

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original English

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

Date. 27 August 2009

**PRE-TRIAL CHAMBER I**

**Before:** Judge Sylvia Steiner, Presiding Judge  
Judge Sanji Mmasenono Monageng  
Judge Cuno Tarfusser

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF THE PROSECUTOR V. ABDALLAH BANDA ABAKAER**

**NOURAIN AND SALEH MOHAMMED JERBO JAMUS**

**Confidential**

**Second Decision on the Prosecutor's Application under Article 58**

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

**The Office of the Prosecutor**  
Mr Luis Moreno-Ocampo, Prosecutor  
Mr Essa Faal, Senior Trial Lawyer

**Counsel for the Defence**

**Legal Representatives of Victims**

**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

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

**PRE-TRIAL CHAMBER I** of the International Criminal Court (the "Chamber" and the "Court" respectively),

**NOTING** the "Prosecutor's Application under article 58" (the "Application"),<sup>1</sup> filed on 20 November 2008 pursuant to article 58 of the Statute of the Court in the investigation of the Situation in Darfur, Sudan, whereby it requested the Chamber to issue warrants of arrest or, alternatively, summonses to appear for Bahar Idriss Abu Garda ("Abu Garda"), **Abdallah Banda Abakaer Nourain** ("Banda") and **Saleh Mohammed Jerbo Jamus** ("Jerbo"), on a confidential and *ex parte* basis,<sup>1</sup>

**NOTING** all the supporting material and information submitted by the Prosecutor,<sup>2</sup>

**NOTING**, in particular, the "Submission of information on the Prosecutor's Application Pursuant to Article 58 and request for summonses to appear",<sup>3</sup> filed by the Prosecutor on 23 February 2009, whereby, *inter alia*, he requested the Chamber to issue a summons to appear against Abu Garda, Banda and Jerbo, partially modifying his original Application,

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<sup>1</sup> ICC-02/05-163-Conf-Exp + Anx1-5 38

<sup>2</sup> ICC-02/05-165-Conf-Exp and ICC-02/05-165-Conf-Exp-Anx1-8, ICC-02/05-172 and ICC-02/05-172-Conf-Exp-Anx1-A-B24, ICC-02/05-173 and ICC-02/05-173-Conf-Exp-Anx1-B25-B26, ICC-02/05-203 and ICC-02/05-203-Conf-Exp-Anx1, ICC-02/05-211-Conf-Exp and ICC-02/05-211-Conf-Exp-Anx1-2, ICC-02/05-212-Conf-Exp, ICC-02/05-214-Conf-Exp and ICC-02/05-214-Conf-Exp-Anx1, ICC-02/05-216-Conf-Exp, ICC-02/05-229 and ICC-02/05-229-Conf-Exp-Anx1-A-B

<sup>3</sup> ICC-02/05-194-Conf-Exp, ICC-02/05-194-Conf-Exp-Anx1

NOTING the “Decision on the Prosecutor’s Application under Article 58”,<sup>4</sup> issued by the Chamber on 7 May 2009, wherein the Chamber found that there were reasonable grounds to believe that Abu Garda was criminally responsible for war crimes under article 8(2)(c)(i), article 8(2)(e)(iii) and article 8(2)(c)(v) of the Statute,

## HEREBY RENDERS THIS DECISION:

### Jurisdiction and admissibility (article 19 of the Statute)

1 Article 19(1) of the Statute requires the Chamber to satisfy itself that it has jurisdiction in any case brought before it. As the Chamber has previously held

[ ] a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court.<sup>5</sup>

2 The Chamber notes that (i) regarding the jurisdiction *ratione loci*, although the events forming the subject of the Prosecutor’s Application took place in Sudan, which is not a State Party to the Statute, the Situation in Darfur, Sudan, was referred to the Court by the Security Council under article 13(b) of the Statute,<sup>6</sup> (ii) in relation to the jurisdiction *ratione temporis*, the allegations contained in the Application relate to conduct which allegedly occurred on 29 September 2007 and, therefore, after 1 July 2002, date of entry into force of the

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<sup>4</sup> ICC-02/05-02/09-1-US-Exp

<sup>5</sup> ICC-01/04-01/07-4, para 9

<sup>6</sup> ICC-02/05-01/07-1-Corr, para 16

Statute,<sup>7</sup> and (iii) regarding the jurisdiction *ratione materiae*, the factual allegations contained in the Application, if proven, would give rise to criminal responsibility for war crimes punishable under article 8(2)(c)(i) (violence to life), article 8(2)(e)(iii) (attack on a peacekeeping mission) and article 8(2)(e)(v) (pillaging) of the Statute

