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No.: ICC-02/05-03/09
Date: 21 December 2012

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

**Defence Notice to the Registrar of the Discontinuance of the Defence appeal
against the Decision on the defence request for a temporary stay of proceedings
(ICC-02/05-03/09-410)**

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. Adebawale Omofade

Counsel for the Defence

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Legal Representatives of the Victims

Ms. Hélène Cissé
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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") hereby respectfully notify the Registrar, pursuant to Rule 157 of the Rules of Procedure and Evidence ("Rules"), of the discontinuance of the Defence appeal proceedings against the "Decision on the defence request for a temporary stay of proceedings" ("Decision").¹

II. Procedural Background

2. On 6 January 2012, the Defence submitted a request that the proceedings be temporarily stayed ("Request").² In the Request, the Defence submitted that the failure of the Government of the Republic of Sudan to cooperate with the Court makes it impossible for the Defence to properly and effectively advance Mr. Banda's and Mr. Jerbo's defence case within the framework of their rights.³
3. On 26 October 2012, Trial Chamber IV rendered the Decision rejecting the Request.
4. On 5 November 2012, the Defence sought leave to appeal the Decision in respect of two, interlinked issues.⁴ The two issues concerned the basis on which temporary stays of proceedings may be granted in cases before this Court and also the adequacy of the remedies proposed to counterbalance the necessity of imposing a stay.⁵
5. On 13 December 2012, Trial Chamber IV granted leave to appeal but certified only part of the first issue for appeal.⁶

¹ ICC-02/05-03/09-410.

² ICC-02/05-03/09-274.

³ *See, e.g., ibid.*, para. 2.

⁴ ICC-02/05-03/09-412.

⁵ *Ibid.*, para. 4.

⁶ ICC-02/05-03/09-428, paras. 12 and 32.

III. Applicable Law

6. Rule 157 of the Rules permits “[a]ny party who has [...] obtained the leave of a Chamber to appeal a decision under rule 155 [to] discontinue an appeal at any time before judgment has been delivered.”
7. As observed by the Appeals Chamber, Rule 157 provides for the discontinuance of an appeal in its entirety.⁷

IV. Submissions

8. The issues raised in the Request are novel and complex. Trial Chamber IV responded to the issues raised by the Request in the lengthy and detailed Decision. The essence of the Trial Chamber’s approach is set out in paragraphs 93 and 95 of the Decision whereby the Chamber determined that:

“the Defence will not have “properly substantiated” its Request if the unavailable evidence is not identified with sufficient specificity”

and

“allegations need to be specific as opposed to vague speculations [...] The evidence must both possess an *apparent* exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.”

9. The Trial Chamber ultimately concluded that the Defence had not established that a fair trial could not occur, finding that “the better approach is for the case to go to trial”, that “the defendant’s complaint will be kept in mind” and that “[a]t trial, the Trial Chamber, the parties and the participants will be in a better position to assess the evidence adduced to see whether the complaints about fair trial are founded.”⁸

⁷ ICC-01/04-01/06-1486, para. 16.

⁸ Decision, para. 159.

10. As is evident from the two issues on which the Defence sought leave to appeal the Decision, the Defence dispute the Decision on a number of bases, from the threshold of specificity applied to the adequacy of the remedies proposed. In this context, the two issues proposed for appeal were intertwined, challenging first those aspects the Trial Chamber considered had not been properly substantiated and, secondly, disputing the various measures which the Trial Chamber considered might alleviate the unfairness to the Defence caused by the unavailability of evidence which had been identified with sufficient specificity. Given that the Decision first made a determination of specificity then considered alternative measures could be available to remedy any prejudice at trial, the viability of the appeal was dependent on both issues being certified.
11. Since only part of the first issue was certified for appeal, in the view of the Defence there is no possibility that the appeal could result in the remedy requested - a temporary Stay of proceedings until an investigation can take place in Sudan. Even if the Defence is successful on the first issue in respect of those limited aspects of its Request the Chamber considered had not been “properly substantiated”, it is prevented from proceeding to explore the adequacy of the Trial Chamber’s decision to proceed to trial and keep the Defence complaints in mind. In these circumstances, the Defence believe that it is in their clients’ interests to withdraw the appeal.

V. Notification

12. Accordingly, the Defence file with the Registrar this Notice of Discontinuance of the Defence appeal proceedings against the Decision.

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 21st day of December 2012

At The Hague, The Netherlands

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