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**International
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Court**

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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

**Public Redacted Version of “Defence Submissions on
the Possible Date for the Commencement of the Trial” filed on 19 November 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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Other

I. Introduction

1. Pursuant to the Trial Chamber's order,¹ the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully file their written submissions on the possible date for the commencement of the trial and request the Trial Chamber to set such date for 6 October 2014.²
2. The possible date for the commencement of trial must take into account how long the Defence investigation and trial preparation is likely to take (section II. 1. below), as well as the time required for the Registry to arrange for the appearance of Defence witnesses before the Court (section II. 2.) [REDACTED].
3. Firstly, there are currently a number of issues within the control of the Prosecution and the Trial Chamber, which the Defence submit need to be resolved, before the Defence can effectively or properly investigate and prepare for trial. The Defence understand that the earliest these issues could be resolved is the end of March 2013. In light of the severe on-going constraints on Defence investigations and commonly experienced delays in arranging missions, the Defence request they be given, upon resolution of these pending issues, at least one year to continue their investigations and

¹ ICC-02/05-03/09-410, p.72, point (iii).

² Pursuant to Regulation 23bis(1) of the Regulations of the Court, this filing is submitted on a Defence, Registry and VWU only confidential and *ex parte* basis since it contains information on sensitive confidential and novel logistics issues, which the Defence have sought the Registry's assistance for, as well as concrete information on investigative steps by the Defence. Annexes A and B are submitted on a confidential and *ex parte* Defence only basis since they contain specific information on on-going Defence investigation and preparation, including names of individuals. The Defence will submit a confidential redacted version of this filing, which will allow the Prosecution's access to all information, but the logistics issues considered confidential and sensitive by the Defence and concrete information on investigative steps by the Defence. Equally, the Defence will submit a public redacted version, which will include redactions to information in relation to Defence investigation, as well as witnesses-related and logistical issues.

identify with sufficient certainty the witnesses they intend to call at trial, i.e. until the beginning of April 2014.³

4. Secondly, once the Defence have decided whom to call as witnesses with enough certainty, their appearance before the Court depends on the resolution of complex security and logistical issues by the Defence and the Registry, which need to be settled before the trial commences. Particularly, taking into account that much depends upon the negotiations with third States, which experience shows are very time-consuming, realistically the resolution of these issues is likely to take at least six months. This leads the Defence to submit that earliest date for the commencement of trial is October 2014.

5. [REDACTED].

II. Submissions

1. Trial Preparation

1.1. Prosecution Disclosure as Provided in the Statute

6. The Defence have not received full disclosure of all the evidence the Prosecution intends to rely upon at trial as is required under the Rome Statute ("Statute"). While full disclosure must be made well in advance of the start of trial, the Defence have also identified on 9 March 2012 specific redactions, which critically impede the Defence investigation on the central issues in this case.⁴ Some redactions were subsequently lifted pursuant to the Trial Chamber's decisions.⁵ This has provided the Defence with vital leads as to the

³ The Defence maintain that, in light of the lack of access to the *locus in quo* and potential Defence witnesses as previously submitted, any Defence investigation will remain incomplete raising fair trial issues. See ICC-02/05-03/09-274.

⁴ Defence Request to Lift Redactions to Prosecution Witness Statements, ICC-02/05-03/09-306, 9 March 2012.

⁵ Decision on the prosecution's applications for lifting redactions on material related to Witnesses 315, 442, and 486 pursuant to Regulation 42 of the Regulations of the Court, ICC-02/05-03/09-392, 12 September 2012;

information they seek. However, the Defence's request remains pending in respect of certain redactions to 8 witness statements.⁶

7. Much of the information sought relates to the names and identities of persons present at MGS Haskanita during the attack on 29 September 2007 and/or at key events relevant to the lawfulness of the attack. This information is essential to the contested issues and is a necessary starting point for even a minimally responsible Defence investigation to prepare for trial.⁷

1.2. Defence Requests for Additional Prosecution Disclosure

1.2.1. 19 July 2011 Request

8. The Defence request for disclosure of Article 67(2) and/or Rule 77 material from the Prosecution dated 19 July 2011 remains, in large part, outstanding. This request comprised three annexes.⁸ Annexes B and C became formal filings and both are currently before the court.⁹ Annex A, however, remains before the Prosecution. The Defence have requested updates from the Prosecution regarding Annex A on a regular basis including on 12 October 2012. However, no response has been received and no progress has been made to satisfy this request since September 2011.¹⁰

Decision on the prosecution's applications for lifting redactions on material related to Witnesses 307 and 484 pursuant to Regulation 42 of the Regulations of the Court, ICC-02/05-03/09-393, 12 September 2012.

