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

Date: 19 March 2012

**TRIAL CHAMBER IV**

**Before:** Judge Joyce Aluoch, Presiding Judge  
Judge Silvia Fernandez de Gurmendi  
Judge Chile Eboe-Osuji

**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 “Requête des Représentants Légaux Communs aux fins d’être autorisé à Répondre à la Réplique de la Défense aux Observations du Procureur sur la Demande de la Défense en Arrêt Temporaire des Procédures avec Autorisation d’Extension des Délais pour Déposer ladite Réponse”**

**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  
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**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. The Defence respectfully request that the Trial Chamber reject the Common Legal Representatives' Request for Leave to Reply to the Defence Reply to the Prosecution Response to the Defence Request for a Temporary Stay of Proceedings ("Request").<sup>1</sup>
2. The Request fails to identify any new or unforeseeable issue arising from the Defence Reply, instead largely indulging in substantive argument on issues raised in earlier filings. In the circumstances, the Request is without merit. It is nothing more than a thinly veiled and belated attempt to seek leave to reply to the Prosecution Response to the Defence request for a temporary stay of proceedings ("Stay Request") – an option which the Trial Chamber has already ruled out. The Request also addresses matters which arise from the original Stay Request. Such submissions are out of time and unnecessary.

## II. Background

3. On 6 January 2012, the Defence submitted its request for a temporary stay of proceedings,<sup>2</sup> in which the Defence argued that the Accused's right to a fair hearing is being violated, *inter alia*, by their inability to carry out investigations in Sudan.
4. On 30 January 2012, both the Prosecution and the Common Legal Representatives filed their Responses to the Defence Request for a Temporary Stay of Proceedings. The Prosecution filed a public redacted version of its response two days later on 1 February 2012.<sup>3</sup>

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<sup>1</sup> ICC-02/05-03/09-303.

<sup>2</sup> ICC-02/05-03/09-274 ("Stay Request").

<sup>3</sup> ICC-02/05-03/09-286-RED ("Prosecution Response").

5. On 2 February 2012, the Common Legal Representatives filed their “Requête aux fins d’être autorisés à soumettre un Addendum”.<sup>4</sup> In it, the Common Legal Representatives requested leave to file an addendum to their Response in order to address both the African Union (“AU”) response to the Chamber’s request for cooperation and to respond to the Prosecution Response to the defence requests.<sup>5</sup>
6. On 21 February 2012, the Defence filed, with the Trial Chamber’s permission,<sup>6</sup> its Reply to the Prosecution 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. A public redacted version was filed on 22 February 2012.<sup>7</sup>
7. On 5 March 2012, the Common Legal Representatives filed the Request.<sup>8</sup>
8. On 6 March 2012, the Trial Chamber rejected the Common Legal Representatives request to file an addendum. The Chamber pointed out that “had the legal representatives wished to file a reply to the Prosecution response, they should have requested leave to do so”.<sup>9</sup> Further, the Trial Chamber concluded that “given the extensive scope of the filings” already made any additional submissions on either the Registry’s Report and the Prosecution response are “unnecessary”.

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<sup>4</sup> ICC-02/05-03/09-287.

<sup>5</sup> *Ibid.*, para 9.

<sup>6</sup> ICC-02/05-03/09-294, RED.

<sup>7</sup> ICC-02/05-03/09-300, RED.

<sup>8</sup> A corrigendum to the Request was filed on 9 March 2012 (ICC-02/05-03/09-303-Corr).

<sup>9</sup> ICC-02/05-03/09-304, para. 6.

### III. This Request is not directed at the Defence Reply

9. The Defence submit that this Request is nothing more than a second attempt by the Common Legal Representative to address matters contained in the Prosecution Response. The Defence Reply does not raise and could not raise any new material. Rather it responded, with the Chamber's leave, to points raised in the Prosecution Response.<sup>10</sup> Any doubt over the intentions of the Common Legal Representatives is resolved by their own submissions in paragraphs 8 to 10 of the Request. These refer to "crucial elements raised in the response of the Prosecutor", "the contested points raised in the response of the Prosecutor" and to "new specific questions in his response".<sup>11</sup> Thus, it is quite clear that what the Common Legal Representatives really intend to address is material raised in the Prosecution Response, rather than issues arising from the Defence Reply.

