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**International
Criminal
Court**

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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

Public Redacted Version of "Defence 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 30 January 2012", filed on 21 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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I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully submit their 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 2012.¹

2. On 14 February 2012, the Trial Chamber granted, in part, the Defence application for leave to reply to the Response and indicated that the Trial Chamber would be assisted by the Defence's submission on the following issues:-²

- i. The appropriate timing of the defence Requests;
- ii. Whether an agreement pursuant to Rule 69 of the Rules limits Mr Banda and Mr Jerbo's fair trial rights on the remaining contested issues;
- iii. Whether the defence is required to demonstrate that the unavailable evidence is "relevant", "must relate to the heart of the case" and must have "a decisive impact" on the outcome of the case;
- iv. Whether any of the following facts have been misrepresented:
 - a. That the Defence has been able to "locate, meet with and interview potential witnesses [...] including in the Sudan and Chad";
 - b. That "[REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]";

¹ ICC-02/05-03/09-286. The Response was filed as "confidential". Pursuant to Regulation 23 *bis* (2) of the Regulations of the Court, the Defence also file this reply as "confidential".

² ICC-02/05-03/09-294-Conf, para. 6.

c. That “the Defence seem to have [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]”; and

v. Whether the Accused persons could be used as investigators.

II. Submissions

The Appropriate Timing of the Defence Requests

3. The Prosecutor’s argument regarding the appropriate timing of the Defence’s request for a temporary stay³ is wrong in law. The Prosecutor erroneously argues that “none of the rights of the Accused persons identified under Article 67(1) of the Statute – specifically the rights contained in Article 67(1)(b) and (e) – have yet been violated or frustrated”. The Prosecutor compounds this error by submitting that “it is clearly premature to conclude that a fair trial will be impossible. Instead, that finding can only be made at the end of the trial (or at a minimum at the end of the Prosecution’s case).”⁴

4. The fundamental error in the Prosecutor’s argument under this head is his focus on considerations relevant to *permanent* rather than *temporary* stays. This error is thrown into stark relief by the Prosecutor’s suggestion that “only unfairness which cannot be resolved, rectified or corrected will trigger a stay of proceedings”.⁵ But the Defence request in this case is very clearly for a temporary stay. It is inherent in the grant of a temporary stay that such grant is made on the basis that the unfairness might be resolved or rectified at a later date, and if it is then proceedings may resume. This fact is recognised in the Appeals Chamber’s observation that:-

³ The Defence request for a temporary stay was made in the filing ICC-02/05-03/09-274 + Anxs + Conf-Anxs + Conf-Exp-Anxs, which is hereinafter referred to as the “Request”.

⁴ Response, para. 11.

⁵ Response, para. 12.

If the unfairness to the accused person is of such nature that - at least theoretically - a fair trial might become possible at a later stage because of a change in the situation that led to the stay, a conditional stay of the proceedings may be the appropriate remedy. Such a conditional stay is not entirely irreversible: if the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay may decide to lift it in appropriate circumstances.⁶

5. Indeed, and contrary to the Prosecutor's submissions, the reality is that Mr Banda and Mr Jerbo's fundamental rights have already been violated and this violation is continuing. Article 67(1)(b) of the Rome Statute ("Statute") guarantees the right to "adequate time and facilities for the preparation of the defence [emphasis added]". The phrase "for the preparation of the defence" indicates that this minimum guarantee applies from the very outset of proceedings, which includes preparing the defence for trial, and not simply once trial has commenced. This right has already been breached by the lack of adequate facilities afforded to the Defence as set out in the Request.⁷

6. Moreover, Article 67(1)(e) of the Statute guarantees the right to "obtain the attendance and examination of witnesses". The Prosecutor submits that because there is no trial scheduled, the right to call witnesses cannot have been violated yet.⁸ This ingeniously narrow approach to a fundamental right cannot be sustained. Mr Banda and Mr Jerbo have the right to "obtain" the attendance and examination of witnesses. It is clearly without merit to suggest that the process of "obtaining" the attendance and examination of witnesses begins when the first witness is to be called. The true position is

⁶ *Prosecutor v. Lubanga*, Judgment on Article 54(3)(e), ICC-01/04-01/06-1486 OA 13, 21 October 2008, para. 80.