⁶ [REDACTED].

⁷ ICC-02/05-03/09-306, 9 March 2012, para. 2. *See also* paragraph 28 below on the importance of lifting redactions.

⁸ The three annexes are: Annex A (general issues); Annex B (African Union documents); and Annex C (materials related to the case against *Al-Bashir*).

⁹ Annex B of the 19 July 2011 request became: (i) Second 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 African Union, ICC-02/05-03/09-234, 20 October 2011; [REDACTED]. Annex C became the Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, ICC-02/0503/09-235, 20 October 2011.

¹⁰ On 30 September 2011, the Prosecution provided a chart responding to each item requested in Annex A. A number of items on the chart were stated to be "[c]urrently under review" and the statements of two Prosecution witnesses (P-0471 and P-0467) were identified as falling within several categories of the disclosure request. The decision of 22 September 2011 (ICC-02/05-03/09-222) expressly lifted the redactions to the identity and identifying information of Witness P-0471. Nevertheless, the Defence have not received any statements from P-0471 to date.

1.2.2. Disclosure of Unredacted Victim Applications

9. On 4 June 2012, the Defence requested disclosure of the unredacted victim applications for the dual status witnesses.¹¹ On 13 June 2012, the Prosecution advised that it would liaise with the Common Legal Representatives ("CLR") concerning the disclosure of these victim applications to the Defence in non-redacted form. This request remains outstanding and no response has been received to the Defence's request for an update of 12 October 2012.

1.2.3. Expert Materials

10. On 14 September 2012, the Defence requested disclosure pursuant to Rule 77 of any and all material obtained by the Prosecution in the course of discussions with the various individuals,¹² whom they considered calling as expert witnesses in this case. Despite a reminder being sent on 12 October 2012, no response has been received by the Defence to date.

1.3. Zaghawa Translations of Prosecution Evidence and the DCC

11. The Prosecution has indicated it will be in a position to fulfil its obligation to provide Mr. Banda and Mr. Jerbo with the translation into Zaghawa of material falling within the scope of Rule 76(1) and (3), by the end of March 2013.¹³ [REDACTED].¹⁴

12. Upon receipt of the Zaghawa translations, the Defence have to transmit audio recordings to their clients in a secure fashion. [REDACTED].¹⁵ The logistics

¹¹ The dual status witnesses are: P-0419, P-0417, P-0420, P-0416, P-0446 and P-0486. To date, the Defence have only received redacted copies of the victim applications of the dual status victim-witnesses. However, given that the identities of all these dual status witnesses have been disclosed to the Defence, the Defence requested disclosure of the unredacted copies of these victims' applications. The Defence also requested disclosure of the unredacted version of the victim application of former Prosecution witness P-0447 pursuant to Rule 77 and Article 67(2).

¹² [REDACTED].

¹³ Transcript, 11 July 2012, ICC-02/05-03/09-T-17-ENG, page 45, lines 17-20; and Fourth Prosecution Report on Translation Issues, 22 October 2012, ICC-02/05-03/09-408, para. 7.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

[REDACTED] are difficult and time-consuming.¹⁶ Additionally, the Defence note that once the *final* versions of the translations are disclosed – with all redactions lifted – these versions must likewise be transported to the clients for their review.

1.4. Other Defence Requests to the Prosecution

1.4.1. Requests to Interview Prosecution Witnesses

13. Only three out of the 10 former and current Prosecution witnesses with whom the Defence have requested interviews have consented, namely P-0305, P-0439 and P-0442.¹⁷ Despite the Defence requests dating from June and September 2011, no arrangements have been made for such interviews. The Defence sent a reminder to the Prosecution about the requests to interview P-0442 and P-0439 on 12 October 2012. No response has been received.¹⁸

14. [REDACTED].¹⁹

1.4.2. Request Regarding Witness P-0445

15. On 14 September 2012, the Defence asked the Prosecution to confirm whether it still intends to call Witness P-0445 and, if it does, to also confirm whether it

¹⁶ [REDACTED].

¹⁷ The other witnesses declined (P-0307, P-0312, P-0314, P-0441, P-0466) or are un-contactable (P-0304 and P-0306). Confirmation that P-0304 and P-0306 remain un-contactable was provided by the Prosecution on 31 August 2012 (*see* Public Redacted Version of “Update on the outcome of the Prosecution’s efforts to contact Witnesses P-0304, P-0305, and P-0306”, filed on 6 August 2012, ICC-02/05-03/09-377-Red, 31 August 2012).