10. This is fatal to the Request. First, the Common Legal Representatives have never requested leave to reply to the Prosecution Response. Nor have they explained why this course was not taken. If there were any genuine explanation for delay, the Common Legal Representatives could even have sought an extension of time in order to make such a request. Second, any such request for leave to reply to the Prosecution Response would now be out of time pursuant to Regulation 34(c). Third, and most importantly, the Trial Chamber has already decided plainly that further submissions on the Prosecution Response are "unnecessary".<sup>12</sup>

<sup>10</sup> This is expressly acknowledged at para. 13 of the Request: "primarily, these new contested points arose, *inter alia*, from observations made by the Prosecutor in his Response [...]" (unofficial English translation of the original French version).

<sup>11</sup> Request, paras. 8 to 10 (unofficial English translation of the original French version). In fact, the arguments in paragraphs 26 and 28 to 32, which the Common Legal Representatives intend to raise in their reply, all arise from the Prosecution Response.

<sup>12</sup> ICC-02/05-03/09-304, para 6.

11. The Request also tries to reopen matters which were raised in the original Defence Stay Request. The Common Legal Representatives apparently seek to challenge the “absolute and final impossibility of carrying out possible investigations [...] in Sudan”<sup>13</sup> and to attempt to show that such investigations are not relevant to the contested issues.<sup>14</sup> But these are not issues which arise from the Defence Reply, or even from the Prosecution Response. They were obvious from the face of the Defence Stay Request<sup>15</sup> itself, which was filed as long ago as 6 January 2012 and which the Common Legal Representatives have already had the opportunity to respond to. There is no cause to allow further submissions on these issues.

#### **IV. The Request is full of substantive argument**

12. Instead of identifying new and distinct issues of law and fact raised in the Defence Reply which would warrant a reply,<sup>16</sup> the Request strays far beyond the proper confines of an application for leave to reply and into the realm of argument. A clear example of this occurs at paragraph 27 of the Request which sets out a list of entirely new facts and arguments which the Common Legal Representatives say will support their submissions. Such material has no place in an application for leave to reply. The Defence invite the Trial Chamber to disregard it entirely.

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<sup>13</sup> Request, para. 18 (unofficial English translation of the original French). The alleged facts referred to in para. 27 appear to be in response to the Defence submissions in their Stay Request.

<sup>14</sup> Request, para. 39. Equally, any submissions as described in paras. 40 and 41 of the Request are in reality in response to issues raised in para. 18 of the Stay Request.

<sup>15</sup> ICC-02/05-03/09-274, *inter alia*, at paras. 4 – 9 and 21 – 23.

<sup>16</sup> Regarding the showing of “good cause” for granting leave to reply 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.

## V. Granting Leave would Delay Determination of the Defence Request

13. The Defence will not make the same mistake as the Common Legal Representatives and present substantive arguments at this stage. However, for the avoidance of doubt as to the effect that granting leave for this reply will have on the ultimate timing of the decision, if the Request is granted, then the Defence would seek leave to file a full reply to that material. In particular, the Defence would seek to correct the wholesale inaccuracies in the representations that the Common Legal Representatives indicate will be part of their submissions, particularly those proffered by the “expert in on-site investigation on the political situation in Sudan.” This can only cause further delay to the determination of a crucial issue, especially in circumstances where the original request was submitted more than two months ago.<sup>17</sup>

Respectfully Submitted,




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Mr. Karim A. A. Khan QC  
Lead Counsel




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Mr. Nicholas Koumjian  
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 19th Day of March 2012

At The Hague, The Netherlands

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<sup>17</sup> The Defence observe that an oral hearing would provide a more expeditious alternative to the proliferation of written filings in this matter.