⁷ Request, paras 4 – 23.

⁸ Response, para. 21.

that to “obtain” the attendance of a witness, the Defence must first be able to investigate in Darfur and to meet with and interview the witness. Calling the witness at trial is the visible culmination of this process, but as a matter of common sense the whole process is covered by the phrase “obtain[ing] the attendance and examination of witnesses”.

7. The Defence submit that an application for a temporary stay should be made as soon as the Accused’s rights are violated. The reason in principle is that once unfairness arises, the proceedings should be temporarily stayed, so that they may be resumed, untainted, once the unfairness has been resolved. This was the approach adopted by Trial Chamber I:-

If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary - indeed, inevitable - that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified.⁹

8. This would also be a logical way to address the issue, since it allows the Trial Chamber to address issues of unfairness at the moment when they arise, consistent with the Trial Chamber’s obligation to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused”.¹⁰ This duty requires the Trial Chamber to ensure the fairness of proceedings at all times and not simply review the fairness of trial as a whole

⁹ *Prosecutor v. Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 91.

¹⁰ Article 64(2) of the Statute.

after the evidence has been heard.¹¹ It is also consistent with the approach adopted by the *ad hoc* tribunals. Thus, in *Tadić*, the ICTY Appeals Chamber held that the accused must “bring the difficulties to the attention of the trial chamber forthwith [emphasis added]”.¹²

9. By contrast, the approach suggested by the Prosecutor would lead to an odd mismatch, where although the violation of Mr Banda and Mr Jerbo’s rights occurred during the investigation phase, the Trial Chamber cannot rule on that violation until (at the earliest) the close of the Prosecutor’s case. This would lead to the absurd result that, even where it is established that an Accused is prevented from adequately exercising their rights, the Trial Chamber must go on with the charade and wasted expense of a flawed trial only to later conclude that the proceedings were unfair. The Prosecution’s proposal to begin the trial and then see how it goes before deciding if the Defence was precluded from adequately investigating the case is remarkably cavalier towards the efficient use of the Court’s resources. Moreover, once witnesses have been called the Accused’s rights against being twice tried for the same offence come into play. If the Trial Chamber found at that point that the Accused’s right to investigate had been compromised, the Chamber would no longer have a choice to wait for the situation to change, rather, the Chamber would be required to dismiss the charges.

Whether an agreement pursuant to Rule 69 of the Rules limits Mr Banda and Mr Jerbo’s fair trial rights on the remaining contested issues

¹¹ This distinguishes the role of the Trial Chamber as a court of first instance from the role of the European Court of Human Rights (“ECtHR”), which as an international human rights court, can only review the fairness of trials after they have been concluded and after all national appeals have been exhausted. This demonstrates why the Prosecutor’s reliance on ECtHR cases is misplaced here.

¹² *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, para. 55.

10. It is particularly disquieting that in the Response the Prosecutor continues to advance Mr Banda and Mr Jerbo's willingness to agree to facts that they do not dispute, as a reason to deny them a fair hearing on those facts that are disputed. There is no basis for such a restriction in the Statute, the Rules of Procedure and Evidence ("Rules") or in principle.

11. Rule 69 of the Rules provides that:-

The Prosecutor and the defence may agree that an alleged fact [...] is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims.

12. Rule 69 provides that the only consequence of an agreement between the Prosecutor and the defence that an alleged fact is not contested is that a Chamber "may" consider that fact "as being proven". Rule 69 is clearly a sensible and pragmatic rule of evidence that facilitates a more efficient trial concentrated on the issues actually in dispute. The rule was never intended to compromise the Accused's rights, including the right to investigate all facts relevant to the contested issues in the trial.

