the following: (i) visit localities including but not limited to those indicated in the application; (ii) meet individuals present in Sudan with a view to their being called as defence witnesses or in order to establish investigative needs; (iii) interview any putative witnesses or other persons identified by the defence; (iv) record evidence (by means of video, photography, audio or other means) whilst in Sudan; and (v) receive documents, photographs and other evidence material to the preparation of the defence.<sup>7</sup>
4. The defence submit that the Chamber has the power to exercise any functions of the Pre-Trial Chamber; which includes the functions specified in Article 57 of the Statute.<sup>8</sup> Moreover, the defence submit that the order requested is in line, and better serves, the Trial Chamber's role in seeking the truth.<sup>9</sup>
5. According to the defence, the Chamber need to satisfy itself that the relief sought would facilitate the collection of evidence which may be material to the proper determination of the issues being adjudicated. If so, the Trial Chamber "shall"

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<sup>5</sup> Corrigendum of the "Decision on the Confirmation of Charges", 7 March 2011, ICC-02/05-03/09-121-Conf-Corr and public redacted version, ICC-02/05-03/09-121-Corr-Red.

<sup>6</sup> Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan, 11 May 2011, ICC-02/05-03/09-145 and public annexes A to F.

<sup>7</sup> ICC-02/05-03/09-145, paragraph 2(c).

<sup>8</sup> ICC-02/05-03/09-145, paragraph 23.

<sup>9</sup> ICC-02/05-03/09-145, paragraph 25.

issue the requested order.<sup>10</sup> The defence assert that the request for cooperation would indeed facilitate the collection of evidence for the accused<sup>11</sup> on whether the attack on MGS Haskanita was unlawful, on whether the accused were aware of the factual circumstances that made the attack unlawful and on whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations ("UN Charter").<sup>12</sup> In order to carry out even the most basic investigation into this case, it is essential that the defence visit a number of locations in order to locate and interview witnesses and proceed to the collection of evidence which may be material to the proper determination of the issues being adjudicated.<sup>13</sup>

6. The defence submit that there is nothing within the provisions of Article 57(3)(b) of the Statute and Rule 116(1) of the Rules that requires further disclosure in order for the present application to be granted. Hence, they cannot be required to reveal their strategy or divulge the specific lines of enquiry that they wish to undertake in order for the application to be granted.<sup>14</sup>
7. Moreover, the defence submit that this application is necessary because the defence have exhausted other possibilities, such as the assistance of the Registry and direct contact with the Government of Sudan, to no avail.<sup>15</sup>
8. According to the defence, it is no answer to this application to suggest that the defence should utilise investigators or local resource persons.<sup>16</sup> Likewise, it is no answer to this application to suggest that the defence seek protective measures

<sup>10</sup> ICC-02/05-03/09-145, paragraph 26.

<sup>11</sup> ICC-02/05-03/09-145, paragraph 29.

<sup>12</sup> ICC-02/05-03/09-145, paragraph 30.

<sup>13</sup> ICC-02/05-03/09-145, paragraph 33.

<sup>14</sup> ICC-02/05-03/09-145, paragraph 34.

<sup>15</sup> ICC-02/05-03/09-145, paragraph 35.

<sup>16</sup> ICC-02/05-03/09-145, paragraph 36.

and interview witnesses outside Darfur. There are persons of interest to the defence, including putative witnesses, present in Darfur (but it is not possible to discover the identity of such critical witnesses unless the defence can enter Darfur).<sup>17</sup>

9. The defence submit that the application contains all the information that the defence would be required to provide in a request for assistance pursuant to Article 96(2) of the Statute and Rule 116(1)(b) of the Rules.<sup>18</sup>
10. The defence argue that the legal basis for its application could be found in either Security Council Resolution 1593 or the provisions of the Statute.<sup>19</sup> The defence assert that pursuant to the Security Council Resolution, the Government of Sudan has an unrestricted obligation to cooperate with the Court so long as the cooperation is “necessary”. The defence contend that this obligation to cooperate is not expressly limited to the forms of cooperation set out in Part 9 of the Statute. Further, the defence submit that the relief sought is also consistent with the forms of cooperation that the Court could request from States Parties as provided under Articles 57(3)(b) and 93(1)(l) and Rule 116(1). These provisions, they argue, establish a regime which is broad enough to encompass the defence’s request for the facilitation of visits to locations inside Sudan.<sup>20</sup>
11. The Office of the Prosecutor (“prosecution”) has not responded to this application.

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<sup>17</sup> ICC-02/05-03/09-145, paragraph 37.

<sup>18</sup> ICC-02/05-03/09-145, paragraph 38.

<sup>19</sup> ICC-02/05-03/09-145, paragraph 22.

