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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
demandant à la Chambre de Fixer les Modalités de Participation des Victimes
dans la Procédure”**

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

Ms. Hélène Cissé
Mr Jens Dieckmann

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

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") submit that it would be premature, unnecessary and inconsistent with the practice of other Trial Chambers to lay down the modalities for victim participation at this stage of proceedings and in particular where no trial date has yet been set and where, if the Trial Chamber accepts the Defence submission, no trial can commence before 6 October 2014¹. The Defence, therefore, respectfully request that the Trial Chamber reject the "Requête des Représentants Légaux Communs demandant à la Chambre de Fixer les Modalités de Participation des Victimes dans la Procédure" ² ("Request") filed by the Common Legal Representatives ("CLRs") on 7 November 2012.
2. In addition, sections of the Request indulge in impermissible substantive arguments on earlier written submissions, without the Chamber's permission. The Defence invite the Trial Chamber to disregard those sections entirely.³

II. Background

3. On 7 March 2011, Pre-Trial Chamber I issued the "Corrigendum of the Decision on the Confirmation of Charges"⁴ in which it confirmed the charges against Mr. Banda and Mr. Jerbo.
4. On 20 March 2012, the CLRs submitted their "Requête aux Fins de Divulgarion aux Représentants Légaux Communs d'Eléments Confidentiels et

¹ ICC-02/05-03/09-422-Conf-Exp.

² ICC-02/05-03/09-414.

³ See paras 13 - 16 below.

⁴ ICC-02/05-03/09-121-Corr-Red.

D'Eléments Expurgés du Dossier de l'Affaire Le Procureur c/ Banda & Jerbo" ("Request for Disclosure").⁵

5. On 11 April 2012, the Prosecution and the Defence submitted their "Joint Response by the Office of the Prosecutor and the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus to the 'Requête aux Fins de Divulgarion aux Représentants Légaux Communs d' Eléments Confidentiels et d'Eléments Expurgé du Dossier de l'Affaire Le Procureur c/ Banda&Jerbo'".⁶
6. On 23 April 2012, the CLRs submitted their "Requête des Représentants Légaux Communs aux fins d'être autorisés à Répondre à la Réplique Conjointe du Bureau du Procureur et de la Défense à la 'Requête aux Fins de Divulgarion aux Représentants Légaux Communs d'Eléments Confidentiels et d'Eléments Expurgés du Dossier de l'Affaire le Procureur c/ Banda & Jerbo.'"⁷
7. On 27 April 2012, the Defence and the Prosecution submitted their "Joint Response by the Defence for Abdallah Banda Abakaer Nourrain and Saleh Mohammed Jerbo Jamus and the Office of the Prosecutor to the 'Requête des Représentants Légaux Communs aux fins d'être autorisés à Répondre à la Réplique Conjointe du Bureau du Procureur et de la Défense à la 'Requête aux Fins de Divulgarion aux Représentants Légaux Communs d'Eléments Confidentiels et d'Eléments Expurgés du Dossier de l'Affaire Le Procureur c/ Banda & Jerbo'".⁸
8. On 31 August 2012, the Prosecution submitted their "Public Redacted Version of 'Prosecution's Submission of a Draft Protocol on the Handling of Non-

⁵ ICC-02/05-03/09-310.

⁶ ICC-02/05-03/09-320.

⁷ ICC-02/05-03/09-325.

⁸ ICC-02/05-03/09-328.

Public Information and Contact of a Party With Witnesses of the Opposing Party, and Prosecution's Update on Expert Witness', filed on 27 August 2012".⁹

9. On 21 September 2012, the CLR's filed their "Observations en Réponse des Représentants Légaux Communs à la Version Publique Expurgée de la Soumission du Procureur relative au Projet de Protocole Concernant la Gestion des Informations Non Publiques et des Contacts par une Partie des Témoins de la Partie Adverse (ICC-02/05-03/09-389-31/08/2012) avec la Version Publique de son Annexe A (ICC-02/05-03/09-AnxA-31/08/2012)".¹⁰
10. On 4 October 2012, the Defence submitted their "Defence Reply to the 'Observations en Réponse des Représentants Légaux Communs à la Version Publique Expurgée de la Soumission du Procureur relative au Projet de Protocole Concernant la Gestion des Informations Non Publiques et des Contacts par une Partie des Témoins de la Partie Adverse (ICC-02/05-03/09-389-31/08/2012) avec la Version Publique de son Annexe A (ICC-02/05-03/09-AnxA-31/08/2012)'"¹¹ ("Defence Reply").
11. The CLR's did not seek leave to respond to the Defence Reply.
12. On 26 October 2012, Trial Chamber IV issued the "Decision on the Defence request for a temporary stay of proceedings".¹² In this decision, the Trial Chamber rejected the "Defence Request for a Temporary Stay of Proceedings"¹³ and ordered the parties and participants to file written

⁹ ICC-02/05-03/09-389-Red.