3 On this basis, and without prejudice to any subsequent determination under article 19 of the Statute, the Chamber is satisfied that the present case falls within the jurisdiction of the Court

4 With regard to the admissibility of the case, the Chamber notes, firstly, that the Application was made on a confidential and *ex parte* basis. Particularly since the Prosecutor has indicated that there are no national proceedings in relation to the case,<sup>8</sup> the Chamber sees no ostensible cause or self-evident factor compelling it to exercise its discretion to review the admissibility of the case *proprio motu* at the current stage of the proceedings. As a result, the Chamber declines to use its discretionary *proprio motu* power to determine the admissibility of the case against Banda and Jerbo at this stage

**Whether there are reasonable grounds to believe that at least one of the crimes described in the Prosecutor's Application has been committed**

5 In its Application, the Prosecutor alleges that the African Union Mission in Sudan ("AMIS") personnel and property stationed at the Military Group Site Haskanita (Sector 8) ("MGS Haskanita"), Umm Kadada Locality, North Darfur

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<sup>7</sup> The Application, para 3

<sup>8</sup> *Ibid*, para 8

were attacked on 29 September 2007,<sup>9</sup> and that during the attack, twelve AMIS personnel were killed and eight were severely wounded<sup>10</sup> According to the Prosecutor, the attackers also appropriated certain property, including vehicles, refrigerators, computers, mobile phones, boots, uniforms, fuel and money during and after the attack<sup>11</sup> These acts, in the Prosecutor's view, constitute war crimes under articles 8(2)(c) and 8(2)(e) of the Statute.<sup>12</sup>

6 Since the definition of every crime within the jurisdiction of the Court includes both contextual and specific elements, the Chamber will first consider whether there are reasonable grounds to believe that the contextual elements of at least one crime within the jurisdiction of the Court are present The Chamber will then analyse whether there are reasonable grounds to believe that the specific elements of any such crime are also met

7. The Prosecutor submits that the alleged attack on the MGS Haskanita took place in the context of an armed conflict not of an international character which occurred in Darfur, Sudan from approximately August 2002 to the filing date of the Application on 20 November 2008, between the Government of Sudan ("GoS") and various armed groups, including the Justice and Equality Movement (the "JEM") and the Sudan Liberation Movement/Army (the "SLM/A")<sup>13</sup> Specifically, the Prosecutor submits that the attack on the MGS Haskanita was committed by a joint group of forces which had broken away from the JEM and the SLM/A, respectively<sup>14</sup>

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<sup>9</sup> *Ibid*, para 3

<sup>10</sup> *Ibid*, paras 71 and 91

<sup>11</sup> *Ibid*, para 72

<sup>12</sup> *Ibid*, para 1

<sup>13</sup> *Ibid*, para 34

<sup>14</sup> *Ibid*, paras 4 and 64

8 According to the Prosecutor, as of June 2006, Abu Garda held the position of Vice President in JEM,<sup>15</sup> and Banda was the Commander-General of JFM.<sup>16</sup> It is alleged, however, that, following a series of internal splits within JEM, Abu Garda and Banda broke away from that part of the movement led by Khalil Ibrahim and subsequently continued to carry out military operations together, supported by troops loyal to them.<sup>17</sup>

9 The Prosecution also submits that various factions who had previously broken away from the SLM/A held a conference in February 2007, resulting in the establishment of a new group called SLA-Unity and that Jerbo was appointed as its Chief of Staff.<sup>18</sup>

10 The Chamber notes, firstly, that articles 8(2)(c) and 8(2)(e) of the Statute set forth crimes committed in the context of an armed conflict not of an international character. The Chamber has also highlighted that

[ ] article 8(2)(f) of the Statute makes reference to “protracted armed conflict between [ ] organized armed groups”, and that, in the view of the Chamber, this focuses on the need for the organised armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time. In this regard, the Chamber observes that, to date, control over the territory by the relevant organised armed groups has been a key factor in determining whether they had the ability to carry out military operations for a prolonged period of time.<sup>19</sup>

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<sup>15</sup> *Ibid*, paras 14 and 49

<sup>16</sup> *Ibid*, paras 21 and 49

<sup>17</sup> *Ibid*, paras 50-56. The Prosecutor submits that Abu Garda and Banda subsequently established their own group, JEM Collective Leadership, on 4 October 2007. The Application, para 58

