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

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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

**Defence Application for Leave to Reply to « Réponse des Représentants Légaux
Communs à la Version Publique Expurgée des ‘Soumissions de la Défense
Relatives à la Date Potentielle Pour le Commencement du Procès Suite à
l’Audience Publique de Mise en Etat tenue le 29 Janvier 2013’ notifiée le 1er
Février 2013 »**

Sources: Defence Team of Abdallah Banda Abakaer Nourain
Defence Team of Saleh Mohammed Jerbo Jamus

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

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I. Introduction

1. The Defence for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus (“Defence”) respectfully request the Trial Chamber to grant leave to reply to the Common Legal Representatives’ response¹ to the Defence’s submissions on issues relevant to a potential date for the commencement of trial, which was filed following the public status conference held on 29 January 2013 (“Submission”).²
2. The Response warrants a reply because the Common Legal Representatives (“CLRs”) allege that the Defence have misled the Trial Chamber and have acted in bad faith.³ In light of the seriousness of such allegations of misconduct and the prejudice caused, the Defence are compelled to seek leave to reply to these unsubstantiated claims.
3. Should the Trial Chamber grant leave to submit a reply, the Defence request that the time limit specified in Regulation 34(c) of the Regulations of the Court (“Regulations”) be extended so that the reply is to be filed within ten days of notification of the Trial Chamber’s decision to grant leave.

II. Background

4. On 29 January 2013, the Trial Chamber held a public status conference. At this status conference, the Trial Chamber granted the Defence leave to file an *ex parte* submission on one distinct and confidential issue.⁴

¹ Réponse des Représentants Légaux Communs à la Version Publique Expurgée des „Soumissions de la Défense Relatives à la Date Potentielle Pour le Commencement du Procès Suite à l’Audience Publique de Mise en Etat tenue le 29 Janvier 2013“ notifiée le 1er Février 2013, 25 February 2013, ICC-02/05-03/09-453 (“Response”).

² Public Redacted Version of “Defence Submissions on Issues Relevant to a Potential Date for the Commencement of Trial Following the Public Status Conference Held on 29 January 2013” Filed on 1 February 2013, 1 February 2013, ICC-02/05-03/09-448-Red.

³ Response, para. 6, as well as paras. 4, 5, 15, 38, 39 and 41.

⁴ See ICC-02/05-03/09-T-21-CONF-ENG, page 61, lines 11 to 18.

5. Subsequently, on 1 February 2013, the Defence submitted this information on a confidential and *ex parte* basis.⁵ In addition, the Defence sought to provide clarification on a second issue relating to referrals by the Defence to the Victims and Witnesses Unit (“VWU”), which was submitted in paragraph 11 of the Submission on a public, but redacted, basis.⁶
6. On 25 February 2013, the CLR’s submitted their Response.⁷ Paragraphs 4 and 5 of this document contain arguments in response to the Defence’s submissions on VWU referrals in paragraph 11 of the Submission. Paragraph 6 of the Response states that in reaction to the status conference, the victims have expressed concerns regarding what they “considèrent comme étant une chaîne de contradictions et de contre vérités [sic] de la part de la Défense révélatrice d’une stratégie manifeste de dilatoire pour empêcher une tenue diligente du procès”. Thus, the CLR’s clearly allege that the Defence is trying to delay the start of trial by relying on “untruths”.
7. The remainder of the substantive submissions in the Response, namely paragraphs 9 to 42, are not a response to the Submission, but are general submissions on issues, which according to the CLR’s are relevant for setting a date for the commencement of trial.⁸ These include the allegations that:

⁵ Submission, paras. 4 to 10.

⁶ Submission, para. 11.

⁷ ICC-02/05-03/09-453.

⁸ The disclosure of unredacted application forms for victim participation (Response, Section III a.), the time required by the Defence to carry out their investigation (Response, Section III b.), evidence which may be obtained through alternative sources (Response, Section III c.), the link between the Government of Sudan’s (“GoS”) campaign of violence and the *mens rea* (Response, Section III d.), a link between the GoS campaign of violence and its non-compliance with peace agreements (Response, Section III e.) and logistical and security problems regarding Mr. Banda and Mr. Jerbo (Response, Section III f.).

- a) the Defence acknowledged that by March 2012 they had transmitted 12 batches of Zaghawa audio translations of Prosecution evidence to Mr. Banda and Mr. Jerbo.⁹
- b) Mr. Banda and Mr. Jerbo “peuvent quitter relativement facilement le Soudan dans le cadres des discussions et négociations en cours”.¹⁰
- c) “[...] en réalité les deux Accusés comprennent bien l’Arabe, une langue officielle de travail de la Cour, contrairement à ce que suggérait la Défense au cours de l’Audience de mise en Etat du 19 Avril 2011.”¹¹
- d) “[i]l est clair que l’utilisation de l’Arabe aurait permis de raccourcir les délais de trois ans qui ont été nécessaires au Greffe et au Procureur pour faire les traductions en Zaghawa.”¹²

III. Standard for Granting Leave to Reply

8. Pursuant to Regulation 24(1) of the Regulations of the Court (“Regulations”)

The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.

9. Regulation 24(4) of the Regulations provides that such a response may not be filed to any document which is itself a response.

10. Regulation 24(5) of the Regulations states that:

⁹ Response, para. 15.

¹⁰ Response, para. 38.

¹¹ Response, para. 39.

¹² Response, para. 41.

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.