¹⁸ The Defence first requested an interview with P-0442 on 13 September 2011. The Prosecution responded on 26 September 2011, advising that the witness was unable to meet with the Defence due to [REDACTED], but would review the request early in 2012. Since September 2011, the Defence have contacted the Prosecution on a regular basis to ask for an update on this witness, the last being on 12 October 2012. The Defence have received no response to date. [REDACTED]. In relation to P-0305 and P-0439, the requests to interview both date from June and September 2011 respectively. The Defence were advised on 9 July 2012 that both witnesses are willing to be interviewed by the Defence. However, P-0305 remains anonymous and subject to court ordered redactions. Until redactions are lifted, the Defence will not be able to conduct any interview with this witness. The Defence understand that the delay in lifting P-0305’s redactions may be linked to the issue of a protocol (*see* Decision on defence request for a temporary stay of proceedings, ICC-02/05-03/09-410, 26 October 2012, paras. 118, 120). As regards P-0439, on 10 July 2012 the Defence requested that the Prosecution make the necessary arrangements for the Defence to interview this witness. However, no further correspondence has been received from the Prosecution by the Defence on this request, despite the Defence asking for an update on 12 October 2012.

¹⁹ [REDACTED].

considers him an expert witness.²⁰ No response to this request has been received to date, despite a reminder being sent by the Defence on 12 October 2012.²¹ Clearly, whether or not the Prosecution intend to call this witness, and the manner in which his evidence is to be considered, are of importance to the Defence, particularly in relation to their own decision whether or not to seek to call an expert on peacekeeping issues.

1.5.Trial Chamber Final Ruling on Outstanding Defence Applications

16. Three requests for disclosure of Rule 77 and Article 67(2) material filed on 23 September 2011, 20 October 2011, and 9 March 2012, which are relevant to the Defence preparations, are currently pending with the Chamber.²²

17. Furthermore, the Defence understand that the disclosure of the identities of the former Prosecution witnesses who remain anonymous is dependent on a protocol, approved by the Chamber, being put in place between the parties.²³ A decision on the issue of a protocol is pending.²⁴

1.6.Cooperation Requests to Non-Court Entities

1.6.1. Cooperation Request Pursuant to Article 87(6) of the Statute

18. Upon the Trial Chamber's orders a cooperation request pursuant to Article 87(6) of the Statute was transmitted to the African Union ("AU") urging it to provide the documents sought by the Defence.²⁵

²⁰ Email by Ms Lawrie to Mr Omofade entitled "Expert Disclosure Issues", sent on 14 September 2012 at 10:33. [REDACTED]

²¹ Email by Ms Lawrie to Mr Omofade entitled "Outstanding Defence Requests: Request for an Up-date", sent on 12 October 2012 at 15:45.

²² [REDACTED]; Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, ICC-02/0503/09-235, 20 October 2011; Defence Request to Lift Redactions to Prosecution Witness Statements, ICC-02/05-03/09-306, 9 March 2012.

²³ ICC-02/05-03/09-410, para. 120. The witnesses affected are witnesses 304, 305, 306, 312, 314, 433, 441 and 466 (*see* para. 118).

²⁴ [REDACTED].

²⁵ ICC-02/05-03/09-268-Red, pp. 12 to 13.

1.6.2. Prosecution Request

19. On 11 July 2012, the Defence learned that the Prosecution have submitted a request for two sets of material which may be exculpatory to [REDACTED] pursuant to their obligations under Article 54(1).²⁶

1.6.3. Defence Requests

20. [REDACTED].²⁷ [REDACTED].²⁸ [REDACTED].²⁹

21. The Defence's multiple efforts to seek the cooperation of the AU to obtain exculpatory evidence are well-documented.³⁰ [REDACTED].

22. Although prior efforts have not yet yielded results, the Defence take to heart the Trial Chamber's observation in the decision on the temporary stay of proceedings, and "[g]iven the progress made",³¹ the Defence shall continue every effort to seek this critical cooperation and exercise patience in awaiting the response.

1.7. Conclusion – Trial Preparation

23. The timing of the resolution of the issues addressed under sections 1.1. to 1.5. is not within the control of the Defence, which depend on their resolution to make further progress in their investigation for the following reasons.