<sup>18</sup> *Ibid*, paras 61-62

<sup>19</sup> ICC-02/05-01/09-3, para 60

11 The Chamber considers that from August 2002<sup>20</sup> until at least on or around 20 November 2008,<sup>21</sup> the filing date of the Application, a protracted armed conflict not of an international character existed in Darfur,<sup>22</sup> and that there are reasonable grounds to believe that the JEM and SLM/A (i) were the main groups opposing the GoS in Darfur, (ii) organised themselves between 2001 and 2002; (iii) began to resort to armed violence in 2002, (iv) fulfilled, despite internal disputes and splits, the organisational requirements required by article 8(2)(d) and (f) of the Statute; (v) conducted sustained military operations for a prolonged period of time, and (vi) controlled certain areas of the territory in the Darfur region<sup>23</sup>

12 The Chamber is also satisfied that there are reasonable grounds to believe that Abu Garda held the position of Deputy Leader and Secretary for Darfur Sector within JEM from 3 January 2005,<sup>24</sup> and that Banda had become the military commander of JEM by May 2006.<sup>25</sup> The Chamber considers that there are reasonable grounds to believe that the the forces loyal to Abu Garda and Banda, which would later become the Justice and Equality Movement

<sup>20</sup> ICC-02/05-01/07-1-Corr, para 47, *see also* ICC-02/05-01/09, para 60

<sup>21</sup> BBC News, "Sudan declares Darfur ceasefire", DAR-OTP-0160-0709 (Anx 5 29 to the Application), *see also* Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3 September 2003, DAR-OIP-0116-0433 (Anx 5 9 to the Application), Agreement on Humanitarian Ceasetime on the Conflict in Darfur Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC), 4 June 2004, DAR-OTP-0154-0021 (Anx 5 26 to the Application)

<sup>22</sup> *See generally* Small Arms Survey Book Series, "Divided They Fall The Fragmentation of Darfur's Rebel Groups", DAR-OTP-0158-0462 (Anx 5 19 to the Application)

<sup>23</sup> J Flint/A, de Waal, Darfur- A Short History of a Long War, 2005 (Anx 5 14 to the Application) DAR-OIP-0120-0678 at 0779-0783, *see also* ICC-02/05-01/09-2-Conf, para 61 *See also* Report of the International Commission of Inquiry on Darfur, para 132

<sup>24</sup> ICC-02/05-02/09-1, para 11, Organisational Structure and Legal and Executive Leaders of the Justice and Equality Movement, DAR-OIP-0156-0031 (Anx 5 11 to the Application) at 0034

<sup>25</sup> Armed Forces Memorandum, DAR-OTP-0116-0721 (Anx 5 12 to the Application) at 0735

Collective Leadership ("the JEM-CL"),<sup>26</sup> broke away from that part of the JEM which remained loyal to JEM Chairman Khalil Ibrahim between late September and early October 2007.<sup>27</sup>

13 The Chamber is also of the view that there are reasonable grounds to believe that, following its establishment at a conference held in Um Rai, North Darfur in February 2007, Jerbo was appointed Chief of Staff of the Sudanese Liberation Army (Unity Faction) (the "SLA-Unity"),<sup>28</sup> which was comprised of groups who had previously broken away from the SLM/A.<sup>29</sup>

14 As a result, the Chamber is satisfied that there are reasonable grounds to believe that, as senior commanders in an armed group which was party to the above-mentioned armed conflict,<sup>30</sup> Banda and Jerbo were aware of the factual circumstances establishing the existence of the armed conflict.

15 On the basis of the evidence and information provided by the Prosecutor, the Chamber is satisfied that there are reasonable grounds to believe that (i) the MGS Haskanita was attacked by a group of approximately 1000 persons armed with anti-aircraft guns, artillery guns and rocket-propelled grenade launchers

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<sup>26</sup> Founding Declaration, "Important Statement, Sudanese Justice and Equality Movement – Collective Leadership", 11 October 2007, DAR-OIP-0156-0097 (Anx 5 25 to the Application) at 0099

<sup>27</sup> Witness Transcript, DAR-OIP-0158-0262 (Anx 5 35 to the Application) at 0324-0326

<sup>28</sup> Witness Transcript, DAR-OIP-0158-0026 (Anx 5 37 to the Application) at 0230-0234