<sup>20</sup> ICC-02/05-03/09-145, paragraphs 40-42.

## II. Relevant Provisions

12. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

### Article 57 of the Statute

#### Functions and powers of the Pre-Trial Chamber

[...]

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

[...]

- (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

[...]

### Article 64 of the Statute

#### Functions and powers of the Trial Chamber

[...]

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

- (a) Exercise any function of the Pre-Trial Chamber referred to it in article 61(11).

[...]

### Article 86 of the Statute

#### General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

### Article 93 of the Statute

#### Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
- (a) The identification and whereabouts of persons or the location of items;
  - (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
  - (c) The questioning of any person being investigated or prosecuted;

- (d) The service of documents, including judicial documents;
- (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- (f) The temporary transfer of persons as provided in paragraph 7;
- (g) The examination of places or sites, including the exhumation and examination of grave sites;
- (h) The execution of searches and seizures;
- (i) The provision of records and documents, including official records and documents;
- (j) The protection of victims and witnesses and the preservation of evidence;
- (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
- (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

[...]

#### **Article 96 of the Statute**

##### **Contents of request for other forms of assistance under article 93**

[...]

2. The request shall, as applicable, contain or be supported by the following:
  - (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
  - (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
  - (c) A concise statement of the essential facts underlying the request;
  - (d) The reasons for and details of any procedure or requirement to be followed;
  - (e) Such information as may be required under the law of the requested State in order to execute the request; and
  - (f) Any other information relevant in order for the assistance sought to be provided.

[...]

#### **Article 99 of the Statute**

##### **Execution of requests under articles 93 and 96**

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.
2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.
3. Replies from the requested State shall be transmitted in their original language and form.
4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including



doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

- (a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
  - (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.
5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

#### **Rule 116 of the Rules**

##### **Collection of evidence at the request of the defence under Article 57, Paragraph 3 (b)**

- 1 The Pre-Trial Chamber shall issue an order or seek co-operation under article 57(3)(b) where it is satisfied:
- (a) that such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person's defence; and
  - (b) In a case of cooperation under Part 9, that sufficient information to comply with article 96, paragraph 2, has been provided.

[...]

##### **Security Council Resolution 1593 (2005)<sup>21</sup>**

[...]

- 2 The Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution [...]

[...]

##### **Article 25 of the UN Charter<sup>22</sup>**

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

<sup>21</sup> S/RES/1593 (2005), adopted by the Security Council at its 5158th meeting on 31 March 2005.

<sup>22</sup> The UN Charter entered into force on 24 October 1945.

### III. Analysis and Conclusions

13. The Chamber notes that the language of Article 57(3)(b) of the Statute and Rule 116(1) suggests that the analysis and determination of cooperation requests for investigative measures falls, in principle, within the functions of the Pre-Trial Chambers.<sup>23</sup> Pursuant to Articles 64(6)(a) and 61(11), a Trial Chamber may, however, exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings. The Chamber finds that dealing with requests for cooperation falls within that scope. Therefore, the Chamber will look at the merits of the defence's application.
  
14. In accordance with Article 86 of the Statute, only States Parties are obliged to cooperate with the Court under the Statute. Sudan, being a non-party to the Statute, is obliged to cooperate with the Court by virtue of Security Council Resolution 1593 and the UN Charter. The Chamber recalls that by this Resolution, the Security Council referred the situation in Darfur to the ICC Prosecutor and decided in its operative paragraph 2 "that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor ..." The Chamber further recalls that pursuant to article 25 of the UN Charter, "the Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". As a consequence, the Security Council, acting under Chapter VII of the UN Charter, may oblige all UN members or some of them to cooperate with the Court in a given case, whether or not they are parties to the Statute.

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<sup>23</sup> It should be noted that "Except for the question of detention, the Pre-Trial Chamber was created to resolve all preliminary issues before committing the accused to the Trial Chamber" (Gilbert Bitti, in: Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, page 1212). The expression "preliminary issues" encompasses articles 56 and 57 (*ibid.*, page 1211).

15. It is thus clear that Sudan is under an obligation to cooperate with the Court pursuant to Resolution 1593. However, the Chamber considers that this obligation, as formulated in the Security Council resolution, only expands the boundaries of cooperation in relation to the Court with respect to “who” is obliged to cooperate. It does not provide for an autonomous legal regime for cooperation that would replace the ICC regime or represent an alternative to it. Therefore, the power of the Chamber to request the cooperation of Sudan remains confined to the provisions of the Statute and its supplementary instruments. Accordingly and pursuant to Article 57(3)(b), the defence application needs to be assessed in light of the cooperation regime of the Statute under Part 9.
  
