

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **11 October 2013**

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 Application for Leave to Reply to the
Prosecution’s Response to the “Defence Request for Termination of
Proceedings””**

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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**Unrepresented Applicants
(Participation/Reparation)**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. Introduction

1. The defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully request the Trial Chamber to grant leave to file a limited reply to the "Prosecution's Response to the "Defence Request for Termination of the Proceedings" ("Response").¹ The Defence request leave to address the Response's conflation of whether Captain Bashir was at MGS Haskanita at the time of the attack with the quite different issue of whether he was removed from MGS Haskanita by AMIS and to address why this issue, which relates to whether AMIS took any steps to rectify the misuse of the base for intelligence purposes, was critical to the finding in the confirmation hearing that the attack was unlawful.
2. Should the Trial Chamber grant leave to submit a reply, the Defence request that the time limit specified in Regulation 34(c) of the Regulations of the Court ("Regulations") be extended so that the reply is to be filed within ten days of notification of the Trial Chamber's decision to grant leave.

II. Confidentiality

3. Pursuant to Regulation 23*bis* of the Regulations, the Defence file this Request confidentially, because it is a request for leave to respond to a confidential document and because it refers to the contents of a confidential witness statement.

¹ ICC-02/05-03/09-506-Conf.

III. Standard for Granting Leave to Reply

4. Pursuant to Regulation 24(1) of the Regulations:

The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.

5. Regulation 24(4) of the Regulations provides that such a response may not be filed to any document which is itself a response.

6. Regulation 24(5) of the Regulations states that:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.

7. Regulation 34(c) of the Regulations provides:

Subject to leave being granted by a Chamber in accordance with regulation 24, sub-regulation 5, a reply shall be filed within ten days of notification in accordance with regulation 31 of the response.

8. A Chamber may grant leave to reply when the moving party has shown “good cause”.² Both Pre-Trial and Trial Chambers have deemed good cause to exist when new and distinct issues of law and fact are raised in the response and

² See e.g. *Prosecutor v. Bemba*, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294, para. 3: "Having considered the Application, the Single Judge is of the opinion that the Defence has shown good cause to grant leave to reply to the Prosecutor's Response."

where the importance and potential effect of the issues contained in the original application and response necessitate additional submissions being made.³

9. The Defence note that in the case of the *Prosecutor v. Ruto and Sang*, the Prosecution recently applied for leave to reply to a response submitted by the defence of Mr. Sang on the basis that “the Sang Defence has either misunderstood, or misinterpreted, the Prosecution’s previous submissions and undertakings”⁴ on the issues in question. The Trial Chamber granted the Prosecution leave to reply, stating that it “consider[d] further submissions would be of assistance because the Sang Defence Response raises issues beyond those addressed in the original application which require clarification from the Prosecution”.⁵

IV. Request for Leave to Reply

10. On 3 September 2013, the Defence filed their “Request for Termination of Proceedings” (“Request”),⁶ which argued, *inter alia*, that the Prosecution failed in their obligation to disclose the witness statements of P-467 and P-471, which contained potentially exonerating material⁷ that should have been disclosed prior to confirmation and further that the Prosecution misled the Pre-Trial Chamber by submitting that [REDACTED].⁸

³ See e.g. *Prosecutor v. Mbarushimana*, Decision on the Prosecution’s request for leave to reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC-01/04-01/10-61, 24 February 2011; *Prosecutor v. Katanga & Ngudjolo*, Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the *Regulations of the Court*), 27 March 2009, ICC- 01/04-01/07-1004-tENG.

⁴ Decision Regarding Prosecution Request for Leave to Reply to Sang Defence Response to Application for Addition of 104 Documents to the List of Evidence, 25 September 2013, ICC-01/09-01/11-989 (citing to Prosecution’s Request for Leave to Reply to the “Sang Defence Response to Prosecution Application pursuant to Regulation 35(2) for Addition of Documents to the List of Evidence”, 23 September 2013, ICC-01/09-01/11-978-Conf.).

⁵ *Ibid.*, para. 4.

⁶ ICC-02/05-03/09-503-Conf.

⁷ *Ibid.*, paras. 27-29.

⁸ *Ibid.*, para. 31.

11. On 24 September 2013, the Prosecution filed the Response. The Prosecution submit that the above Defence submission was a “misrepresentation”.⁹ The Prosecution submit that it was not in possession of statements that established that [REDACTED]¹⁰ apparently on the basis that P-471 stated at one time that [REDACTED]¹¹ and the statement of P-467 states that [REDACTED].¹²
12. Importantly, the Prosecution continues to assert that its [REDACTED]¹³ justifies its earlier submission that [REDACTED].
13. Leave to reply is warranted because this Response misunderstands or misinterprets the Defence submission. The Prosecution’s submission at confirmation that [REDACTED] logically contained two distinct factual propositions [REDACTED]. In the Response, the Prosecution mistakenly seeks to elide the two issues by arguing that evidence suggesting that Captain Bashir left MGS Haskanita justified its submission that [REDACTED].
14. The Response fails to address the thrust of the Defence Request, that there was a serious failure of disclosure because the information in the two witness statements was potentially exonerating – not least for the inconsistencies between them and other witness statements¹⁴ – or at least material to the preparation of the defence. Notwithstanding this, the Defence seek leave to reply solely in order to address the Prosecution’s conflation of these two critical issues. In so doing, the Defence seek leave to explain that the statements of P-467 and P-471, which the Prosecution withheld from the Pre-Trial Chamber, are exculpatory precisely because they establish that [REDACTED].

⁹ ICC-02/05-03/09-506-Conf, para. 24.

¹⁰ *Ibid.*, para. 30.

¹¹ *Ibid.*, para. 36.

¹² *Ibid.*, para. 32.

¹³ *Ibid.*, paras. 38 – 39.

¹⁴ An issue which the Response does not address at all.

15. Moreover, the Defence seek leave to reply in order to explain the importance of this distinction. Not only will the Reply demonstrate that the Prosecution submission that [REDACTED] was wrong, but this distinction is also crucial to the impartiality of MGS Haskanita and hence to the confirmation of charges. Conscious of the requirement not to set out substantive submissions in a request for leave to reply, at this stage the Defence simply outline that it is one thing to submit that a peacekeeping force, which is aware that an individual within its ranks is carrying out intelligence activities which offer a definite advantage to one party to the conflict, retains its impartiality by actively removing that individual, but quite another to argue that it retains its impartiality by doing nothing, simply because the individual happens to depart the base by his own or his faction's choice, free to return and/or having been replaced by another intelligence agent.¹⁵

16. The Defence submit that the Defence's clarification of the Prosecution's critical mistaken conflation – which, of course, is an issue that is newly and unexpectedly raised in the Response – will be of assistance to the Trial Chamber in determining the Request.

V. Relief Requested

17. Based on the above submissions, the Defence respectfully request that the Trial Chamber grant leave to reply to the Response under Regulations 24(5) and 34(c) of the Regulations. Should the Trial Chamber grant the Defence leave to submit a written reply, the Defence request that the time limit specified in Regulation 34(c) of the Regulations be extended so that the reply is to be filed within ten days of notification of the Trial Chamber's decision to grant leave.

¹⁵ The factual issue of who, if anyone, removed Captain Bashir from MGS Haskanita is one of a number of factual issues relevant to the question of impartiality.

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 11th day of October 2013

At The Hague, the Netherlands

Dated this 11th day of October 2013

At Phnom Penh, Cambodia