<sup>29</sup> Witness Transcript, DAR-OIP-0158-0026 (Anx 5 37 to the Application) at 0230, 02032, 0233

<sup>30</sup> Agreement on Humanitarian Ceasefire on the Conflict in Darfur Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in the Darfur Area of the Sudan (CFC), 4 June 2004, DAR-OTP-0154-0021 (Anx 5 26 to the Application), "Justice and Equality Movement and Sudan Liberation Army Sign Military and Political Agreement in Area of Bir Markey", DAR-OIP-0156-0046 (Anx 5 16 to the Application)

on 29 September 2007,<sup>31</sup> (ii) the above-mentioned attack was carried by splinter forces of JEM, under the command of Banda and Abu Garda, jointly with the troops belonging to SLA-Unity, which had broken away from the SLMA/A, under the command of Jerbo,

16 The Application alleges that Abu Garda, Banda and Jerbo directed the above-mentioned attack on the MGS Haskanuta.<sup>32</sup> Specifically, the Prosecutor alleges that the events which took place during the attack give rise to crimes under articles 8(2)(c)(i) (violence to life), 8(2)(e)(iii) (attacking personnel or objects involved in a peacekeeping mission) and 8(2)(e)(v) (pillaging) of the Statute.<sup>33</sup>

17 In relation to the specific elements of the above-mentioned crimes, the Chamber notes, firstly, that in order to be protected under article 8(2)(c)(i), a person must be either *hors de combat* or must be considered as a civilian, medical personnel or religious personnel not taking an active part in the hostilities.<sup>34</sup>

18 On the basis of the material submitted by the Prosecutor, the Chamber is satisfied that there are reasonable grounds to believe that (i) the mandate of AMIS tasked the forces with monitoring and observing compliance with the Humanitarian Ceasefire Agreement of April 2004, as well as future peace agreements,<sup>35</sup> (ii) AMIS' rules of engagement permitted the use of lethal force

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<sup>31</sup> Witness Statement, DAR-OTP-0165-0352 (Anx 1 to ICC-02/05-211) at 0359, para 44, Witness Transcript, DAR-OIP-0157-1124 (Anx 5 36 to the Application) at 1247-1249, lines 165-197, Witness Transcript, DAR-OIP-0158-0262 (Anx 5 35 to the Application) at 0349, lines 285-292

<sup>32</sup> The Application, para 69

<sup>33</sup> *Ibid*, para 1

<sup>34</sup> Elements of Crimes, Article 8(2)(c)(i)-1(2)

<sup>35</sup> African Union Communiqué, Peace and Security Council 17<sup>th</sup> Meeting, 20 October 2004, DAR-OTP-0021-0158 (Anx 5 5 to the Application) at 0160

only in personal self-defence,<sup>36</sup> and (iii) AMIS forces neither exceeded their mandate nor their rules of engagement.<sup>37</sup> Accordingly, the Chamber finds that there are reasonable grounds to believe that the AMIS personnel were entitled to the protection offered to civilians not taking any active part in the hostilities

19 The Chamber is further satisfied that there are reasonable grounds to believe that, during the attack, the attackers killed twelve<sup>38</sup> and severely wounded eight<sup>39</sup> AMIS personnel

20 The Chamber notes that, in order to be protected under article 8(2)(e)(iii) of the Statute, the person or object subject to the attack must be (i) considered as personnel, installations, material, units or vehicles "involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations",<sup>40</sup> and (ii) entitled to that protection given to civilians or civilian objects under the international law of armed conflict.<sup>41</sup>

21. The Chamber has already found that there are reasonable grounds to believe that the AMIS personnel were entitled to the protection given to civilians not taking any active part in the hostilities under the international law

<sup>36</sup> Human Rights Watch, "Imperatives for Immediate Change – the African Union Mission in Sudan", DAR-OTP-0154-0074 (Anx B4 to ICC-02/05-172) at 0102

<sup>37</sup> Witness Statement, DAR-OTP-0165-0521 (Anx 2 to ICC-02/05-211-Conf-Exp) at 0525, para 21

