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

Date: **15 October 2012**

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernández 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

Confidential

**Defence Application for Leave to Reply to the Victims and Witnesses Unit's
observations following Trial Chamber V's (*sic*) instructions
dated 21 September 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:

The Office of the Prosecutor

Ms. Fatou Bensouda
Mr. Adebowale Omofade

Counsel for the Defence

Mr. Karim A. A. Khan QC
Mr. Nicholas Koumjian

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Ms. Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus ("Defence") respectfully request the Trial Chamber to grant them leave to reply to the Victims and Witnesses Unit's observations on the draft protocols prepared by the Prosecution and Defence ("Observations").¹
2. The Observations warrant a reply since they mischaracterise, albeit inadvertently, certain points which are in dispute between the parties. The possible prejudicial implications of the imposition of any protocol on the conduct of defence investigations further support the need for a reply.²
3. Should the Trial Chamber grant leave to submit a 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. Background

4. Following submission by the Prosecution on 27 August 2012 of a draft protocol on, *inter alia*, the handling of non-public information³ and submission of an amended version of same by the Defence on 18 September 2012,⁴ the

¹ Victims and Witnesses Unit's observations following Trial Chamber V's (*sic*) instructions dated 21 September 2012, ICC-02/05-03/09-400-Conf ("Observations"), 5 October 2012 and related confidential Annex 1 (ICC-02/05-03/09-400-Conf-Anx1) and public Annex 2 (ICC-02/05-03/09-400-Anx2). Pursuant to Regulation 23bis(2) of the Regulations of the Court, this application is filed confidentially.

² See Defence Response to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party, ICC-02/05-03/09-394-Conf, 18 September 2012 ("Defence Submission"), paras. 1-2, for a summary of the negative implications of the proposed protocol. Note a public redacted version of the Defence Submission was filed on 18 September. See ICC-02/05-03/09-394-Red.

³ Prosecution's Submission of a Draft Protocol in the Handling of Non-Public Information and Contact of a Party With Witnesses of the Opposing Party, and Prosecution's Update on Expert Witness, ICC-02/05-03/09-389-Conf, 27 August 2012 and related Annex, ICC-02/05-03/09-389-Conf-AnxA. On 30 August 2012, the Trial Chamber granted the Prosecution leave by email to reclassify ICC-02/05-03/09-389-Conf-AnxA as a public document (ICC-02/05-03/09-389).

⁴ Defence Submission. The protocol proposed by the Defence was provided in Public Annex A, ICC-02/05-03/09-394-AnxA.

Trial Chamber instructed the Victims and Witnesses Unit ("VWU") to file observations on the Defence's draft protocol no later than 16:00 on 5 October 2012.⁵ The Trial Chamber also instructed the VWU to provide a draft proposal that combined, to the extent acceptable, the proposals of both parties along with the VWU's comments and views, as suggested during the 12 July 2012 *ex parte* Prosecution and VWU only Status Conference ("12 July Status Conference").⁶

5. On 28 September 2012, the VWU asked the parties by email: (i) whether they wished to have a meeting on 1 October 2012 with representatives of the Prosecution and the Defence which would be scheduled by the VWU; or (ii) whether the views expressed in the parties' filings were final?⁷
6. On 28 September 2012, the Prosecution responded to the VWU's email by stating that its position on the draft protocol, as expressed in the filing of 27 August 2012 and its annex, remained unchanged.⁸
7. On 1 October 2012, the Defence advised the VWU by email that they "would welcome the opportunity to meet with representatives of the VWU, at [their] convenience, to address any concerns the VWU may have with respect to the Defence Draft Protocol or provide any clarifications that may be of assistance to the VWU." The Defence further explained that they considered "such a meeting would be most fruitful if the Defence were to meet privately with the VWU, for example, in order to provide greater detail regarding particular investigative difficulties facing the Defence that [they] would not feel

⁵ Email from Trial Chamber IV's Legal Officer titled "Draft protocols on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party" sent on 21 September 2012 at 15.17.

⁶ *Ibid* citing to ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, p. 32, lines 1 to 10.

⁷ As the email from the VWU's Ms. Schauder to Prosecution and Defence counsel dated 28 September 2012 was copied to the Trial Chamber's Legal Officers, a copy is not provided with this application.