16. In accordance with Article 57(3)(b), the Chamber may “seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence”. The conditions for the application of Article 57(3)(b) are set out in Rule 116 which stipulates that the Pre-Trial Chamber shall issue an order or seek cooperation under Article 57(3)(b) where it is satisfied “(a) that such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence; and (b) in a case of cooperation under Part 9, that sufficient information to comply with article 96, paragraph 2, has been provided.”
  
17. From the combined reading of these provisions it is clear that the powers of the Chamber under Article 57(3)(b) may be exercised when the conditions set forth in

Rule 116 are met.<sup>24</sup> As a result, the Chamber may seek cooperation under Part 9 when the requirements of (i) specificity (ii) relevance and (iii) necessity are met.

18. Specificity of requests for cooperation, both in terms of the types of assistance and the contents of the request, is a central aspect of the cooperation regime under Part 9. Pursuant to Article 86 of the Statute, Sudan is obliged to cooperate “fully” with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court, “in accordance with the provisions of the Statute”. The reference to the provisions of the Statute indicates that the general obligation found in Article 86 is to be read in conjunction with the specific cooperation duties to be found in other provisions of Part 9 of the Statute. It is not possible to modify these specific obligations to cooperate by referring to the general obligation in Article 86.<sup>25</sup>
19. Article 93 paragraph 1 (a) to (k) details the types of specific assistance that can be requested. In addition to these listed types of assistance, pursuant to subparagraph 1, States Parties are obligated to grant any type of assistance that is not prohibited by national law. This “catch all” provision broadens the type of assistance that might be requested in addition to those specifically listed under Article 93. However, “as the type of assistance is not specified under this paragraph, it would not be appropriate to place a general obligation on a State to comply with such requests, when the nature of the obligation cannot be specified. Thus, the obligation is limited to that assistance which is not prohibited under national law.”<sup>26</sup>

<sup>24</sup> See also Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (“DRC”), 25 April 2008, ICC-01/04-01/07-444.

<sup>25</sup> Claus Kress / Kimberley Prost, in: Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article (Second Edition)*, page 1514.

<sup>26</sup> *Ibid.*, page 1579.

20. The request for the type of assistance listed under Article 93 needs to contain the information detailed in paragraph 2 of Article 96. According to Rule 116(1)(b), "which constitutes the main safeguard against general and non-specific requests",<sup>27</sup> the party seeking the cooperation order has to provide sufficient information to comply with Article 96, paragraph 2.
21. In accordance with Article 96, paragraph 2, of the Statute the request should, *inter alia*, contain a concise statement of the assistance sought, as much detailed information as possible about the location or identification of any person or place that must be found or identified and a concise statement of the essential facts underlying the request, along with the reasons and details of any procedure to be followed.
22. The defence seek to visit a non exhaustive list of localities in Darfur and other regions of Sudan as well as a non exhaustive list of camps in Sudan that would include "any other camps for internally displaced persons in Sudan considered necessary by the Defence for the purposes of its investigation."<sup>28</sup> They also wish to interview persons and receive and retain evidence material to the preparation of the defence.<sup>29</sup> The defence submit that witnesses are "inevitably still located in the vicinity of Haskanita", that it is "likely" that witnesses to the incidents are still present in the surrounding area<sup>30</sup> and that additional locations of interest to the defence "may come to light",<sup>31</sup> "perhaps as a result of this application".<sup>32</sup> In light of the way the defence have formulated their request, the Chamber considers they

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<sup>27</sup> ICC-01/04-01/07-444, page 8.

<sup>28</sup> ICC-02/05-03/09-145, paragraph 2.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, paragraph 31.

<sup>31</sup> *Ibid.*, paragraph 32.

<sup>32</sup> *Ibid.*

have not provided the information required under Article 96(2)(b), but have required instead permission to undertake an open-ended expedition to the Sudan in order to find out whether there might be something or someone potentially useful to the defence case.

23. Furthermore, the defence make an indiscriminate request to execute all measures “unhindered and unmonitored by the Government of Sudan or any agency of the State”. This Chamber recalls that the general regime applicable for the execution of requests for assistance under Part 9 normally presupposes execution by States in accordance with national procedures pursuant to Articles 93(1) and 99(1) of the Statute and that the direct execution of measures is *lex specialis* to be applied within the terms and conditions of Article 99(4). Even in the circumstances contemplated in this provision, measures sought need to be specific enough to allow for the consultations required therein.
24. Since the condition of specificity required in Rule 116(1)(b) for the application of Article 57(3)(b) is not met, the Chamber is not in a position to deal with the condition of relevance within the terms of Rule 116(1)(a).
25. The Chamber is, however, of the view that it is useful at this stage to express some observations on the third and final condition to be met by the defence, namely “necessity”.
26. The Chamber recalls, that in accordance with Article 57(3)(b) of the Statute, the Chamber may seek such cooperation “as may be necessary”. The defence sets out a series of failed steps it undertook (via the Registry and the Embassy of the Republic of Sudan in the Hague) in order to seek assistance in arranging a mission

to Sudan before seeking the assistance of the Chamber.<sup>33</sup> In light of the explanations and supporting material provided by the defence, this Chamber is satisfied that the defence have exhausted the steps to obtain the cooperation from Sudan before resorting to the intervention of the Chamber.

