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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernandez de Gurmendi

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

**Public Document
with Public Annexes A, B, C, D and E**

Defence Submission on the Translation of Incriminatory Evidence

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
Ms. Fatou Bensouda
Mr. Adebawale Omofade

Counsel for the Defence

Mr. Karim A. A. Khan QC
Mr. Nicholas Koumjian
Mr. Ibrahim Yillah

Legal Representatives of the Victims

Mr. Brahim Kone
Ms. Hélène Cissé
Mr. Akin Akinbote
Mr. Frank Adaka
Sir Geoffrey Nice & Mr. Rodney Dixon

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") file these submissions pursuant to the Trial Chamber's order of 12 July 2011. The Defence request that the Trial Chamber instruct the Prosecution to: (i) provide Zaghawa translations of the Document Containing the Charges ("DCC"); and (ii) proceed to translate the statements of Prosecution witnesses into Zaghawa in accordance with the procedure outlined in this filing.

2. The Defence wish to underline at the outset that it is committed to ensuring that these proceedings are conducted in a spirit of cooperation. This commitment is evidenced by concrete actions such as Messrs. Banda and Jerbo's voluntary surrender to the Court, their agreement to waive some of their rights at the confirmation stage of this case and their agreement to narrow the scope of the contested issues. However, as the parties enter the trial stage of these adversarial proceedings, there are certain fair trial rights which simply cannot be compromised, notwithstanding any practical difficulties which the Prosecution may otherwise face. Especially when these practical difficulties, in the Defence's respectful submission, appear to be of the Prosecutor's own making.

3. Messrs. Banda and Jerbo have the fundamental right to be fully informed of the grave charges and the case which the Prosecution has brought against them. Messrs. Banda and Jerbo contest these charges and seek to actively defend themselves against them. The right to be provided with the actual statements of Prosecution witnesses in a language which they fully understand and speak, which is explicitly stated in Rule 76(3), is, therefore, critical in order that they can advance a meaningful and effective defence. This fair trial right cannot be simply brushed aside and subjugated to concerns of expediency.

II. BACKGROUND

4. The Prosecution have been aware since January 2010 at the latest that audio translations into Zaghawa could be required for at least one accused.¹
5. On 16 August 2010, the Defence agreed that, for the purposes of the confirmation hearing *only*, the Prosecution need only provide the Defence with Zaghawa translations of *summaries* of all witness statements disclosed by the Prosecution in order to satisfy the Prosecution's Rule 76(3) obligations.² The Prosecution responded that this would "save a lot time for the confirmation process."³ The parties informed the Pre-Trial Chamber about the agreement on Zaghawa summaries and the fact that it was only for purposes of confirmation on 26 August 2011.⁴
6. On 5 and 15 November 2011, in two separate filings, the Defence reiterated that the agreement on the translation of summaries was only for purposes of confirmation.⁵
7. To date, the Prosecution have provided the Defence with signed witness statements for the AMIS witnesses, the third-party witnesses and Witness 0439. The Prosecution have also provided the Defence with transcripts of the interviews of witnesses 0307 and 0442. However, so far the Prosecution have not provided the Defence with any translations other than translations of the summaries which were produced for the purpose of the confirmation hearing.
8. On 12 July 2011, a status conference was convened by Trial Chamber IV to address, among other issues, time estimates for the translation of incriminatory

¹ See Prosecution's Status Report on arrangements for the execution of Second Decision on the Prosecutor's Application under Article 58, 26 January 2010, ICC-02/05-03/09-18-US, para. 21.

² See Annex A, Email communication by the Defence "Zaghawa summary of witness materials for confirmation", 16 August 2010.

³ See Annex A, Email communication by the Prosecution "Zaghawa summary of witness materials for confirmation", 16 August 2010

⁴ ICC-02/05-03/09-T-7-ENG, p. 12, line 24 to p. 25 line 2.

⁵ See signed agreements of Mr. Banda and Mr. Jerbo regarding the waiver of the right to attend the confirmation hearing. ICC-02/05-03/09-93-Conf-Exp-AnxA, para. 10 and ICC-02/05-03/09-99-Conf-Exp-AnxA, para. 11.

evidence by the Prosecution.⁶ Following oral submissions by the parties, the Trial Chamber ordered the parties to propose practical solutions regarding the translation of incriminatory evidence in a joint filing by 8 August 2011.⁷

9. In the course of oral submissions, the Prosecution noted the desirability of summarising some witness-related materials then translating them and reading them onto an audio tape, rather than translating the entire documents.⁸
10. The Defence submitted orally that, instead of simply providing interview transcripts to the Defence, the Prosecution is obliged to provide fair and accurate signed statements from those transcripts, and that translation of these statements rather than the entire transcripts would reduce the Prosecution's translation burden.⁹ This submission was grounded in the jurisprudence of Trial Chamber II, which held, citing Rule 111 of the Rules of Evidence and Procedure ("Rules"), "that it is incumbent upon the Prosecution to produce signed witness statements of all witnesses it wants to present at trial."¹⁰
11. Regarding the charging document, the Defence submitted during the status conference that in every case before this Court the Prosecution has provided the accused with a translation of the DCC into a language they fully understand as a matter of principle. However, the Defence indicated that it will consult their clients on the matter and inform the Trial Chamber on the position to be taken.¹¹
12. Following the status conference, the Defence, on 14 July 2011, sent an Email to the Office of the Prosecutor ("Prosecution") containing a proposed practical solution regarding the translation of the statements of the Prosecution witnesses.

