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No.: ICC-02/05-03/09
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TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

Defence Response to the Prosecution's update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses

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. On 16 August 2011, the Trial Chamber clearly ordered the Prosecution to “immediately [...] start translating into Zaghawa the witness statements which it intends to reply upon for the purposes of the trial.”¹
2. In response to this Order, the Prosecution provided the Trial Chamber with an update on language related issues and further information on the re-interviews of two Prosecution witnesses² (“Prosecution Update”). Of critical concern to the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“Defence”) are the multiple references in the Prosecution Update to the Prosecution’s intention, at least in respect of some of the Prosecution’s witnesses, to translate the summaries of these witnesses’ interview transcripts into Zaghawa, rather than witness statements as ordered by the Chamber.³
3. The Defence previously requested that they be provided with translations of proper witness statements, as provided by the jurisprudence of the Court. The Defence, therefore, reiterate their position according to which: (i) the Defence are entitled to be given signed witness statements for all witnesses to be relied upon at trial by the Prosecution; and (ii) Messrs. Banda and Jerbo have the right to be provided with a translation into Zaghawa of the said witness statements.⁴

II. DEFENCE SUBMISSIONS

4. The Defence are seriously concerned with the Prosecution’s intention to only provide the Defence with Zaghawa translations of the summaries of the transcripts of witness interviews rather than translations of witness statements. The Prosecution’s justification for such an approach is to be found in the depths

¹ Order on translation of witness statements, 16 August 2011, ICC-02/05-03/09-199 (“Order”) (emphasis added).

² ICC-02/05-03/09-205, 1 September 2011.

³ Prosecution Update, paras. 5, 8 and 9.

⁴ See ICC-02/05-03/09-195.

of a footnote which states “that [as] the Trial Chamber did not address the issue of translating transcribed interviews into Zaghawa” the Prosecution assume “only summarised versions of the transcripts would need to be translated.”⁵

5. The Defence submit that this approach is erroneous because it is inconsistent with the Defence’s previous submissions on this specific point – that interview transcripts of audio interviews with witnesses must be transformed into signed witness statements which, in turn, should be translated into Zaghawa⁶ – as well as the plain language of the Trial Chamber’s Order, instructing the Prosecution to translate “witness statements” and the Court’s applicable law and jurisprudence.
6. As stated in the Defence Submission on the Translation of Incriminatory Evidence the Prosecution (“Submission”) is obligated, pursuant to Rule 76(3) of the Rules of Procedure and Evidence, to translate into a language Messrs. Banda and Jerbo fully understand, witness statements of all witnesses they intend to call at trial.⁷ The fair trial right to obtain a witness statement in original and in a language which the accused fully understands is an absolute and fundamental right.⁸
7. The proposed translation of summaries into Zaghawa for the purposes of the trial does not satisfy the requirements laid down in Rule 76(3) and the *Katanga* decision, which provides that the Prosecution must produce signed witness statements for all witnesses it wishes to present at trial.⁹

⁵ Prosecution Update, footnote 5.

⁶ See paras. 8 and 9 of the present filing; and see in particular ICC-02/05-03/09-195.

⁷ For Defence submissions on the obligations of the Prosecution to provide the Defence with written statements of the witnesses the Prosecution intend to reply upon at trial, as well as the Zaghawa translation of those witness statements, see ICC-02/05-03/09-195.

⁸ The Defence acknowledge that Rule 76(3) is subject to considerations of witness protection and confidentiality pursuant to Rule 76(4). However, these considerations are not at stake in the present case.

⁹ ICC-01/04-01/07-1553, para. 35.

8. Nor have the Defence waived their right to be provided at the trial stage with written witness statements in English and Zaghawa. On the contrary, the Defence clearly stated previously that they would accept translation of summaries of witness interviews for the purposes of the confirmation proceedings only.¹⁰ Moreover, in communications with the Prosecution¹¹ and by way of submissions during a status conference,¹² as well as a filing to the Trial Chamber,¹³ the Defence have repeatedly made their request for translations of witness statements; a request which is supported by the applicable law and jurisprudence of the Court.
9. Against this background, the Defence notice with concern the apparent continued delay in the translation of witness statements. Specifically, the Prosecution have been aware since January 2010, at the latest, that audio translations into Zaghawa could be required at trial for at least one accused.¹⁴ On 16 August 2010, as well as on 5 and 15 November 2010,¹⁵ the Prosecution was made aware that the Defence would not accept summaries of witness interviews for the purposes of the trial. On 12 July¹⁶ and 8 August 2011,¹⁷ the Defence again requested the translation of witness statements into Zaghawa, instead of summaries. Despite the Defence's repeated statements and requests, the Defence have not received a single translated witness statement to date – six months after the Decision on the Confirmation of Charges¹⁸ – and the Prosecution have only scheduled the work of the translators to begin on 5 September 2011. Moreover, rather than preparing signed statements for witnesses 0307 and 0442 for translation into Zaghawa, as requested by the Defence, the Prosecution are

¹⁰ See Annex A, ICC-02/05-03/09-195. Article 61(5) of the Statute provides that the Prosecution may rely on “summary evidence” at the confirmation of charges hearing. No such provision exists regarding the trial stage.

¹¹ See Annexes A and B to ICC-02/05-03/09-195.

¹² ICC-02/05-03/09-T-12-ENG ET WT, page 13, line 12 to page 14, line 19.

¹³ See, in particular, ICC-02/05-03/09-195.

¹⁴ ICC-02/05-03/09-18-US, para. 21.

¹⁵ Annex A, ICC-02/05-03/09-195.

¹⁶ ICC-02/05-03/09-T-12-ENG ET WT, page 13, line 12 to page 14, line 19.

¹⁷ ICC-02/05-03/09-195.

¹⁸ ICC-02/05-03/09-121-Conf-Corr.

indicating their intention to summarise the transcripts of the witness interviews.¹⁹

10. The Defence also note that the Prosecution Update does not include any information on the translation of any amended Document Containing Charges²⁰ ("DCC") to be provided by the Prosecution, nor does it appear that the time estimates for translation provided in paragraph 5 include the time required for the translation of such amended DCC.
11. The Defence appreciate that the Trial Chamber is already seized of the issue of the translation of incriminatory evidence and has issued an order which will subsequently be followed by written reasons.²¹ The Defence remain alive to the rights of Messrs. Banda and Jerbo in this regard, and the present observations are prompted solely by the submissions in Prosecution Update, which appear not to be in compliance with the Chamber's Order and the Defence respectfully submit same to the Trial Chamber for consideration.

III. RELIEF REQUESTED

For the reasons set out above, the Defence request that the Trial Chamber order the Prosecution to:

- (i) provide the Defence with a Zaghawa translation of any amended DCC filed by the Prosecution and of all existing, signed witness statements of the AMIS witnesses and third-party witnesses they intend to rely on at trial, as well as Witness 0439; and
- (ii) proceed to produce complete and accurate signed witness statements for Witnesses 0307 and 0442 from these witnesses' existing interview

¹⁹ Prosecution Update, paras 8 & 9.

²⁰ See ICC-02/05-03/09-T-12-ENG, page 12.

²¹ See ICC-02/05-03/09-199.

transcripts, as well as for any newly interviewed or other re-interviewed witnesses and to translate these statements into Zaghawa following the procedure proposed by the Defence in their Submission.

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 7th Day of September 2011

At Nairobi, Kenya

Dated this 7th Day of September 2011

The Hague, The Netherlands