<sup>38</sup> Witness Statement, DAR-OTP-0165-0521 (Anx 2 to ICC-02/05-211-Conf-Exp) at 0533, para 73, International Herald Tribune, "Darfur Raid Kills 10 African Peacekeepers", 30 September 2007, DAR-OTP-0154-0329 (Anx 5 1 to the Application), Associated Press, "Sudan Rebels Kill 10 Darfur Peacekeepers", DAR-OTP-0154-0292 (Anx 5 2 to the Application), Sudan Tribune, "Peacekeeper dies 2 months after Darfur's Haskanita Attack", 12 December 2007, DAR-OTP-0154-0148 (Anx 5 22 to the Application) at 0148, Unamid News Bulletin, May 2008, DAR-OTP-0152-0230 (Anx 5 21 to the Application) at 0231

<sup>39</sup> International Herald Tribune, "Darfur raid kills 10 African Peacekeepers, 30 September 2007, DAR-OTP-0154-0329 (Anx 5 1 to the Application) at 0330, Associated Press, "Rebel Attack Came at End of Ramadan Fast", DAR-OTP-0154-0349 (Anx 5 3 to the Application) at 0350

<sup>40</sup> Elements of Crimes, Article 8(2)(e)(iii)(2)

of armed conflict<sup>42</sup> The Chamber also concludes that there are reasonable grounds to believe that AMIS forces were not using their installations, material, units or vehicles to make an effective contribution to the military action of a party to the conflict and that the objects thus retained the protection afforded to civilian objects<sup>43</sup>

22 Additionally, the Chamber is satisfied that there are reasonable grounds to believe (i) that the AMIS mission was present in Darfur in accordance with the consent of the State of Sudan and the other parties to the conflict,<sup>44</sup> (ii) that the AMIS troops were neutral or impartial,<sup>45</sup> and (iii) that the AMIS troops' rules of engagement permitted the troops to use force only in self-defence.<sup>46</sup> The Chamber thus concludes that there are reasonable grounds to believe that the personnel and objects belonging to the AMIS mission were involved in and associated with a peacekeeping mission "in accordance with the Charter of the United Nations" and were thus entitled to protection under article 8(2)(e)(iii) of the Statute

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<sup>41</sup> Elements of Crimes, article 8(2)(e)(iii)(4)

<sup>42</sup> See *supra* para 18

<sup>43</sup> Witness Transcript, DAR-OIP-0158-0026 at DAR-OTP-0158-0086-0087 (Anx 5 37-2 to the Application), lines 441-463

<sup>44</sup> Agreement with the Sudanese Parties on the Modalities for the Establishment of the Ceasefire Commission and the Deployment of Observers in the Darfur of 28 May 2004, DAR-00021 261 (Anx B1 to ICC-02/05-172) , Status of Mission Agreement (SOMA) on the Establishment and Management of the Ceasefire Commission in Darfur Area of the Sudan of 4 June 2004, DAR-OTP-0154-0021 (Anx 5 26 to the Application) at 0023-0024, Protocol between the Government of the Sudan, the Sudan Liberation Movement/Army (SL M/A), the Justice and Equality Movement (JEM) on the Enhancement of the Security Situation in Darfur in accordance with the Ndjamena Agreement of 9 November 2004, DAR-OTP-0154-0004 (Anx B2 to ICC-02/05-172) at 0006-0009

<sup>45</sup> Witness Statement, DAR-OTP-0165-0521 (Anx 2 to ICC-02/05-211-Conf-Exp) at 0525, para 21, Witness Statement, DAR-OIP-0165-0424 at 0431, para 28

<sup>46</sup> Human Rights Watch Report, "Sudan Imperatives for Immediate Change - the African Union Mission in Sudan", DAR-OIP-0154-0074 (Anx B4 to ICC-02/05-172) at 0102, Witness Statement DAR-OIP-0165-0521 (Anx 2 to ICC-02/05-211-Conf-Exp) at 0525, paras 19-20

23 The Chamber further considers that there are reasonable grounds to believe that Banda and Jerbo were aware of the factual circumstances establishing the above-mentioned protection<sup>47</sup>

24 In the view of the Chamber, there are reasonable grounds to believe that, during the attack on the MGS Haskanita, in addition to attacking AMIS personnel, the attackers destroyed the communications installations, dormitories, vehicles and other materials belonging to AMIS.<sup>48</sup> The Chamber further finds that there are reasonable grounds to believe that the AMIS personnel, installations, material, units and vehicles stationed at the MGS Haskanita were the intended object of the attack<sup>49</sup>

25 Furthermore, the material submitted by the Prosecutor provides reasonable grounds to believe that after the attack, the attackers appropriated certain AMIS property, including approximately seventeen vehicles, as well as refrigerators, computers, cellular phones, military boots and uniforms, fuel, ammunition and money.<sup>50</sup> The Chamber is satisfied that there are reasonable grounds to believe that the attackers intended to appropriate the above-