27. Furthermore, the Chamber has to be satisfied that the defence have explored possible alternatives, short of a request for cooperation to Sudan, for obtaining the document(s) or measure(s) sought.
28. The defence submit that alternative measures, such as utilizing investigators or local resource persons would not be feasible. The defence argue that even if they managed to identify suitable local persons, those persons, by cooperating with the ICC, would be at risk of harassment and attack by the Government of Sudan.<sup>34</sup> The defence indicate that the Registry was not in a position to provide the requested assistance in light of the "volatile security situation on the ground"<sup>35</sup> and recall that the Prosecutor has also expressed that persons suspected of cooperating with the Court have been harassed and attacked.<sup>36</sup> The defence consider that "these risks are wholly unacceptable".<sup>37</sup>
29. However, at the same time, the defence conclude that their application, which includes meeting individuals that may be called as defence witnesses and interviewing any putative witnesses or other persons, is the "only option remaining to the Defence".<sup>38</sup> The Chamber notes that the same or potentially even worse security risks could arise if the defence team, rather than local resource

<sup>33</sup> ICC-02/05-03/09-145, paragraphs 7-10.

<sup>34</sup> ICC-02/05-03/09-145, paragraph 36.

<sup>35</sup> ICC-02/05-03/09-145, paragraph 8.

<sup>36</sup> ICC-02/05-03/09-145, paragraph 36 and footnote 21.

<sup>37</sup> ICC-02/05-03/09-145, paragraph 36.

<sup>38</sup> ICC-02/05-03/09-145, paragraph 35.

persons, met with potential witnesses. The defence do not explain how they intend to surmount these obstacles if they were to arrange a mission.

30. In this connection, the Chamber recalls its own obligation, pursuant to Article 87(4) of the Statute to take appropriate measures to protect the safety, physical and psychological well-being of victims, potential witnesses and their families in relation to any request for assistance presented under Part 9. Again, the lack of specificity of the application, does not enable this Chamber to assess the risks that the measures sought could entail for the security of such persons on the ground and whether protective measures would be necessary.
31. In light of the above considerations and particular difficulties encountered in the context of the case, it is crucial for the defence to explore, and for the Chamber to assess, whether the evidence can be obtained or has been obtained by other means including through third states or the prosecution,<sup>39</sup> taking into account, in particular, the prosecution's obligation to "investigate incriminating and exonerating circumstances equally" pursuant to Article 54(1)(a) of the Statute.
32. It follows from the above considerations that the application, as it has been submitted, does not satisfy the statutory requirements for the Chamber to order the cooperation of Sudan.
33. The defence submit that it cannot go further and divulge in its application the specific lines of enquiries that they wish to undertake. The defence argue that to do so would be to reveal its strategy in advance of trial to the detriment of the

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<sup>39</sup> See ICC-01/04-01/07-444. The Chamber held that its intervention appeared not to be necessary in relation to certain documents reaching this conclusion "on the basis that these are documents and information likely to be in the possession or control of the Prosecution; and that the Defence [...] must first request these documents and information in accordance with Rule 77 of the Rules", page 6.



accused.<sup>40</sup> While the Chamber is willing to deploy all efforts to assist the defence in the preparation of its case, it can only issue a cooperation request if the statutory requirements are met. As possible remedies to the defence concerns and the insufficient specificity of the current application, the Chamber notes the possibility of either requesting an *ex parte* hearing to explore the avenues of investigation and details required by Article 96(2) of the Statute with the Chamber or to set these out in *ex parte* submissions.

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<sup>40</sup> ICC-02/05-03/09-145, paragraph 34.

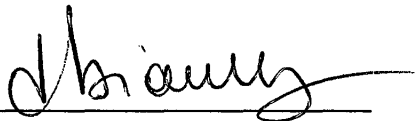
**FOR THE FOREGOING REASONS,**

**THE CHAMBER DENIES THE DEFENCE APPLICATION.**

Done in both English and French, the English version being authoritative.



**Judge Joyce Aluoch**



**Judge Fatoumata Dembele Diarra**



**Judge Fernández de Gurmendi**

Dated this 1 July 2011

At The Hague, The Netherlands