



Original: English

No.: ICC-02/05-03/09  
Date: 26 November 2010

**PRE-TRIAL CHAMBER I**

**Before: Judge Cuno Tarfusser, Single Judge**

**SITUATION IN THE DARFUR, SUDAN**

**IN THE CASE OF *THE PROSECUTOR***

***v.***

***ABDALLAH BANDA ABAKAER NOURAIN***

***&***

***SALEH MOHAMMED JERBO JAMUS***

**Public**

**Defence application seeking to preserve its ability to request leave to reply to the Prosecutor's response to the "Defence Application for Leave to Appeal" dated 17 November 2010, pursuant to Regulation 24(5) of the Regulations of the Court**

**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**

Mr Luis Moreno-Ocampo

Mr Essa Faal

**Counsel for the Defence**

Mr Karim A. A. Khan

**Legal Representatives of the Victims**

**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**

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**Registrar**

Ms Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **I. Background**

1. On 10 November 2010, the Defence teams of Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("the Defence") filed the "Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan" ("Defence Cooperation Application")<sup>1</sup>.
2. On 12 November 2010, the Single Judge issued an Order<sup>2</sup> to the Prosecutor to file a response to the Defence Cooperation Application by 16 November 2010.
3. On 16 November 2010, the Prosecution filed its Response<sup>3</sup> to the Defence Cooperation Application, which was registered by the Registry on 17 November.
4. On 17 November 2010, the Single Judge issued a Decision<sup>4</sup> rejecting the Defence Cooperation Application.
5. On Friday 19 November 2010, the Defence filed its Application<sup>5</sup> (the "Application") seeking leave to appeal the Single Judge's Decision of 17 November.
6. On 24 November 2010, the Single Judge issued an Order<sup>6</sup> (the "Order") to the Prosecutor to file a response (the "Response") to the Defence Application by Monday 29 November 2010.

## **II. Notice of reservation of right to seek leave to file reply**

7. In light of the Order, the Defence hereby seeks to preserve its ability to request leave to file a reply in the event that such an application is deemed necessary after considering the Response.
8. Past experience has led the Defence to consider the present filing to be both prudent and necessary. For example, when the Prosecutor filed its response<sup>7</sup> to

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<sup>1</sup> ICC-02/05-03/09-95.

<sup>2</sup> ICC-02/05-03/09-98.

<sup>3</sup> ICC-02/05-03/09-101.

<sup>4</sup> ICC-02/05-03/09-102.

<sup>5</sup> ICC-02/05-03/09-105.

<sup>6</sup> ICC-02/05-03/09-106.

the Defence's recent application for relief pursuant to Article 57(3)(b) of the Statute<sup>8</sup>, the learned Single Judge issued his Decision<sup>9</sup> almost immediately and it was received at a time when the Defence was busy preparing its application for leave to file a reply. An application seeking leave to reply was considered necessary at that time as several new matters were raised in the Prosecution response that were inaccurate and/or which the Defence had not otherwise addressed in the originating motion.

9. Whilst fully acknowledging that the parties do not have a right to reply *per se*, Regulation 24(5) suggests that the parties should have the material possibility to seek leave to reply in appropriate cases. In light of this, and the potential importance of this matter, the Defence respectfully prays that the learned Single Judge grant the Defence a two hour grace period from the time it is notified of the Response, before issuing any decision. This period will allow the Defence to consider the contents of the Response in order to decide whether an application seeking leave to reply, pursuant to Regulation 24(5) of the Regulations of the Court, is necessary, or not.
10. The Defence's decision in this regard will be notified to the Pre-Trial Chamber's Senior Legal Officer and the Prosecution within a maximum of two hours from receipt of any Prosecution filing. Any application for leave to file a reply will be filed as soon as possible thereafter, and in accordance with any time limit imposed by the learned Single Judge or Pre-Trial Chamber.
11. The circumstances surrounding the Application, and the importance of the issue at stake militate in favour of the requested relief. The following factors may also be generally relevant when determining this matter:
  - i. The Defence filed its Application on Friday 19 November at 16h00. Noting that there was a possibility that the Application might only come to the knowledge of the Prosecution on the following Monday, and in order to give

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<sup>7</sup> ICC-02/05-03/09-101.

<sup>8</sup> Circulated at 10h21 on Wednesday, 17 November

<sup>9</sup> ICC-02/05-03/09-102.

the Prosecution sufficient time to consider the Application, the Defence immediately forwarded to the Prosecution a courtesy copy of the Application, receipt of which was acknowledged.

- ii. The Defence did this mindful of the time limits imposed by dint of Regulation 65(3) of the Regulations of the Court. This provides that:

*Participants may file a response within three days of notification of the application described in sub-regulation 1, unless the Pre-Trial or Trial Chamber concerned orders an immediate hearing of the application. In the latter case, the participants shall be afforded an opportunity to be heard orally.*

- iii. Accordingly, the effect of this Regulation is to restrict time limits to respond to applications for leave to appeal filed pursuant to Article 82(1)(d) of the Statute to three days, unless the Pre-Trial Chamber or Single Judge wishes to shorten the limits and hear the matter without delay. If this Regulation were to have been applied in the usual way, the Prosecution would *already* have filed any response.
  - iv. Notwithstanding the terms of Regulation 65(3), in circumstances where no *inter partes* request for extension of time was filed by the Prosecutor, and where no good cause for such an extension had been raised by him, the Prosecution were given a *de facto* extension and required to submit a response on the Defence Application by Monday 29 November 2010.
12. The Defence simply do not know, at present, whether it will be necessary to seek leave to reply or not. It is hoped that such an application may well be unnecessary. In the circumstances of this case, however, and given the importance of the issue being litigated, the Defence respectfully submits that a two hour grace period, in order for it to take a view on this matter, is both modest and necessary. Particularly when additional time has been afforded to the Prosecution to respond. It is in the interests of justice that the Defence have the opportunity to address any new arguments that are raised in the Prosecution's Response. Past practice, referred to above, indicates that it is by no means certain

that the Defence will get an opportunity to persuade the Single Judge that leave should be granted, without the present application being filed as a precautionary measure.

## Relief

13. Accordingly, the Defence respectfully seeks the following relief:

- i. That it be granted a period of two hours following receipt of the Prosecutor's Response within which to decide whether to seek leave to reply; and
- ii. That no decision concerning its Application be made until the Chamber has received notification from the Defence that it does not intend to seek such leave.

Respectfully Submitted,



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Mr. Karim A. A. Khan

Defence Counsel for Abdallah Banda Abakaer Nourain and  
Saleh Mohammed Jerbo Jamus

Dated this 26th Day of November 2010

At The Hague, The Netherlands