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<sup>47</sup> Witness Statement, DAR-OTP-0165-0521 (Anx 2 to ICC-02/05-211-Conf-Exp) at 0527, para 33, Witness Transcript, DAR-OTP-0157-0275 (Anx 5 36 to the Application) at 1221, lines 1154-1174, Witness Interview Summary Notes, DAR-OTP-0161-0159 at 0180

<sup>48</sup> See, e.g. Witness Statement, DAR-OTP-0165-0521 (Anx 2 to ICC-02/05-211-Conf-Exp) at 0534, AU Investigation Report on the Attack on MGS Haskanita, 9 October 2007, DAR-OTP-0160-0826 (Anx B8 to ICC-02/05-172) at 0830

<sup>49</sup> Witness Statement, DAR-OTP-0165-0521 (Anx 2 to ICC-02/05-211-Conf-Exp) at 0527, paras 31-33, Witness Transcript, DAR-OIP-0158-0026 (Anx 5 37 to the Application) through 02222 at DAR-OIP-0158-0073 at 0086-0087

<sup>50</sup> Witness Statement, DAR-OTP-0165-0352 at 0361-0362 (Anx 1 to ICC-02/05-211-Conf-Exp), paras 60, 61, Witness Statement DAR-OIP-0165-0521 (Anx 2 to ICC-02/05-211-Conf-Exp) at 0535, paras 81 and 86, Witness Transcript, DAR-OTP-0158-0026 (Anx 5 37 to the Application) at 0089-0090, lines 535-559, Witness Transcript, DAR-OIP-0158-0262 (Anx 5 35-3 to the Application) at 0378-0379, lines 1278-1303

mentioned AMIS property for private or personal use,<sup>51</sup> and that such appropriation was without the consent of the owner or owners

26 On the basis of the forgoing, the Chamber is satisfied that there are reasonable grounds to believe that (i) the war crime of violence to life in the form of murder was committed or attempted (article 8(2)(c)(i) of the Statute), and that (ii) the war crimes of attacking a peacekeeping mission (article 8(2)(e)(iii) of the Statute) and pillaging (article 8(2)(e)(v) of the Statute) were committed during the attack on the MGS Haskanita on 29 September 2007

**Whether there are reasonable grounds to believe that Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus are criminally responsible for the crimes mentioned above**

27 The Prosecutor alleges that Abu Garda, Banda and Jerbo are individually criminally responsible as co-perpetrators or as indirect co-perpetrators under article 25(3)(a) of the Statute for the above-mentioned crimes<sup>52</sup>

28 As noted above, the Chamber is of the view that there are reasonable grounds to believe that (i) the attack to MSG Haskanita was carried out by splinter forces of JEM acting in concert with the forces of SLA-Unity, and (ii)

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<sup>51</sup> DAR-OTP-0158-0262 (Anx 5 35-3 to the Application) at 0379, lines 1304-1318, Witness Transcript, DAR-OTP-0158-0026 (Anx 5 37-2 to the Application) at 0099-0100, lines 895-910, Witness Statement, DAR-OTP-0165-0352 (Anx 1 to ICC-02/05-211-Conf-Exp) at 0362, para 62

<sup>52</sup> The Application, para 140

Abu Garda, Banda and Jerbo were in command of the said splinter forces of JEM and SLA-Unity,<sup>53</sup> which were hierarchically organised<sup>54</sup>

29 Furthermore, in the view of the Chamber, the material submitted by the Prosecutor provides reasonable grounds to believe that (i) a common plan to attack the MGS Haskanita existed between Abu Garda, Banda and Jerbo,<sup>55</sup> and (ii) the common plan included the commission of the war crimes referred to in the previous section.<sup>56</sup>

30 The Chamber also finds that there are reasonable grounds to believe that Banda, as a commander of the splinter forces of JEM, along with Abu Garda, and Jerbo, as a commander of SLA-Unity, exercised joint control over the commission of the alleged crimes and that their respective contributions to the perpetration of the alleged crimes were essential.<sup>57</sup> Moreover, there are reasonable grounds to believe that, as commanders of their respective forces