11. Regulation 34(c) of the Regulations provides:

Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response.

12. A Chamber may grant leave to reply when the moving party has shown "good cause".¹³ Both Pre-Trial and Trial Chambers have deemed such good cause to exist when new and distinct issues of law and fact are raised in the response and where the importance and potential effect of the issues contained in the original application and response necessitate additional submissions being made.¹⁴

IV. There Is Good Cause to Allow a Reply

13. In the course of this case, the Defence have had ample opportunity to criticise the quality and propriety of the CLR's submissions. However, the Defence have chosen not to burden the Trial Chamber with further arguments in response. Rather, the Defence trusted that the Chamber had all relevant information to determine which of the CLR's submissions had merit and should be considered.

14. However, on this occasion the Defence cannot ignore the CLR's Response because it directly alleges bad faith on the part of the Defence. It explicitly

¹³ See e.g. *Prosecutor v. Bemba*, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294, para. 3: "Having considered the Application, the Single Judge is of the opinion that the Defence has shown good cause to grant leave to reply to the Prosecutor's Response."

¹⁴ See e.g. *Prosecutor v. Mbarushimana*, Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material", ICC-01/04-01/10-61, 24 February 2011; *Prosecutor v. Katanga & Ngudjolo*, Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the *Regulations of the Court*), 27 March 2009, ICC-01/04-01/07-1004-ENG.

raises general allegations that the Defence exhibit a pattern of lying,¹⁵ and, therefore, that the Defence are systematically misleading the Trial Chamber, and that the Defence acted in bad faith by pursuing a strategy of delaying the commencement of trial.¹⁶

15. The CLR also specifically maintain that the Defence have misled the Trial Chamber by wrongly stating that Mr. Banda and Mr. Jerbo do not understand Arabic¹⁷ and that in doing so the Defence have delayed the proceedings by three years.¹⁸

16. Where explicit allegations of misconduct are made against a party, those allegations cannot be fairly considered or even left on the court record unless that party is given the opportunity to respond to those allegations. This basic principle of fairness requires that the Defence have the opportunity to reply to the Response.

17. Specifically, the Defence seek leave to respond to the following unsubstantiated submissions in the Response:

- a) the explicit allegation of a pattern of dishonest statements or behaviour and a strategy aimed at delaying the commencement of the trial by the Defence;¹⁹
- b) the explicit allegation of dishonesty and delaying tactics by the Defence regarding Mr. Banda's and Mr. Jerbo's ability to understand Arabic.²⁰

¹⁵ I.e. telling "untruths". See Response, para. 6.

¹⁶ Response, para. 6.

¹⁷ Response, para. 39.

¹⁸ Response, para. 41

¹⁹ Response, para. 6.

²⁰ Response, para. 39.

18. The Defence submit that there is good cause to allow a limited reply. First, the allegations under points a) and b) in paragraph 17 above constitute new issues of both law and fact, which were not addressed in the Submission. The Defence have not made any submissions on the allegation of misconduct, or specifically on the new facts alleged in relation to whether Mr. Banda and Mr. Jerbo understand Arabic well.²¹

19. Second, the baseless allegation that the Defence systematically misled the Trial Chamber and pursue a strategy aimed at delaying the commencement of the trial raises serious issues of professional conduct and, if unaddressed, has the potential to have a grave impact on the rights of Mr. Banda and Mr. Jerbo. Equally, the Defence are entitled to reply to the allegation of dishonesty and delaying tactics in relation to Mr. Banda's and Mr. Jerbo's ability to understand Arabic.

v. The Reply Sought Is Limited in Nature

20. The Defence do not understand whether the CLR's are also alleging dishonesty and delaying tactics in relation to the issues of (c) VWU referrals²² and (d) the transmission of Zaghawa audio translations to Mr. Banda and Mr. Jerbo,²³ and (e) Mr. Banda's and Mr. Jerbo's ability to travel outside of Sudan²⁴ and, therefore, their attendance to court proceeding.

21. Whilst the Defence strenuously deny any bad faith in relation to these issues also, all relevant facts and submissions are already before the Trial Chamber. In addition, it may be that the Trial Chamber considers that, in making these

²¹ See Response, paras. 39 to 41. The Defence, of course, have responded to earlier unfounded submissions by legal representatives that Mr. Banda and Mr. Jerbo fully understand and speak Arabic in the sense of Article 67(1)(a) and (f) of the Statute, as well as Rule 76(3) of the Rules of Procedure and Evidence. See ICC-02/05-03/09-T-10-ENG, 19 April 2011, page 22, lines 13 to 21, page 24, line 7 to page 25, line 24.

²² Response, paras. 4 and 5.

²³ Response, para. 15.

²⁴ Response, para. 38.

allegations, the CLR's trespassed beyond the permissible bounds of a Response. The Defence, therefore, do not seek to respond to every unfounded allegation in the Response, but only to the specific issues identified above.

Relief Requested

Based on the above submissions, the Defence respectfully request that the Trial Chamber grant leave to reply to the Response under Regulations 24(5) and 34(c) of the Regulations. Should the Trial Chamber grant the Defence leave to submit a written reply, the Defence request that the time limit specified in Regulation 34(c) of the Regulations be extended so that the reply is to be filed within ten days of notification of the Trial Chamber's decision to grant leave.

Respectfully Submitted,



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Mr. Nicholas Koumjian

Co-Lead Counsel

Dated this 4th Day of March 2013

At The Hague, The Netherlands

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