

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **18 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 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**

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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**

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**Registrar**

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**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

Ms. Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**

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## I. Introduction

1. On 16 October 2012, the Trial Chamber granted the Defence for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus ("Defence") leave to reply<sup>1</sup> to the Victims and Witnesses Unit's observations on the draft protocols prepared by the Prosecution and Defence ("Observations").<sup>2</sup> The Defence's submissions in reply are, therefore, respectfully set out below.<sup>3</sup>

## II. Submissions

2. The purpose of this reply is to clarify three inadvertent mischaracterisations made in the Observations regarding the points which are in dispute between the Prosecution and the Defence ("parties") regarding the terms of any draft protocol imposed by the Trial Chamber.<sup>4</sup>

### *A) Paragraphs 7 and 8 of the combined protocol*

3. Contrary to the observation that "there seems to be no substantial disagreement on [...] proposed paragraphs 7 and 8 [of the combined protocol] between the Defence and the Prosecution",<sup>5</sup> the Defence do object to the terms of paragraph 8.<sup>6</sup> The reason for this objection is that paragraph 8 does not offer a sufficiently precise definition of the material which is intended to be covered by the protocol. The Defence submit that in order for any protocol to

<sup>1</sup> Email from Trial Chamber IV's Legal Officer titled "Defence application for leave to reply (ICC-02/05-03/09-405-Conf)", sent on 16 October 2012 at 10:45AM.

<sup>2</sup> Victims and Witnesses Unit's observations following Trial Chamber V's (*sic*) instructions dated 21 September 2012, ICC-02/05-03/09-400-Conf, 5 October 2012 ("Observations") and related confidential Annex 1 (ICC-02/05-03/09-400-Conf-Anx1) and public Annex 2 (ICC-02/05-03/09-400-Anx2). Public Annex 2 contains a combined protocol ("combined protocol").

<sup>3</sup> Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this reply is filed confidentially.

<sup>4</sup> The Prosecution's proposed draft protocol was provided in the Annex ("Prosecution Protocol") to the 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. 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). The protocol proposed by the Defence was provided in Public Annex A (ICC-02/05-03/09-394-AnxA) ("Defence Protocol") to the 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"). Note a public redacted version of the Defence Submission was filed on 18 September. See ICC-02/05-03/09-394-Red.

<sup>5</sup> Observations, Public Annex 2, p. 5.

<sup>6</sup> See Defence Submission, para. 31.

be workable, the material which it is intended to cover should be properly and precisely defined. Any definition which relies simply on reference to "public knowledge" lacks the requisite precision because it fails to define how the parties and participants are to measure "public knowledge".

4. The definition suggested by the Defence is currently set out in paragraph 1.a of the combined protocol (which replicates paragraph 1.a of the Defence Protocol), whereas paragraph 8 of the combined protocol, which replicates paragraph 3 of the Prosecution Protocol, was deliberately not included in the Defence Protocol. Paragraph 1.a of the Defence Protocol was intended to replace paragraph 3 of the Prosecution Protocol, not to sit alongside it.

***B) Paragraphs 9 and 10 of the combined protocol***

5. The Defence's concerns regarding paragraphs 9 and 10 of the combined protocol do not relate solely to the fact that these provisions would apply "only at this stage of proceedings".<sup>7</sup> While the issue of whether such provisions will have retrospective application, or serve any purpose at this late stage of proceedings, is a very real concern both from a practical and administrative standpoint, the Defence's concerns are even broader.<sup>8</sup>
6. First, why is it proposed that both a log (paragraph 9) and a record (paragraph 10) need to be maintained? No attempt is made to explain the difference between paragraphs 9 and 10 either by the Prosecution or the Victims and Witnesses Unit ("VWU"). Second, while the VWU approach both provisions from the stand point of witness security,<sup>9</sup> the provisions clearly extend to all non-public information and not just non-public information concerning witnesses. Third, given the absence of any breaches of

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<sup>7</sup> Observations, Public Annex 2, pp. 6-7.

<sup>8</sup> Defence Submission, para. 23.

<sup>9</sup> See, e.g., Observations, Public Annex 2, p. 5 ("the maintenance of such log [...] is a useful tool to ensure the security of witnesses").

confidentiality to date in this case, the Defence submit that, for reasons of judicial economy and the efficient working of the parties, further analysis needs to be undertaken before imposing additional bureaucratic measures. The Defence submit that the additional administrative burden on the parties outweighs the fact that the VWU consider such logs and records to be "useful". This is particularly so when the parties and participants are all subject to existing strict confidentiality obligations which have successfully governed the receipt and use of non-public information in the case to date.

7. Also, the VWU do not address or provide guidance on the Defence's concern regarding the final sentence of paragraph 10 of the combined protocol. Such vague and potentially onerous obligations cannot be imposed without a proper understanding of how they are to be practically discharged on a day-to-day basis by their subjects.

*C) Paragraph 25 of the combined protocol*

8. Finally, the VWU's observations on paragraph 25 of the combined protocol fail to appreciate the unreasonable breadth of this provision.<sup>10</sup> In order to ensure its practical, day-to-day application, the terms of this provision must be narrowed so that only information directly related to witness security issues is notified to the VWU Head of Protection.

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<sup>10</sup> Observations, Public Annex 2, pp. 12-13. See Defence Submission, para. 31

### III. Relief Requested

The Defence respectfully request that the Trial Chamber:

- (a) take the above clarifications into account when determining whether to impose a protocol on the parties and participants in these proceedings;  
and
- (b) grant the relief requested by the Defence in the Defence Submission.<sup>11</sup>

Respectfully Submitted,



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Mr. Karim A. A. Khan QC

Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus



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Mr. Nicholas Koumjian

Co-Lead Counsel

Dated this 18<sup>th</sup> Day of October 2012

At The Hague, The Netherlands

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At The Hague, The Netherlands

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<sup>11</sup> Defence Submission, p. 15.