

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/05-03/09
Date: 15 February 2012

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

Public Redacted Version of "Defence Application for Leave to Reply to the 'Prosecution's Response to the 'Defence Request for a Temporary Stay of Proceedings' and to the 'Defence Request for an Oral Hearing' ' ", filed on 3 February 2012

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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**Victims Participation and Reparations
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Other

I. Introduction

1. In this application¹ the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully request the Trial Chamber to grant leave to reply to the Prosecution's "Response to the Defence Request for a Temporary Stay of Proceedings and to the Defence Request for an Oral Hearing" ("Response"), filed on 30 January 2012.²
2. The Response warrants a reply since it raises new and distinct issues of law and, the Defence contend, both misinterprets the applicable law and misrepresents facts. The importance of the "Defence Request for a Temporary Stay of Proceedings" ("Request")³ to the right of Mr Banda and Mr Jerbo to a fair trial further supports the need for a Reply.
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 The Response was filed as "confidential". Pursuant to Regulation 23 *bis* (2), the Defence also file this application as "confidential".

² ICC-02/05-03/09-286-Conf.

³ ICC-02/05-03/09-274.

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. A Chamber may grant leave to reply when the moving party has shown "good cause".⁴ 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.⁵

III. There is Good Cause to allow a Reply

7. The importance of the Request cannot be overstated. It directly relates to Mr Banda and Mr Jerbo's fundamental right to a fair trial and to the scope of the minimum guarantees for a fair trial.⁶ The significance of the issues at stake underlines the importance of allowing the Defence to respond to new issues raised in the Response and to correct misrepresentations of fact and law in the Response.
8. There is good cause to allow the Defence to address three new and distinct legal issues advanced in the Response. First, whether the Trial Chamber is precluded from assessing unfairness and breaches of the minimum guarantees set out in Article 67(1) of the Rome Statute ("Statute") which relate to the inability of the Defence to prepare for Trial, until after the Trial itself. The

⁴ 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."

⁵ 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.

⁶ See Defence Request for an Oral Hearing, 18 January 2012, ICC-02/05-03/09-280, paras. 10 – 11.

Response argues that the Request should only have been made at the close of the trial, or the close of the Prosecution case, on the basis that the Chamber can only determine after the event whether the Defence had a fair opportunity to prepare for the proceedings.⁷ This issue was not addressed in the Request.

9. Furthermore, in advancing this argument the Response relies on a number of cases from the European Court of Human Rights without properly explaining the context of those decisions.⁸ As a result, the interpretation of those decisions in the Response is misleading. The Defence have not had the opportunity to make submissions on those cases. It would be in the interests of justice to allow the Defence to reply in order to place those decisions in the context of an international human rights court reviewing completed proceedings before national courts and to address the relevance of those decisions to the Court pursuant to Article 21 of the Statute and the proper interpretation of those decisions.
10. Second, whether an agreement pursuant to Rule 69 of the Rules of Procedure and Evidence limits Mr Banda and Mr Jerbo's fair trial rights on the remaining contested issues. The Response argues that the impediments to the Defence ability to investigate must be viewed against "this focussed case and the limited issues."⁹ The Defence did not address the significance of the Rule 69 agreement in its Request.¹⁰ Unless leave is granted to reply, there is a risk that the Request will be determined on an incomplete basis.
11. Third, whether it is fair to require the Defence to identify specifically that evidence from unavailable witnesses relates to the heart of the case, in circumstances where the Defence are unable to meet and interview the

⁷ Response, paras. 11 – 12.

⁸ Response paras. 11 and 22.

⁹ Response, p. 3, unnumbered paragraph 2.

¹⁰ The Chamber granted leave to reply to the Defence on a similar point in respect of the recent Defence request for disclosure: Order on the Defence's application for leave to reply, 24 November 2011, ICC-02/05-03/09-261.

witnesses in the first place. The Response argues that for a temporary stay to be granted the Defence would have to show that the evidence that the Defence is unable to secure must be “relevant”, “must relate to the heart of the case” and must have “a decisive impact” on the outcome of the case.¹¹ This issue is not only a new and distinct legal issue, the threshold test it suggests is also novel.

12. Further, there is good cause to allow the Defence to correct misrepresentations of fact in the Response. Unless leave to reply is granted, there is a risk that the Chamber will be misled and the Request determined on a false basis. The Defence seeks leave to reply to the following misrepresentations of fact:-

- a) the Response suggests misleadingly that the Defence have been able to “locate, meet with and interview potential witnesses [...] including in the Sudan and Chad”¹² (emphasis added);
- b) the Response states incorrectly that “[REDACTED]”¹³;
- c) the Response asserts incorrectly that Haskanita is in the Darfur liberated area;¹⁴
- d) the Response states that “the Defence seem to have [REDACTED]”¹⁵. In the absence of further information about the extremely limited role and location of such persons, the information currently before the Chamber is misleading.

13. The Response submits that the use of Mr Banda and Mr Jerbo as investigators in Darfur cures the Defence’s inability to investigate.¹⁶ This raises a new and

¹¹ Response, para. 23.

¹² Response, p. 3, unnumbered paragraph 4.

¹³ Response, para. 26.

¹⁴ Response, para. 37.

¹⁵ Response, para. 28.

¹⁶ Response, para. 24.

distinct issue of fact which was not addressed in the Request. It is submitted that there is good cause to allow the Defence to respond to explain why the suggested use of the Mr Banda and Mr Jerbo as investigators provides no answer to the Request.

14. There is also good cause to allow the Defence to respond to statements in the Response which appear inconsistent with earlier statements by the Prosecutor. In particular, the suggestion in the Response that “the Defence has not exhausted the possibility of a judicial request to the GoS for cooperation”¹⁷. Yet the Prosecutor previously acknowledged that such an application would be futile because “it is beyond serious dispute that a request made at this time will not be granted”¹⁸.

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.

¹⁷ Response, para. 28.

¹⁸ Prosecution’s response to the “Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan” filed on 10 November 2010, 16 November 2010, ICC-02/05-03/09-101, para. 9.

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 15th Day of February 2012
At London, United Kingdom

Dated this 15th Day of February 2012
At Los Angeles, United States