⁶ ICC-02/05-03/09-T-12-ENG ET WT, page 10, lines 15-17.

⁷ *Ibid.*, page 15, lines 16-23.

⁸ *Ibid.*, page 11, lines 15-18.

⁹ *Ibid.*, page 13, line 12 to page 14, line 19.

¹⁰ Prosecution v. *Katanga & Ngudjolo*, Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, 23 October 2009, ICC-01/04-01/07-1553, para. 35.

¹¹ ICC-02/05-03/09-T-12-ENG ET WT, page 13, lines 2 to 11.

This proposal was made in the spirit of cooperation between the Parties and the Court to make proceedings as succinct and efficient as possible, while preserving the basic fair trial right of Messrs. Banda and Jerbo to know the evidence against them.

13. It was communicated that should the Prosecution agree to the Defence proposal, namely to translate into Zaghawa all witness statements and that the Prosecution lead at trial only the evidence contained in the witness's statement, the Defence would recommend that their clients, Messrs. Banda and Jerbo, agree to the procedure.¹² Indeed, the Defence have consulted their clients about this issue and both have agreed to Zaghawa translations of signed witness statements, rather than having entire transcripts of witness interviews translated into Zaghawa.
14. Separately, also on 14 July 2011, the Defence informed the Prosecution that Messrs. Banda and Jerbo will waive their right to have the Prosecution's List of Evidence ("LoE") translated in full into Zaghawa.
15. Despite the Defence's proposal being made within days of the status conference and several reminders being sent thereafter, no response was received from the Prosecution until after close of business on Thursday, 4 August. In their response, the Prosecution informed the Defence that they agree to produce statements of all witnesses they intend to call at trial based on prior interviews, statements and transcripts of the interviews of these witnesses. However, as the Prosecution later clarified in their Email, they were in fact proposing to *summarise* the witness material in their possession and to subsequently translate these *summaries* into Zaghawa.¹³ The Prosecution is unwilling to agree that such statements would be reviewed and signed by the witness in question.

¹² See Annex B for the Defence's First Email "Reducing Translation burden", 14 July 2011.

¹³ See Annex C for the Prosecution's First Email "Reducing Translation burden", 4 August 2011.

Furthermore, the Prosecution was not agreeable to only rely in court on evidence which is contained in the signed witness statements.¹⁴

16. From the Prosecution's response, it was clear that there was a risk that the Prosecution might have misconstrued the Defence proposal.¹⁵ Thus, with the 8 August deadline on the horizon, the Defence immediately sought to remedy any confusion and sent an Email on 5 August 2011 clarifying certain aspects of the Defence proposal.¹⁶ The Defence also stated that with regard to the existing signed witness statements of the AMIS witnesses, the third-party witnesses and Witness 0439, the translation into Zaghawa should have already begun. The Defence, therefore, requested the Prosecution to provide an update regarding which translations had already been undertaken. In addition, for the interview transcripts of Witnesses 0307 and 0442 and of any other new or existing witnesses, the Defence requested the Prosecution to provide a signed witness statement following the procedure described below in paragraph 23 and then proceed to translate those statements into Zaghawa in full.
17. The Defence also informed the Prosecution that they must produce full Zaghawa translations for the DCC and any Pre-Trial Brief.
18. In their response sent mid-afternoon on the same day,¹⁷ the Prosecution made the surprising revelation that it had not started translating any of the existing signed witness statements into Zaghawa. The Prosecution stated that "[w]hile a solution that could be agreeable to the Defence was still being reached, we could not have commenced the translation of any of the witnesses' full statements in full into Zaghawa until we had clarity on the manner in which the R[ule] 76 obligation would be resolved." Further, the Prosecution agreed to produce signed statements for witnesses 0307 and 0442. However, the Prosecution made it clear

¹⁴ See Annex C for the Prosecution's First Email "Reducing Translation burden", 4 August 2011

¹⁵ See Annex C for the Prosecution's First Email "Reducing Translation burden", 4 August 2011.

¹⁶ See Annex D for the Defence's Second Email "Reducing Translation burden", 5 August 2011.