24. Firstly, the review of the translated materials of Prosecution witnesses by Mr. Banda and Mr. Jerbo will enable them to give instructions and provide information relevant to the conduct of the investigation that is not possible

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ See ICC-02/05-03/09-146, paras. 5 to 12; as well as ICC-02/05-03/09-234 and ICC-02/05-03/09-274.

³¹ ICC-02/05-03/09-410, para. 144.

until such review has taken place. The Defence need to be given enough time to act upon these instructions and leads.

25. Secondly, the review of the full and requested additional disclosure, including exculpatory evidence and identities of former Prosecution witnesses, as well as the potential information to be obtained during Defence interviews with Prosecution witnesses, will allow the Defence to further investigate existing avenues and to start investigations into new areas.

26. The Trial Chamber will recall the well-documented difficulties encountered by the Defence with respect to investigations.³² A further illustration of these problems is provided by [REDACTED],³³ which is indicative of the lengthy timeframe involved with both planning and executing such missions.

27. There are examples of recently disclosed information, which triggered Defence investigation into new areas and yet demonstrate the investigative difficulties that the Defence encounter.³⁴ The Trial Chamber must accord sufficient time for the Defence preparation, particularly since information relevant to the Defence case has only recently been disclosed, with additional disclosure to come.³⁵

28. In particular, the importance of disclosing information currently redacted in Prosecution statements as soon as possible was highlighted by the recent disclosure [REDACTED].³⁶ [REDACTED].³⁷ [REDACTED].³⁸ [REDACTED].

³² See e.g. ICC-02/05-03/09-274, paras. 9, 12 to 15.

³³ Confidential and *ex parte* Annex A.

³⁴ Confidential and *ex parte* Annex B.

³⁵ In *Lubanga*, the Trial Chamber found that “there is further preparation that the defence [...] must engage in and which can only be completed once there has been full disclosure on the part of the prosecution” (*see* Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, para. 16).

³⁶ [REDACTED].

³⁷ See also Confidential *ex parte* Annex B for further examples.

³⁸ [REDACTED].

Had [REDACTED] been disclosed sooner, the Defence could have obviously begun actively pursuing this line of enquiry and the investigation would be further along than it is today.³⁹ Delays in disclosure lead inevitably to justifiable delays in the Defence investigation.

29. Additionally, it must be kept in mind that the heart of the Defence case is the intelligence operation of the Government of Sudan ("GoS") at the MGS Haskanita. It can be reasonably expected that any investigation of military intelligence operations will be difficult and time-consuming, especially where there is a lack of access to direct sources, as is presently the case, since the Defence cannot rely on the cooperation of the GoS, and, therefore, lack access to GoS documents and personnel.

30. The Defence submit that pursuant to Article 67(1)(b) and due to the complexities of the Defence investigations and the importance of the upcoming disclosed or translated information, a *minimum* of one year⁴⁰ counting from the final resolution of the issues in section 1.1. to 1.5.,⁴¹ is reasonable and required to consult with the clients, evaluate final disclosure and information received from third parties, and carry out investigations.

31. In light of the above, assuming that the issues in question will be definitively resolved no later than the end of March 2013 - the expected date for the completion of the Zaghawa translations - the Defence would require at least until the beginning of April 2014 to conduct further necessary investigations.

³⁹ [REDACTED].

⁴⁰ The Defence note that in *Bemba*, the defence was given five months to prepare for trial after full disclosure. However, the factual circumstances as to the investigative difficulties of the Defence are different in the present case. See ICC01/05-01/08-598, para. 5.

⁴¹ The resolution of the issues raised under section 1.6. is outside the Court's control and inherently uncertain. In the event exculpatory evidence is obtained, and depending on the timing, scope and size of the material, the Defence may request additional time for investigation in accordance with Rule 132(1).

2. Defence Witnesses' Appearance Before the Court

2.1.Safety and Logistical Issues

32. Persons who are willing to appear as Defence witnesses before the Court, encounter challenges both in terms of their safety and logistics.

33. The overwhelming majority of potential Defence witnesses reside in Sudan, where cooperating with the Court is a criminal offense and witnesses and their families are at risk of being detained, tortured, prosecuted, or killed.⁴² The security needs of each witness will have to be carefully assessed and appropriate protective measures, potentially including permanent relocation, planned and implemented by the Victims and Witnesses Unit ("VWU").

