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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 Application for Leave to Reply to the Prosecution's Response to the
Defence Request for Disclosure**

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. In this application the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully request the Trial Chamber to grant leave to reply, through an oral hearing or in the alternative in writing, to the Prosecution's Response to the Defence Request for Disclosure ("Response"), filed on 10 November 2011.¹
2. The Response warrants a reply since it raises various new issues of law, misinterprets the applicable law and misrepresents the facts in an unanticipated way given the limited scope of the Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor ("Request"). The importance and potential effect of these issues on the ability of Messrs. Banda and Jerbo to present their defence and the Trial Chamber's ultimate determination of guilt or innocence also necessitate additional submissions being made.
3. 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 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. Standard for Granting Leave to Reply

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

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

¹ ICC-02/05-03/09-251.

5. Furthermore, 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.

6. It is well established in the jurisprudence of this Court that a Chamber may, as a matter of discretion, grant leave to reply when the moving party has shown "good cause".² 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.³

III. Leave Should Be Granted

7. In the Response, the Prosecution oppose the Defence's request for disclosure of material previously submitted by the Prosecution in support of the Prosecutor's Application under Article 58 of the Statute for the arrest of Omar Hassan Ahmad Al Bashir in the Situation in the Darfur.⁴ It is submitted that there is good cause to allow the Defence an opportunity to address fundamental issues of law raised in the Response which will undoubtedly impact on the ultimate determination of guilt or innocence of Messrs. Banda and Jerbo. The issues at stake in the Request, particularly in light of the Response, go to the heart of the case. The Response raises new and distinct issues of law. Furthermore, and critically, the Response goes beyond the

² 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."

³ 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-tENG.

⁴ Response, para. 44.

subject-matter of the Request and while doing so misstates, misinterprets or incompletely presents the applicable law or facts.

8. First, the Defence seek leave to address the new and distinct legal issues as to whether either the volume of the material in question or the fact that material is publically available relieve the Prosecution of its statutory duties under Article 67 and Rule 77 of the Rules of Procedure and Evidence ("Rules"). The Prosecution begin their Response with an argument that the material requested is over 5000 pages⁵ and, therefore, the requested disclosure is "unduly burdensome".⁶ The Response ends by stating that much of the material regarding the Government of Sudan's campaign against the civilian population in Darfur, which was on-going at the time of the attack on MGS Haskanita, is publically available.⁷ In its Request, the Defence did not make any observations on these issues which were not foreseeable.

9. Second, the Response refers to the new and distinct legal question as to whether the Prosecution may be relieved of its disclosure obligations where an accused before the Court may be able to testify to his own motives and indeed whether he is required to do so in order to relieve the Prosecution of the inconvenience of disclosing Article 67(2) and Rule 77 evidence. The Prosecution argued that Messrs. Banda and Jerbo themselves "are in the best position to explain their personal motives."⁸ The Defence made no submissions on this issue, nor was this argument by the Prosecution foreseeable. Moreover, the proposed interpretation of the disclosure regime impacts on two of the accuseds' fair trial rights, namely the right to disclosure of exonerating evidence and evidence which is material to defence preparation

⁵ Response, para. 1. The Defence note that the Prosecution's count of pages and documents appears to include victim's statements which the Request specifically excluded.

⁶ Response, para. 2.

⁷ Response, para. 41.

⁸ Response, para. 36. The Prosecution also refer to evidence led by Messrs. Banda and Jerbo, which may cast light on their motives. At this stage, the Defence will not address this point, since the materials which are subject to the Request may indeed be evidence which the Defence will present at trial to explain the motives of Messrs. Banda and Jerbo.

and the right “to remain silent, without such silence being a consideration in the determination of guilt or innocence”.⁹

10. Third, the Prosecution submit that the “Defence did not explain how it understood these facts to be relevant to the three contested issues remaining in this case, nor did the Prosecution see a correlation.”¹⁰ The following new and distinct “twin” issues contained in the Response require a reply:

- (a) The issue of detailed information on relevance of the disclosable material: whether disclosure is only warranted where the Defence provide detailed explanations as to how the materials sought fit into the defence case and where the Prosecution agrees; and
- (b) The issue of relevance to the contested issues: whether an agreement pursuant to Rule 69 relieves the Prosecution of its obligation to disclose evidence which the Defence consider may be exonerating or material for the defence preparation. The Defence seek leave to address whether legal provisions or jurisprudence provide for a limitation of the type of material falling under Article 67(2) and Rule 77 of the Rules in the event of the existence an agreement pursuant to Rule 69 of the Rules. Effectively, the issue is whether by admitting their own participation in the attack on MGS Haskanita and narrowing the trial to those issues actually in dispute, Messrs. Banda and Jerbo have waived their right to a full and fair trial on these issues and their statutory rights to disclosure of information necessary for their defence under Article 67(2) or Rule 77 of the Rules.