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<sup>53</sup> Witness Transcript, DAR-OTP-0157-1124 (Anx 5 36 to the Application) through 1244 at DAR-OTP-0157-1244 at 1247-1250, Witness Transcript, DAR-OTP-0158-0262 (Anx 5 35 to the Application) at 0349, lines 285-292, Witness Transcript, DAR-OTP-0158-0026 (Anx 5 37 to the Application) at 0084-0086, lines 263-429

<sup>54</sup> Witness Transcript, DAR-OIP-0157-0275 (Anx 5 34 to the Application) at 0427-0429, Founding Declaration, "Important Statement, Sudanese Justice and Equality Movement – Collective Leadership", 11 October 2007, DAR-OIP-0156-0097 (Anx 5 25 to the Application) at 0099

<sup>55</sup> Witness Statement, DAR-OIP-0161-0159 (Anx B5 to ICC-02/05-172) at 0184, Witness Transcript, DAR-OTP-0157-0275 (Anx 5 34 to the Application) at 0427-0429, Witness Transcript, DAR-OTP-0158-0026 (Anx 5 35 to the Application) at 0081 to 0084, Witness Transcript, DAR-OIP-0158-0026 (Anx 5 37 to the Application) through 0222 at DAR-OTP-0158-0073 at 0085, lines 400-404

<sup>56</sup> Witness Statement, DAR-OTP-0165-0352 (Anx 1 to ICC-02/05-211-Conf-Fxp) at para 67

<sup>57</sup> Witness Transcript DAR-OTP-0157-0275 (Anx 5 34 to the Application) at 0408, lines 374-394, Witness Transcript, DAR-OIP-0157-1124 (Anx 5 36 to the Application) through 1244 at DAR-OTP-0157-0244 at 1254-1256

before and during the attack to Haskanita, they were aware of their respective abilities to jointly control the commission of the alleged crimes.<sup>58</sup>

31 For the foregoing reasons, the Chamber finds that there are reasonable grounds to believe that Banda and Jerbo are criminally responsible as co-perpetrators or as indirect co-perpetrators under article 25(3)(a) of the Statute for

- (i) The war crime of violence to life in the form of murder, whether committed or attempted, under article 8(2)(c)(i) of the Statute,
- (ii) The war crime of attacking personnel or objects involved in a peacekeeping mission, under article 8(2)(c)(iii) of the Statute, and
- (iii) The war crime of pillaging, under article 8(2)(e)(v) of the Statute

**Whether the specific requirements under article 58 of the Statute for the issuance of a summons to appear have been met**

32 The Chamber notes that the second requirement provided for by article 58(7) of the Statute is that the Chamber is satisfied that there are reasonable grounds to believe that a summons is sufficient to ensure the person's appearance

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<sup>58</sup> Witness Transcript, DAR-OTP-0158-0026 (Anx 5 37 to the Application) at DAR-OTP-0158-0073 at 0085, lines 400-401, Witness Transcript, DAR-OTP-0157-0275 (Anx 5 34 to the Application), lines 1016-1018

33 In its Application, the Prosecutor initially requested the issuance of warrants of arrest for Abu Garda, Banda and Jerbo<sup>59</sup> However, the Prosecutor also stated that a summons to appear could be a feasible alternative should the commanders express a willingness to pursue that route<sup>60</sup> Subsequently, the Prosecutor submitted that, indeed, the issuance of summonses would be sufficient to ensure their respective appearances.<sup>61</sup> The Prosecutor has continued to provide additional information to the Chamber in that regard<sup>62</sup>

34 On the basis of the information submitted by the Prosecutor, the Chamber is satisfied that there are reasonable grounds to believe that a summons to appear is sufficient to ensure the appearances of Banda and Jerbo before the Court within the meaning of article 58(7) of the Statute

35 The Chamber reserves its right to review this finding either *proprio motu* or at the request of the Prosecutor, however, particularly if the suspects fail to appear on the date specified in the summons or fail to comply with the orders contained therein

#### FOR THESE REASONS, THE CHAMBER HEREBY

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<sup>59</sup> The Application, para 169

<sup>60</sup> *Ibid*, para 170

<sup>61</sup> See, e.g. ICC-02/05-165-Cont-Lxp, ICC-02/05-165-Conf-Exp-Anxs1-8

<sup>62</sup> ICC-02/05-194-Conf-Exp, ICC-02/05-194-Cont-Exp-Anxs1-2, ICC-02/05-229-AnxA

## DECIDES TO ISSUE

A **SUMMONS TO APPEAR** for **ABDALLAH BANDA ABAKAER NOURAIN**, for his alleged responsibility under article 25(3)(a) of the Statute for