13. The Prosecution argument that the Defence inability to investigate "must be viewed against the backdrop" of the Rule 69 agreement ignores the fact that each of the three issues contested concern facts about Sudan and no other location but Sudan. Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations, whether the attack on the AMIS base was unlawful and the *mens rea* of the Accused at the time of the attack, all depend on facts about the conflict in Darfur and events that occurred in

Darfur. The relationship between AMIS, the Government of Sudan ("GoS") and the Movements, the GoS offensive in the Haskanita area in 2007, how this offensive fit into its on-going criminal campaign against civilians populations in Darfur, the role of the MGS Haskanita in facilitating this offensive, and other facts at issue in this focused trial all concern what was happening in Darfur and require investigation in Darfur and witnesses from Darfur. If the Prosecutor expects that the Accused, by agreeing to limit the trial to the elements of the charges not supported by the facts, intend to capitulate on these issues, he will be disappointed.

Whether the Defence is required to demonstrate that the unavailable evidence is "relevant", "must relate to the heart of the case" and must have "a decisive impact" on the outcome of the case

14. The circumstances of this case are unique. In each of the cases cited by the Prosecutor, after an active and full defence investigation has occurred, specific and identifiable pieces of evidence were unavailable.¹³ By contrast, in this case the unfairness arises at an earlier stage – it is the ability of the Defence to investigate in any meaningful way which is compromised.

15. The Prosecutor invites the Trial Chamber to establish a threshold that will always be out of reach for Mr Banda and Mr Jerbo, and any accused who are prevented from carrying out a proper investigation. The Prosecutor suggests that in order for an application for a stay to succeed on the basis of unavailable evidence, the Defence must show that the unavailable evidence

¹³ Thus, for example in *Simba*, the unavailable evidence related to two identified witnesses, the likely contents of whose evidence the defence was able to specify: *Prosecutor v Simba*, ICTR-01-76-A, Judgment, 27 November 2007, paras 40 – 58. Further in *Renzaho*, the defence had actually taken statements from three witnesses who subsequently died or refused to testify. The complaint was against the Trial Chamber's refusal to admit the written evidence. Since they had written statements, again the defence were able to particularise the missing evidence: *Tharcisse Renzaho v. The Prosecutor*, ICTR-97-31-A, Judgment, 1 April 2011, para. 174.

would have a “decisive impact” on the outcome of the case, must “relate to the heart of the case” and must be “particularised”.¹⁴ In these novel circumstances, the test suggested by the Prosecutor creates a paradox. It requires the Defence to particularise the contents of evidence that is unavailable to the Defence. But the very fact that the evidence is unavailable, which is the source of the unfairness, also prevents the Defence from knowing and, hence, from particularising the contents of the evidence. This alone suggests that the various tests advanced by the Prosecutor cannot be correct.

16. The Defence accept that a temporary stay would not be justified where the unavailable evidence is entirely spurious or irrelevant. But the relevance of the unavailable evidence to the contested issues is set out, in as much detail as the Defence can provide, in the Annexes to the Request.¹⁵ It is clear that the factual issues that the Defence seek to investigate do go to the heart of the case and would have a decisive impact on the verdict. In the circumstances prevailing in this case, it is simply not possible to particularise any further information that cannot be known in this detail until the investigation is conducted. This is particularly evident with regard to witnesses. The fact that the Defence may not travel to Darfur means that the Defence are unable to identify a significant number of witnesses. The Defence cannot be expected to particularise the contents of the evidence of witnesses that it cannot even identify, still less speak to.

Claim that the Defence “have been able to locate, meet with and interview potential witnesses [...] including in the Sudan [...]”¹⁶

¹⁴ Response, para. 23.

¹⁵ See confidential and *ex parte* Annexures H and K to the Request. The Defence acknowledge that the Prosecution did not have access to these *ex parte* annexures but advise that relevance was an issue which was addressed in relation to each.

