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No.: ICC-02/05-03/09
Date: 25 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

**Public
with Confidential Annex**

Second Defence Application to File Supplementary Material

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 Other
Reparations Section**

I. Introduction

1. On 23 October 2012, the Registry transmitted a memo to the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") containing the response of the United Nations ("UN") Under-Secretary-General for Political Affairs to one of the requests for cooperation ("memo")¹ referred to by the Defence in its "Request for a Temporary Stay of Proceedings" ("Request").²
2. The Defence respectfully invite the Trial Chamber to accept the submission of the memo into the record of proceedings and to consider it for the purposes of its final determination on the Request.

II. Background

3. On 6 January 2012, the Defence submitted the Request. In paragraph 17 and corresponding footnote 35 of the Request, the Defence noted that it had requested relevant contemporaneous documents from the UN Mission in Sudan (UNMIS), amongst others, but, as at the date of filing, had received no substantive response to these requests.
4. On 9 February 2012, the Defence submitted the "Defence Application to File Supplemental Material".³ In this application, the Defence sought permission to submit to the Trial Chamber, *inter alia*, a letter received from the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) in response to the Defence request for relevant contemporaneous documents ("the letter") as supplementary material relevant to the Request.

¹ For reference and to assist the Chamber in its determination of this application, the memo is provided in the confidential Annex hereto. Pursuant to Regulation 23bis(1) of the Regulations of the Court, the memo is provided confidentially in order to respect any confidentiality or security concerns which the UN may have regarding this correspondence.

² Defence Request for a Temporary Stay of Proceedings, 6 January 2012, ICC-02/05-03/09-274.

³ Defence Application to File Supplementary Material, 9 February 2012, ICC-02/05-03/09-292.

5. On 9 March 2012, the Trial Chamber issued its “Decision on the Defence Application to File Supplementary Material” (“Decision”).⁴ In relation to the letter, the Trial Chamber held that:

*“pursuant to Article 64(6)(f) of the Statute, the Chamber is of the view that the Letter should be part of the Record and should be considered, among other documents before it, for the purpose of its final determination on the defence request”.*⁵

6. The basis for this decision was that the letter was a “response to one of the defence cooperation requests” which had been referred to in the Request.⁶ Moreover, the Trial Chamber found that the letter did not raise any new facts or arguments, nor was it prejudicial to the Prosecution.⁷

7. On 6 July 2012, the Trial Chamber issued the “Order on the scheduling of a hearing and status conferences on 11 July 2012”⁸ in which the Trial Chamber issued the agenda for the forthcoming status conference. The agenda addressed topics which were “relevant to the defence request for a temporary stay of proceedings as well as to the conduct of proceedings as a whole”.⁹ One agenda item was entitled “Cooperation Issues” and required an “update from both parties on the status of pending cooperation requests”.¹⁰

8. On 23 October 2012, the Registry transmitted the response of the UN Under-Secretary-General for Political Affairs to the Defence. In the memo, the UN

⁴ Decision on the “Defence Application to File Supplementary Material”, 9 March 2012, ICC-02/05-03/09-307.

⁵ *Ibid*, para. 8.

⁶ *Ibid*, para. 8.

⁷ *Ibid*, para. 8.

⁸ Order on the scheduling of a hearing and status conferences on 11 July 2012, 6 July 2012, ICC-02/05-03/09-366.

⁹ *Ibid*, para. 15.

¹⁰ *Ibid*, p. 8.

Under-Secretary-General for Political Affairs confirms that the Organisation has identified four documents that may be relevant to the Request, but that it *“is not in a position to disclose those documents”*. Thus, another door closed on the Defence investigation.

III. Legal Basis

9. Article 64(6) of the Rome Statute (“Statute”) provides in part that:-

“In performing its functions prior to trial or during the course of trial, the Trial Chamber may, as necessary:

...

(f) Rule on any other relevant matters”

10. The Defence note that, in granting the previous “Defence Application to File Supplementary Material”, the Trial Chamber rejected the Defence submission on Regulation 28 of the Regulations of the Court¹¹ and relied instead on Article 64(6)(f).¹²

IV. Submissions

11. The Defence submit that the memo should be treated in exactly the same manner as the earlier letter from OCHA. In common with the letter, the memo constitutes a response to one of the requests for cooperation which were specifically relied upon in the Request. Like the letter, the memo does not raise any new factual or legal arguments. The inclusion of the memo in the record would, therefore, cause no prejudice to the Prosecution.

¹¹ Decision, para. 6.

¹² See paragraph 5 above.

12. Furthermore, since the Request was initially filed, the Trial Chamber has sought to be updated on the status of the Defence cooperation requests by including them, *inter alia*, on the agenda for the status conference held on 11 July 2012. The Defence, therefore, believe that the Trial Chamber may be assisted by the memo, which represents the most up to date information on this specific request for cooperation.

13. Accordingly, the Defence respectfully invite the Trial Chamber to exercise its powers under Article 64(6) of the Statute in order to accept the submission of the memo as part of the record of the case and to consider it for the purposes of its final determination on the Request.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 25th Day of October 2012
At Nairobi, Kenya

Dated this 25th Day of October 2012
At The Hague, The Netherlands