¹⁰ ICC-02/05-03/09-396.

¹¹ ICC-02/05-03/09-399.

¹² ICC-02/05-03/09-410.

¹³ ICC-02/05-03/09-274.

submissions on the possible date for the commencement of the trial by 19 November 2012.¹⁴

III. Sections of the Request should be Disregarded

13. The Chamber previously rejected a request by the CLR's to file an "addendum to a response"¹⁵ in part on the basis that:

*"a reply to a response may be filed only with the Chamber's leave in accordance with Regulation 24(5) of the Regulations. Therefore, had the legal representatives wished to file a reply to the prosecution Response, they should have requested leave to do so."*¹⁶

14. Sections of the Request make the same error: they constitute a substantive reply to an earlier response or reply, made without the Chamber's permission. Thus, paragraphs 21 – 32 inclusive of the Request amount to a substantive reply to the Defence Reply. This includes, for example, the CLR's attempt to argue that the Defence Reply "*ignorant complètement que les victimes à double statut*"¹⁷ and "*denature[s] et méconnaît[s]*"¹⁸ the CLR's obligations.

15. The CLR's had the opportunity to seek the Chamber's permission to submit their observations on the Defence Reply.¹⁹ They did not do so. Accordingly, the Defence respectfully invite the Trial Chamber to disregard these paragraphs entirely.

¹⁴ ICC-02/05-03/09-410, para. 160.

¹⁵ ICC-02/05-03/09-287.

¹⁶ ICC-02/05-03/09-304, para. 6.

¹⁷ Request, para. 22.

¹⁸ Request, para. 23.

¹⁹ Pursuant to Regulation 24(5) of the Regulations of the Court.

16. Similarly, in paragraphs 43 – 45 inclusive of the Request, the CLRs attempt to revisit their Request for Disclosure. On this occasion, the CLRs did seek leave to respond to earlier filings.²⁰ To this date leave has not been granted. Accordingly, the Defence respectfully invite the Trial Chamber to disregard these paragraphs.

IV. Premature and Unnecessary to Decide Modalities at this Stage

17. The Defence submit that it would be premature and unnecessary to lay down the modalities for victim participation at trial at a stage in proceedings when no trial date has yet been set, where, if the Trial Chamber accepts the Defence submission, no trial can commence before 6 October 2014²¹ and where the victims' right to participate is adequately protected by the Rome Statute ("Statute"), the Rules of Procedure and Evidence ("Rules") and by the Trial Chamber itself.

18. First, there is nothing in the Statute, the Rules or the Court's jurisprudence which requires a decision on modalities to be made at this stage. In fact, Article 68(3) provides for the victims' views and concerns to be presented "*at stages in proceedings determined to be appropriate by the Court*". The result is that it is for the Chamber, in its discretion,²² to determine when to decide the modalities of victim participation at trial and, indeed, to decide the level of victim participation at the current stage of the proceedings.

19. Second, no other Trial Chamber has exercised its discretion to lay down the modalities of victim participation at trial so far in advance of the start of trial as the CLRs request in this case. In *Lubanga*, the decision on modalities of

²⁰ See para. 6 above.

²¹ ICC-02/05-03/09-422-Conf-Exp.

²² "The Statute gives the Chamber discretion to determine the appropriate timing of any intervention of victims", ICC-01/09-02/11-498, para. 12.

victim participation was made on 18 January 2008.²³ At the time this decision was made, trial was due to start on 31 March 2008.²⁴ In *Katanga*, the decision on modalities of victim participation was made on 22 January 2010²⁵ although trial had already started on 24 November 2009.²⁶ In *Bemba*, the decision on modalities of victim participation was made on 19 July 2010.²⁷ Trial had been intended to start on 14 July 2010,²⁸ but this trial date had been vacated by the time the decision on modalities was made.²⁹ Thus, in each of these cases, the decision on modalities of victim participation was made close to (or after) the start of trial.

20. The Defence acknowledge that in both *Ruto* and *Muthaura*, Trial Chamber V ruled on the modalities of victim participation on 3 October 2010³⁰ when trial was due to start on 10 April 2013³¹ and 11 April 2013 respectively.³² However, Trial Chamber V deliberately took a “*different approach*”³³ to the whole issue of victim application and participation, motivated by the “*large number of victims*” and the “*unprecedented security concerns and other difficulties*” in those cases.³⁴ In this case, there are a relatively small number of victims, the majority of whom reside outside of Darfur, and, therefore, the concerns expressed in *Ruto* and *Muthaura* do not apply here.