- (i) The war crime of violence to life, in the form of murder, whether committed or attempted, within the meaning of article 8(2)(c)(i) of the Statute,
- (ii) The war crime of intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission, within the meaning of article 8(2)(e)(iii) of the Statute,
- (iii) The war crime of pillaging, within the meaning of article 8(2)(e)(v) of the Statute,

## DECIDES TO ISSUE

A **SUMMONS TO APPEAR** for **SALEH MOHAMMED JERBO JAMUS**, for his alleged responsibility under article 25(3)(a) of the Statute for

- (iv) The war crime of violence to life, in the form of murder, whether committed or attempted, within the meaning of article 8(2)(c)(i) of the Statute,

- (v) The war crime of intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission, within the meaning of article 8(2)(e)(iii) of the Statute,
- (vi) The war crime of pillaging, within the meaning of article 8(2)(e)(v) of the Statute;

### DECIDES

that the summonses for **Abdallah Banda Abakaer Nourain** and **Saleh Mohammed Jerbo Jamus** shall be included in separate self-executing documents containing the information required by article 58(7) of the Statute and imposing on **Abdallah Banda Abakaer Nourain** and **Saleh Mohammed Jerbo Jamus**, without prejudice to further decisions of the Chamber in this respect, the following conditions

- (i) to refrain from discussing issues related to either the charges which form the basis of the present summons or the evidence and information presented by the Prosecutor and considered by the Chamber,
- (ii) to refrain from making any political statements while within the premises of the Court, including the location assigned to them,

- (iii) not to leave, without specific permission of the Chamber and for the whole period of their stay in the Netherlands, the premises of the Court, including the location assigned to them,
- (iv) to comply, in any case, with all the instructions of the Registrar for the purposes of their respective appearances before the Court;

### ORDERS

the Registrar to, as soon as practicable and in coordination with the Prosecutor, serve the above-mentioned summons on **Abdallah Banda Abakaer Nourain** and **Saleh Mohammed Jerbo Jamus** as required by article 58(7) of the Statute and in accordance with regulation 31(3)(b) of the Regulations of the Court,

### ORDERS

the Registrar to

- (i) monitor the compliance of **Abdallah Banda Abakaer Nourain** and **Saleh Mohammed Jerbo Jamus** with the conditions set forth by the Chamber in the summons to appear and contained in the present decision from the moment it is served upon them,
- (ii) immediately report any violation of the said conditions by **Abdallah Banda Abakaer Nourain** or **Saleh Mohammed Jerbo Jamus** to the Chamber,

## RECALLS

the United Nations Security Council Resolution 1593, acting pursuant to Chapter VII of the Charter of the United Nations, in which the Security Council decided that the Government of the Sudan and all other parties to the Darfur conflict, *shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to the Resolution and, while recognizing that States not party to the Statute have no obligation under the Statute, urged all States and concerned regional and other international organisations to cooperate fully,*

## ORDERS

the Registrar, as appropriate, to prepare and to transmit to any other State any request for *cooperation which may be necessary to facilitate the voluntary appearances of Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* before the Court pursuant to articles 87 and 93 of the Statute,

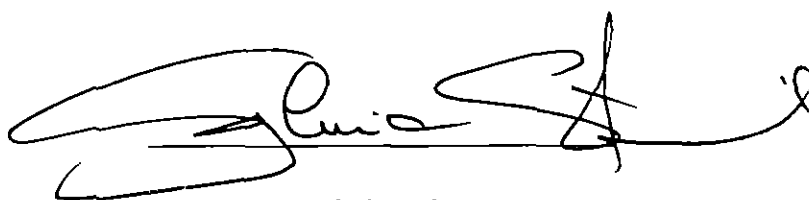
## REQUESTS

the Prosecutor to transmit to the Chamber and to the Registry, as far as its confidentiality obligations allow, all information available to the Prosecutor that may assist in averting any risks to victims or witnesses associated with the *transmission of any of the above-mentioned cooperation requests;*

## REQUESTS

the Prosecutor to transmit to the Chamber and to the Registry, as far as its confidentiality obligations allow, all information available to it that, in its view, would facilitate the transmission and execution of any of the above-mentioned cooperation requests,

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



Judge Sylvia Steiner

Presiding Judge



Judge Sanji Mmasenono Monageng



Judge Cuno Tarfusser

Dated this Thursday, 27 August 2009

At The Hague, The Netherlands