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

Date: 14 April 2011

TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

AND

SALEH MOHAMMED JERBO JAMUS

Public Document

with confidential *ex parte* annexure available only to the Prosecution and Registry

**Defence submissions in response to the questions contained in the Trial
Chamber's agenda for the 19 April 2011 status conference**

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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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Mr Didier Preira

Victims and Witnesses Unit

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**Victims Participation and Reparations
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Ms Fiona McKay

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I. Background

1. On 17 June 2010, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("the accused") voluntarily appeared before the Court in response to summonses issued by Pre-Trial Chamber I. The confirmation of charges hearing in this case took place on 8 December 2010, the Pre-Trial Chamber having accepted the accused's waiver of their right to attend¹. On 7 March 2011, the Pre-Trial Chamber issued its decision confirming for trial the three charges preferred by the Prosecutor against each accused.²
2. On 16 March 2011, the Presidency constituted Trial Chamber IV (the "Chamber") and referred to it the accused's case.³ Judge Aluoch was elected Presiding Judge of the Chamber on 17 March.⁴
3. On 30 March 2011, the Chamber issued an order⁵ scheduling a status conference for 19 April 2011. By way of email communication⁶ on 4 April 2011, the Chamber transmitted an agenda for the status conference to the parties, participants and Registry with instructions to file written submissions in response to the questions contained in the agenda by 14 April 2011 at 16:00. The parties, participants and Registry were further instructed to submit requests for the addition of items to the agenda by 8 April 2011. In a subsequent email the Trial Chamber transmitted an additional confidential agenda item to the parties and Registry, applying the above mentioned deadlines for written submissions and requests for additions.⁷

¹ Decision on issues related to the hearing on the confirmation of charges, 17 November 2010, ICC-02/05-03/09-103, para. 4.

² Corrigendum of the "Decision on the Confirmation of Charges", ICC-02/05-03/09-121-Corr-Red.

³ Decision constituting Trial Chamber IV and referring to it the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*,

⁴ Decision notifying the election of the Presiding Judge, 18 March 2011, ICC-02/05-03/09-126.

⁵ Order scheduling a status conference, ICC-02/05-03/09-127.

⁶ Email communication between the Legal Adviser to the Trial Division and the parties, participants and the Registry dated 4 April 2011, at 12:24.

⁷ Email communication between the Legal Adviser to the Trial Division and the parties, participants and the Registry dated 4 April 2011, at 12:29.

4. On 8 April 2011, the Defence submitted to the Chamber via email a request for the addition of an item to the status conference agenda.⁸
5. On 12 April 2011, the Chamber issued its Agenda of the status conference scheduled for 19 April 2011⁹ with a confidential annex of additional agenda items to be addressed at a closed session status conference attended by the parties and Registry following the public status conference.
6. The Defence hereby submit their response to the questions addressed to them in the agenda issued by the Chamber on 12 April 2011. The Defence's submissions on the additional agenda items are included as confidential *ex parte* "Annexure A" to this filing.

II. Item A – Status of the agreement between the parties as to evidence pursuant to Rule 69 of the Rules

7. The Defence inform the Chamber that they are currently in discussions with the Prosecution regarding an agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence (the "Rules").¹⁰ The Defence shall immediately notify the Chamber in the event any understandings between the Prosecution and Defence are reached on this matter.

III. Item B – Timing and volume of disclosure by the prosecution

8. With respect to sub-item "b." of the agenda concerning the language of disclosure, the Defence submit that after reviewing the disclosed statements of prosecution witnesses and conferring with the accused, the Defence shall inform the Prosecution and the Chamber – for each prosecution witness statement – whether the accused require a full, partial or summarised

⁸ Email communication between the Defence and the Legal Adviser to the Trial Division dated 8 April 2011, at 13:16.

⁹ ICC-02/05-03/09-128.

¹⁰ For the sake of clarity, the Defence note that pursuant to paragraph 5 of the Joint Submission by the Office of the Prosecutor and the Defence as to Agreed Facts and submissions regarding modalities for the conduct of the Confirmation hearing (19 October 2010, ICC-02/05-03/09-80), the agreement on facts reached by the Prosecutor and Defence in that filing was applicable solely for the purposes of the confirmation of charges process. Accordingly, this earlier agreement on facts has no effect for the purposes of the trial stage of the case.

Zaghawa audio translation of the statement in satisfaction of the Prosecution's obligations under Rule 76(3) of the Rules.

IV. Item C – Issues concerning witnesses

9. With regard to sub-item "b." concerning expert witnesses, the Defence is in the process of identifying potential expert witnesses and will likely seek to call expert witnesses at trial. While the joint instruction of an expert or experts may be feasible, the Defence is not presently in a position to evaluate that possibility.

V. Item D – Preparation of the defence

10. In response to sub-item "a.", the Defence inform the Chamber that they do not intend to advance any of the defences included in rules 79 or 80 of the Rules.
11. With respect to sub-item "b.", the Defence submit that any estimate they would provide on the length of time needed for preparation following disclosure would be merely speculative at this juncture. Until the Prosecution has informed the Defence of both the number and identity of the witnesses they intend to call at trial, the Defence are unable to evaluate an estimated time period for defence preparation.
12. Further, the Defence note that additional factors beyond the control of the Prosecution impact the time necessary for defence preparation:
 - i. Thus far, Defence team members have been unable to enter and conduct investigations on Sudanese territory for legal, logistical and security reasons.
 - ii. The only investigations the Defence have been able to undertake are meetings outside of Sudan with a few persons relevant to the Defence case who have managed to leave Sudanese territory for the express purpose of meeting with the Defence. Given the increasingly volatile security situation in Darfur as well as other parts of Sudan, and the Sudanese government's official position of hostility to the Court and

any persons cooperating with it, these persons naturally encounter dangerous and difficult security and logistical barriers when attempting to meet with the Defence.

- iii. Accordingly, the Defence have encountered and expect to continue encountering significant difficulties in identifying and meeting with persons presently located within Sudan who are relevant to the Defence case.
- iv. It should also be noted that the Defence regularly encounter difficulties in meeting with their clients – outside of Sudan – despite the professional, conscientious and essential assistance provided by members of the Registry in The Hague and abroad to help facilitate such meetings.
- v. In addition, the Defence have requested and continue to request relevant documentary and other evidence in the possession of various intergovernmental bodies – a relatively lengthy process that may eventually require requests for cooperation being filed with the Chamber.

VI. Item F – Languages to be used in the proceedings

13. With regard to sub-item “b.”, the Defence, at this stage, foresee calling witnesses who will testify in English, Arabic and Zaghawa.

VII. Item G – Date of trial

14. For the reasons outlined in paragraphs 11 and 12 above, the Defence are unable, at this time, to provide an estimate for the earliest date by which they would be ready for the trial to commence.

Respectfully Submitted,



Mr. Karim A. A. Khan, QC

Defence Counsel for Abdallah Banda Abakaer Nourain and
Saleh Mohammed Jerbo Jamus

Dated this 14th Day of April 2011

At Nairobi, Kenya