21. In any event, no Trial Chamber has ruled on the modalities of victim participation before a trial date has been set. In fact, in the majority of cases

²³ ICC-01/04-01/06-1119, Decision on victims’ participation, 18 January 2008.

²⁴ ICC-01/04-01/06-1019, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, at para. 29.

²⁵ ICC-01/04-01/07-1788, Decision on the Modalities of Victim Participation at Trial.

²⁶ *Ibid.*, para 13.

²⁷ ICC-01/05-01/08-807, Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 19 July 2010.

²⁸ ICC-01/05-01/08-803, Order postponing the commencement of the trial, 25 June 2010 para. 3.

²⁹ ICC-01/05-01/08-811, Order postponing the commencement of the trial, para. 6.

³⁰ ICC-01/09-01/11-460, and ICC-01/09-02-11-498 respectively.

³¹ ICC-01/09-01/11-440, para. 20.

³² ICC-01/09-02/11-451, para. 25.

³³ ICC-01/09-02/11-498, para. 22.

³⁴ *Ibid.*, para. 23.

the modalities of victim participation have been set shortly before the intended commencement of trial.

22. Third, the Defence submit that it is unnecessary to lay down the modalities of victim participation now because at this stage in proceedings the victims' interests are fully protected by the Statute, the Rules and by the Trial Chamber. Thus, for example, Rule 93 allows the Trial Chamber to "*seek the views of victims or legal representatives participating [...] on any issue*". Further, the CLRs can "*file a response to any document when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3, and rule 89, sub-rule 1, subject to any order of the Chamber*".³⁵ The combination of these provisions means that at this stage in proceedings, the CLRs are provided ample opportunity to respond to filings made by the Defence or the Prosecution and to be consulted on "*any*" issue that the Chamber deems appropriate. The Defence submit that this adequately protects the victims' interests at this stage in proceedings.

23. This is borne out by the record of this case. Since the confirmation of charges, the representatives of the victims have submitted at least 32 filings; have been permitted to attend and make submissions at status conferences³⁶ and at the oral hearing on the Defence request for a temporary stay;³⁷ and, most recently, were invited by the Chamber to make submissions on the start date of trial.³⁸ As a result, it cannot be said the victims have been inhibited in their ability to participate in this phase of proceedings.

24. Finally, the Defence submit that the CLRs advance no compelling reason why a decision on modalities should be made now. There has been no relevant

³⁵ Regulation 24(2) of the Regulations of the Court.

³⁶ See for example ICC-02/05-03/09-T-12 p24 - 25, 12 July 2011.

³⁷ ICC-02/05-03/09-366, paras. 9 – 10.

³⁸ See para. 12 above.

change in circumstances from the point of view of the victims since the charges were confirmed on 7 March 2011. The rejection of the Defence request for a temporary stay of proceedings does not result in a change in circumstances; it merely continues the *status quo*. On the contrary, there is every reason why such a decision should not be taken at this stage in proceedings. The Trial Chamber has not yet decided on the “Joint Submissions by the Office of the Prosecutor and the Defence regarding the procedures to be adopted for the presentation of evidence”.³⁹ The modalities for the presentation of evidence in general surely need to be decided before determining the role that the CLR’s should play in that process.

25. The Defence, therefore, invite the Trial Chamber to reject the Request as premature and unnecessary at this stage of proceedings.

26. Should the Trial Chamber decide that it is appropriate to consider the modalities of victim participation at this stage of proceedings, the Defence respectfully request to make further submissions as to those modalities. The modalities of victim participation in this case are unlikely to be straightforward. One example of the unusual issues in this case, is that the Chamber will be aware that both the Prosecution and the Defence have previously expressed concern about the connection between intermediaries linked to victims A/1646/10 and A/1647/10 and the Government of Sudan.⁴⁰ This complicates issues such as access to confidential information filed in this case. As a result of these and other issues, and so as to avoid prejudice to the rights of Mr. Banda and Mr. Jerbo, the Defence respectfully request the opportunity to make substantive submissions on the modalities of victim participation should the Trial Chamber deem it appropriate to address these issues at this stage of proceedings.

³⁹ ICC-02/05-03/09-166.

⁴⁰ ICC-02/05-03/09-110 and ICC-02/05-03/09-113 respectively.

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 28th Day of November 2012

At Nairobi, Kenya

Dated this 28th Day of November 2012

At The Hague, The Netherlands