34. Indeed, as indicated by the Registry at a meeting with the Defence on 13 November 2012, [REDACTED].

35. [REDACTED].⁴³

36. As explained by the Registry at the 13 November meeting, upon referral of the witnesses by the Defence, the VWU requires, for each set of 5 witnesses, *at least* two months to arrange for and carry out the required in-person evaluation of these individuals. Should the Defence refer 15 to 20 witnesses located in Darfur to the VWU, this entails a *minimum* timeframe, simply for the evaluation process, of 6 months.⁴⁴

2.2.Conclusion – Witnesses' Appearance

37. The Defence will only be in a position to make a decision on the witnesses they intend to call with sufficient certainty, and, therefore, make the last

⁴² See ICC-02/05-03/09-274, para. 4.

⁴³ [REDACTED].

⁴⁴ Defence Meeting with Registry, 13 November 2012. [REDACTED].

referral to the VWU, once the necessary investigations have progressed – that is one year after final disclosure of evidence and completion of Zaghawa translations.⁴⁵ The Defence will, of course, endeavour to refer possible witnesses to the VWU as soon as the Defence have provisionally selected them to testify based on the information presently available.

38. The Defence wish to make it clear that they strongly object to any plan to start this trial before they are aware of which of their witnesses will likely be available. In fact, the failure to address and resolve the issues regarding each Defence witnesses' appearance could cause prejudice to the Defence case and lead to considerable and unreasonable delays during the trial, *de facto* cutting the case into two parts.

39. Firstly, knowing which Defence witnesses are available is necessary to have a coherent strategy during the Prosecution case and the submissions by the CLR. Effectively, in order to controvert a witness in cross-examination, the Defence must put their case to him/her on the basis of evidence, which the Defence think will be available to them during their own case. Therefore, before the case-in chief starts, the Defence must be in a position to reasonably know which witness will be available.

40. Secondly, if the resolution of the security and/or logistical issues relating to the Defence witnesses is delayed until the start of the Defence case, this could significantly delay the start of the Defence's presentation of evidence, in effect running counter the right to an expeditious trial pursuant to Article 67(1)(c) of Mr. Banda and Mr. Jerbo.⁴⁶ The Defence note that in the *Katanga* case, the

⁴⁵ The Defence, of course, reserve their right to decide during the trial to call witnesses in addition to those already referred to VWU, depending on the case-in-chief and the Defence strategy. These witnesses will be referred to the VWU as soon as the Defence decide to call them.

⁴⁶ [REDACTED].

unaddressed protection issues relating to Prosecution witnesses caused the Trial Chamber to postpone the commencement of the trial by two months.⁴⁷

41. In light of the above and assuming that the Defence, to the best of their ability, will seek to make a decision on the witnesses they will call by April 2014, i.e. at the end of the time period requested for their investigation, and refer no more than 15 witnesses to the Registry for assessment of their situation and implementation of measures regarding their security and the logistics as to their appearance, the issue of the Defence witnesses' availability will be sufficiently resolved at earliest by the end of September 2014 and trial could, therefore, start in October 2014.⁴⁸

3. [REDACTED]

3.1.[REDACTED]

42. [REDACTED].⁴⁹

43. [REDACTED].

44. [REDACTED].⁵⁰ [REDACTED].

3.2.[REDACTED]

45. [REDACTED].⁵¹ [REDACTED].⁵²

⁴⁷ The *Katanga* trial was initially set to start on 24 September 2009 and was postponed to 24 November 2009. See ICC-01/04-01/07-1442. Note that the protection issues in question were to be resolved by a body of the Court, the *Lubanga* Trial Chamber, which initially ordered protective measures. This is likely to be less time-consuming than where security and protection matters need to be addressed completely anew by the Registry in cooperation with other relevant non-Court entities.

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

3.3.[REDACTED]

46. [REDACTED].⁵³ [REDACTED].⁵⁴

47. [REDACTED],⁵⁵ [REDACTED].⁵⁶

48. [REDACTED].

49. [REDACTED].

50. [REDACTED].⁵⁷ [REDACTED].

51. [REDACTED],⁵⁸ [REDACTED].

3.4.[REDACTED]

52. [REDACTED].

53. [REDACTED].⁵⁹ [REDACTED].

54. [REDACTED].

III. Conclusion

55. In light of the above, the Defence submit that the proposed date for commencement of trial on 6 October 2014 is realistic and reasonable.

⁵³ [REDACTED].

⁵⁴ [REDACTED].

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ [REDACTED].

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

Respectfully Submitted,



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Dated this 21st Day of November 2012
At Nairobi, Kenya

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At The Hague, The Netherlands