¹⁶ Response, p. 4.

17. No member of the Defence has entered Sudan.¹⁷ All meetings with and in-person interviews of potential witnesses conducted by the Defence, including all those referred to in the Request and its annexes, have taken place outside Sudan.

Assertion that [REDACTED]

[REDACTED] "18

18. As is clearly set out in confidential Annexure J to the Request, on 22 December 2011, [REDACTED]
[REDACTED]
[REDACTED] no permission had been granted by the Chadian authorities for Mr Banda – who had by then been waiting for several weeks close to the Chad-Darfur border – to enter Chad.¹⁹

19. Further, the Prosecutor's implying that Mr Banda was unable to enter Chad because [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] "20 is, at best, disingenuous. The Prosecutor completely ignores [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] – detailed throughout confidential Annexure J – that resulted in Mr Banda and the seven witnesses travelling with him being unable to enter Chad. As noted at paragraph 18 of confidential Annexure J, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] "21

¹⁷ As set out at paragraphs 6 to 9 of the Request, the Defence is unable to legally enter or otherwise conduct investigations on the ground in Sudan.

¹⁸ Response, para. 26.

¹⁹ ICC-02/05-03/09-274-Conf-AnxJ, paras 20 – 23.

²⁰ Response, para. 26.

²¹ ICC-02/05-03/09-274-Conf-AnxJ.

Further, on 21 December 2011, a month after [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]"²²

20. Therefore, contrary to the Prosecutor's assertion, it was not the case that Mr Banda's [REDACTED]
[REDACTED]²³ – was the cause of Mr Banda and the seven potential witnesses travelling with him being unable to enter the country. In any event, and as the Prosecutor likewise ignores, upon being informed of [REDACTED], Mr Banda immediately agreed [REDACTED]²⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Contention that the "Defence seem to have [REDACTED]

[REDACTED]"²⁵

21. As a preliminary matter, the Defence note with concern the Prosecutor's continued²⁶ attempt to analogise between the case of Mr Abu Garda – against whom Pre-Trial Chamber I declined to confirm any charge²⁷ – and that of Mr Banda and Mr Jerbo. As should be apparent to the Prosecutor, a confirmation

²² ICC-02/05-03/09-274-Conf-AnxJ, para. 21.

²³ [REDACTED]
[REDACTED] (ICC-02/05-03/09-274-Conf-AnxJ, para. 18).

²⁴ ICC-02/05-03/09-274-Conf-AnxJ, para. 19.

²⁵ Response, para. 28.

²⁶ See 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. 12.

²⁷ *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red.

hearing is not a trial, and the circumstances with regard to Mr Abu Garda – for whom the Pre-Trial Chamber found insufficient evidence to establish even a basic link to the core events alleged by the Prosecutor²⁸ – are wholly different than those concerning Mr Banda and Mr Jerbo.

22. With respect to the Prosecutor's specific assertion that the Defence in the *Abu Garda* case [REDACTED]²⁹ this recycled claim³⁰ has previously been discredited by the Defence³¹ and remains, unsurprisingly, factually inaccurate and misleading. As is made clear in the item of evidence cited by the Prosecutor at footnote 65 of the Response,³² [REDACTED]

23. Accordingly, [REDACTED]

²⁸ *Prosecutor v. Bahar Idriss Abu Garda*, Separate opinion of Judge Cuno Tarfusser, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 6 ("It is my firm view that the present case lacks evidence establishing a proper link between the historical events (the attack on MGS Haskanita, the killings and the looting) and the suspect (Mr Abu Garda) in terms of either direct or indirect involvement. In this respect I do concur with the decision taken in paragraphs 163 to 233, whereby the Chamber established that the Prosecutor failed to prove his allegation as to Mr Abu Garda's involvement in the attack on the MGS Haskanita.").

²⁹ Response, para. 28.

³⁰ See 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. 12.

³¹ Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan, 11 May 2011, ICC-02/05-03/09-145, p. 13, footnote 22.