⁹ Article 67(1)(g) of the Statute.

¹⁰ Response, para. 7.

11. Lastly, the Defence submit that the Response goes well beyond the subject-matter of the Request. Given the limited scope of the Request,¹¹ the arguments in the Response as to the elements of the crimes charged and to the guilt or innocence of Messrs. Banda and Jerbo, which are matters for trial, were unforeseeable. While doing so, the Prosecution misstate or misinterpret the applicable law, or present the applicable law in an incomplete way. Furthermore, the Prosecution misrepresents facts. The Defence have not had the opportunity to address the Prosecution's submissions as to the elements of crimes. To avoid prejudice to the Defence, it is submitted that in the event the Trial Chamber consider the Prosecution's arguments regarding the elements of the crimes charged and issues concerning guilt or innocence when deliberating on the Request, there is good cause to permit a reply on the issues listed below in order that the Trial Chamber can receive submissions including the complete jurisprudence.

- (a) The Prosecution submit their definition of the Statute's reference to "in accordance with the United Nations Charter."¹² The Defence contest this definition and seek leave to reply.
- (b) The Prosecution concede that the Government of Sudan's criminal campaign targeting the civilian population in Darfur is **relevant to the contested issues** in this trial *if* it is shown that AMIS personnel or objects were making a contribution to the campaign.¹³ The implication from the Prosecutor's argument is that no such evidence exists. The Defence seek leave to reply in order to prevent the Trial Chamber from basing its ruling on a misrepresentation of the facts, as the Prosecution's own evidence

¹¹ The Defence note that in their Request, the Defence stated in one instances that "[i]t is not the intention of this Request to fully argue those issues." It is submitted that doing so, would have been beyond the scope of a request for disclosure. See ICC-02/05-03/09-235, para. 22.

¹² Response, paras. 18 and 19.

¹³ Response, para. 27.

shows that personnel and objects in the AMIS base in Haskanita contributed to the military campaign.

IV. Reply Through Oral Hearing

12. The Defence believe that it will assist the Trial Chamber to hear the Defence's reply and to clarify certain aspects of the Prosecution's position in an oral hearing.¹⁴

13. The Prosecution's arguments that the Defence is not entitled to raise the issue of Government of Sudan agents using the AMIS base in Haskanita to provide intelligence to a military campaign directed against the civilian population of Darfur, if accepted, would deny Messrs. Banda and Jerbo the right to present this central defence to the charges in this case. Before considering a ruling of such consequence to the fair trial rights of the accused, the Trial Chamber should allow the Defence to reply to the Prosecutor's new legal arguments and statements regarding the applicable law and the Trial Chamber can only benefit from hearing submissions by both parties on these critical issues.

14. Furthermore, at the confirmation stage the Prosecution advanced the argument that the communication of intelligence by a Government of Sudan representative at the MGS Haskanita base could not justify the scale of the 29 September 2007 attack.¹⁵ An oral hearing may clarify whether the Prosecution, by arguing in the Response that the evidence of the Government of Sudan's consistent pattern of directing attacks against civilians is irrelevant, is now abandoning its previous argument that the attack on MGS Haskanita was disproportionate to the threat posed by the intelligence emanating from the base. If the Prosecution maintain their argument that the attack was disproportionate, they can then address the Defence's argument, submitted in

¹⁴ Rule 121(2)(b) of the Rules provides for status conferences to be held "to ensure that disclosure takes place under a satisfactory conditions". Furthermore, Article 61(11) provides that once the charges have been confirmed, the Trial Chamber seized of the case "may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings."

¹⁵ ICC-02/05-03/09-112-Conf-AnxA, para. 91.

the Request, that any consideration of proportionality must take into account the consequences for the civilian population in the Haskanita area that the intelligence emanating from the AMIS base had. Addressing this issue in an oral hearing would assist the Trial Chamber to further delineate the issue and save Court time and resources.

15. In sum, given the scale and magnitude of the issues raised by the Prosecution in response to the limited request for disclosure and the potential impact on the outcome of the trial, an oral hearing is warranted.

Relief Requested

Based on the above submissions, the Defence respectfully request that the Trial Chamber grant leave to reply, through an oral hearing or, in the alternative, in writing, to the Prosecution 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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Dated this 17th Day of November 2011

At The Hague, The Netherlands

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