⁸ As the email from Prosecution Trial Lawyer, Mr. Omofade, to Ms. Schauder dated 28 September 2012 was copied to the Trial Chamber's Legal Officers, a copy is not provided with this application.

comfortable elaborating on in the presence of the Prosecution.” The Defence advised that they would not object to the Prosecution likewise meeting in private with representatives of the VWU.⁹

8. On 1 October 2012, the VWU replied by email that it did not believe that any private discussions could be held in relation to this specific document.¹⁰
9. On 5 October 2012, the VWU filed its Observations as instructed. On 8 October 2012, the Trial Chamber reclassified the Observations and Annex 1 thereto as “confidential”.¹¹
10. Accordingly, the Defence have not had an opportunity to discuss or explain their approach to the draft protocol with the VWU. The Defence have also never received from the Prosecution any of the VWU’s suggestions on the protocol at the closure of the *inter partes* discussions,¹² something that the VWU itself indicated would be beneficial to this *inter partes* process and to the Defence in particular.¹³ This lack of discussion may explain the VWU’s confusion on some discrete points of contention raised by the Defence.

III. Standard for Granting Leave to Reply

11. 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.

⁹ As the email from the Defence’s Case Manager, Mr. Shah, on behalf of Defence counsel to Ms. Schauder dated 1 October 2012 was copied to the Trial Chamber’s Legal Officers and the Prosecution, a copy is not provided with this application.

¹⁰ A copy of this email from Ms. Schauder was provided to the Trial Chamber’s Legal Officers and the Prosecution. Therefore, a copy of this email is not provided with this application.

¹¹ ICC-02/05-03/09-400-Conf and ICC-02/05-03/09-400-Conf-Anx 1.

¹² Observations, para. 5.

¹³ See email from VWU’s Ms. Schauder to the Prosecution dated 27 August 2012 at 13h00, contained in ICC-02/05-03/09-400-Conf-Anx 1.

12. 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.

13. A Chamber may grant leave to reply when the moving party has shown "good cause".¹⁴ Both Pre-Trial and Trial Chambers have deemed such good cause to exist when new and distinct issues of law or 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.¹⁵

IV. There is good cause to allow a Reply

14. The implications of the imposition of a protocol which, in addition to covering the handling of non-public information and the procedure for conducting interviews with an opposing party's witnesses, could possibly cover areas not previously canvassed at the 12 July Status Conference, such as the use of photographs for investigative purposes, the conduct of interviews by a party with its own witnesses and other aspects of a party's internal operating procedures, is of serious concern to the Defence. The potential significance of the protocol on the future conduct of Defence investigations underlines the importance of allowing the Defence to correct any mischaracterisations of fact, regardless of whether such mischaracterisations were made inadvertently.

¹⁴ 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, ICC-01/05-01/08-294, 27 November 2008, 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."

¹⁵ 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*), ICC- 01/04-01/07-1004-tENG, 27 March 2009.

15. Unless leave to reply is granted, there is a risk that the Trial Chamber may potentially not fully appreciate the concerns which the Defence have with the combined protocol prepared by the VWU¹⁶ and, thus, be misled. The Defence seek leave to reply to the following mischaracterisations that:

- a) "there seems to be no substantial disagreement on the proposed paragraphs 7 and 8 [of the combined protocol] between the Defence and the Prosecution";¹⁷
- b) the Defence's concerns regarding paragraphs 9 and 10 of the combined protocol relate solely to the provisions' retrospective application;¹⁸ and
- c) paragraph 25 of the combined protocol concerning witness security issues.¹⁹

¹⁶ The combined protocol is provided in public Annex 2 of the Observations.

¹⁷ Observations, Public Annex 2, p. 5. VWU's observation regarding paragraph 8 of the combined protocol is incorrect. See Defence Submission, para. 28.

¹⁸ Observations, Public Annex 2, pp. 6-7. The Defence's concerns are broader than those identified by VWU. See Defence Submission, paras. 23-24.

¹⁹ Observations, Public Annex 2, pp. 12-13. VWU fails to appreciate the unreasonable breadth of this provision as highlighted in the Defence Submission, para. 31.

V. Relief Requested

Based on the above submissions, the Defence respectfully request that the Trial Chamber grant leave to reply to the Observations 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,



Mr. Karim A. A. Khan QC

Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus



Mr. Nicholas Koumjian

Co-Lead Counsel

Dated this 15th Day of October 2012

At The Hague, The Netherlands

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