³² DAR-D05-0001-0015. The Defence find it unfortunate that the Prosecutor deems it appropriate to reference a confidential item of Defence evidence from the case of *Prosecutor v. Bahar Idriss Abu Garda* that has not been submitted into the record of this case or otherwise disclosed between the parties, and which is therefore unavailable to the Trial Chamber.

26. The Prosecutor's observations regarding the ability of Mr Banda and Mr Jerbo to move within Sudan and to meet with witnesses there are clearly directed at the suggestion that the clients might somehow cure the Defence's inability to investigate by acting as pseudo-investigators.³⁴ These observations are flawed as they are predicated on a view of the clients' abilities to investigate and the security situation in Sudan which has no bearing in reality. The true position is that Mr Banda and Mr Jerbo cannot travel freely through Sudan, nor can they function effectively as investigators, or even interpreters. Moreover, the Prosecution must surely realize that no Defence should be required to use the Accused persons themselves to contact, screen or interview witnesses. Putting the Accused persons in that position could create myriad issues to the disadvantage of the Defence.

27. As set out in detail in the Request, Sudan is a country riven by conflict. Currently, violence occurs on a daily basis in many of its regions (not just Darfur) such as Abyei, Southern Kordofan and Blue Nile. In addition, Mr Jerbo is a member of one of the main groups opposed to the Sudanese Government. Mr Jerbo's movements are, therefore, severely constrained within Darfur, and Sudan as a whole. Mr Banda and Mr Jerbo are, accordingly, unable to freely travel around Sudan meeting potential witnesses.

28. In addition, even if travel were not an issue, neither client is a professional investigator or lawyer. The clients also do not have the benefit of any formal education. As a result, they simply do not have the expertise to conduct investigations and interviews. This is a small but complex case and requires proper, professional investigation. No doubt this is one of the reasons why

³⁴ Response, para. 24. The Prosecutor's clarification of his submissions on this point in ICC-02/05-03/09-291-Conf., para. 12 [REDACTED]

the Statute provides Mr Banda and Mr Jerbo with the right to professional legal assistance.³⁵ While both clients obviously provide assistance to their Defence team, in that they are able to provide telephone numbers for potential witnesses which they either have readily to hand or are able to acquire through their contacts,³⁶ the assistance which they can provide is far more limited than the Prosecutor allows. Neither client has been able to find and contact witnesses who are located in hostile territory – such as the Haskanita area – and / or places where there is no or limited mobile telephone network coverage.

29. Mr Banda and Mr Jerbo's investigative capabilities are further compromised by the fact that they speak Zaghawa which, as the Court is well aware, is not a written language. Neither client is able to sufficiently speak and understand Arabic. Many potential witnesses do not speak Zaghawa but Arabic. Further, due to the constantly shifting sands on which politics in Sudan are built, individuals might not be comfortable speaking to either client, whereas they might be willing to speak to a non-Sudanese third-party such as a Defence team member.

30. Finally, Mr Banda and Mr Jerbo are unable to arrange travel for potential witnesses. The clients have themselves encountered numerous problems arranging their own travel out of Sudan, [REDACTED]. They are certainly not equipped to arrange the generally perilous journey out of Sudan for any other person the Defence team ask to meet with. Mr Banda and Mr Jerbo generally only travel with members of their own entourage or persons who are active members of their movements. Any persons who fall outside these categories who we have asked to meet and interview have made their own

³⁵ Article 67(1)(d).

³⁶ Even this form of assistance is of currently of limited value given that as detailed in the Request, the revolutionary movements are no longer using Thuraya satellite phones to communicate.

travel arrangements and have travelled at great personal risk as set out in the Request.

31. The stark fact is that the presence of Mr Banda and Mr Jerbo in Sudan offers no solution to the fair trial rights problems with which the Defence is faced.

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 22nd Day of February 2012
At London, United Kingdom

Dated this 22nd Day of February 2012
At Los Angeles, United States