¹⁷ See Annex E for the Prosecution's Second Email "Reducing Translation burden", 5 August 2011.

that their final proposal is to provide Zaghawa translations of *summaries* of the existing witness statements, as well as of the signed statements of witnesses 0307 and 0442 and any other newly interviewed or re-interviewed witnesses, rather than translations of the statements in full.¹⁸ As it was apparent by mid-afternoon on Friday that the Prosecution did not intend to agree to the Defence's proposal to translate into Zaghawa the fair, accurate, well-organised and signed statements of each and every witness it intends to rely upon at trial, but rather to simply provide Zaghawa translations of *summaries* of each witness' material, the Defence was not in a position to agree to a joint filing with the Prosecution. This was communicated by telephone to the Prosecution shortly after receipt of the Prosecution's second Email.

III. APPLICABLE LAW

19. Pursuant to Article 67(1)(a) of the Rome Statute an accused is entitled to be informed promptly and in detail of the nature, cause and content of the charge, in a language which he fully understands and speaks. Furthermore, Article 67(1)(f) provides that an accused has the right to have "translations as are necessary to meet the requirements of fairness, if any of the [...] documents presented to the Court are not in a language which the accused fully understands and speaks".
20. Rule 76(3) compels the Prosecutor to make available the statements of prosecution witnesses in original and in a language which the accused fully understands and speaks. The Appeals Chamber has had occasion to consider this provision and has confirmed the pre-eminence of the defence's right in this regard.¹⁹

¹⁸ While the wording in the Prosecution's Second email is ambiguous, the Prosecution clarified this point by telephone on 5 August 2011.

¹⁹ The Appeals Chamber held that a Pre-Trial Chamber erred because it "did not comprehensively consider the importance of the fact that the word 'fully' is included in the text, and the article's full legislative history"; "The fact that this standard is high is confirmed and further clarified by the preparatory work of the Statute, to which the Appeals Chamber turns under article 32 of the Vienna Convention on the Law of Treaties". See; *Prosecutor*

21. Of assistance in the determination of the issues raised in this submission is the jurisprudence of Trial Chamber II. In *Katanga*, that Chamber established that the Prosecution must produce signed witness statements for all witnesses it wishes to present at trial.²⁰

IV. DEFENCE POSITION

A. Proposed Procedure for Translation of Incriminatory Evidence

22. The Defence submit that in accordance with Rule 76(3), which provides that the statements of Prosecution witnesses must be made available in a language the accused fully understands, the Prosecution is obligated to translate witness statements of *all* witnesses they intend to call at trial.
23. Regarding witnesses 0307 and 0442 and any re-interviewed or newly interviewed witnesses specifically, the Defence request that, in accordance with the *Katanga* decision and Rule 76(3), the Prosecution produce fair, accurate and well-organised statements of these witnesses based on all prior interviews, statements and transcripts of the interviews held.²¹ Subsequently, the witnesses should be given the opportunity to review and agree or amend their statements. Once the witnesses agree the finalised content of their statements, the statements should then be signed by the witnesses with the acknowledgement that they are true to the best of the witness' knowledge and recollection. If an interpreter is used, the standard procedure for interpreter certification should be followed. These signed statements should then be translated into Zaghawa and recorded onto audio tapes.

v. *Katanga & Ndgudjolo*, Judgment on Katanga's Language Appeal, 27 May 2008, ICC-01/04-01/07-522 OA3, paras. 37, 50.

²⁰ ICC-01/04-01/07-1553, para. 35.

²¹ The Defence acknowledge that the Prosecution have already agreed to produce signed statements for witnesses 0307 and 0442. See paragraph 18.

24. As to the audio tapes containing the witness statements in Zaghawa, as outlined in the Defence's original proposal, the Defence request that as each new page of the English version of the witness statement is translated onto the audio tape, the page number is read aloud at the relevant point. This will allow the Defence to direct the clients to specific portions of the tapes in the course of communications.²²
25. To ensure that Messrs. Banda and Jerbo are provided with all relevant information contained in witness interviews, statements and transcripts, any evidence relied upon by the Prosecution when examining the witness in court must be contained in the finalised statements of *all* the witnesses relied upon by the Prosecution and in the corresponding Zaghawa translations.
26. With regard to the DCC, Messrs. Banda and Jerbo are entitled to a translation of this charging document into a language they fully understand, pursuant to Article 67(1)(a). They have indicated to the Defence that they will not waive this right. Therefore, the Defence request that the Prosecution proceed with the translation of the DCC into Zaghawa and subsequent recording onto audio tapes.
27. Since Messrs. Banda and Jerbo have waived their right to have the LoE translated in full into Zaghawa, no further steps need to be taken by the Prosecution in this regard.

B. The Fair Trial Right of Messrs. Banda and Jerbo to Have Incriminatory Evidence Translated Prevails Over Considerations of Expediency

28. The fair trial right to obtain a witness statement in *original and in a language which the accused fully understands* as laid down in Rule 76(3) is an absolute right²³ which cannot be impaired or compromised on the grounds of expediency. It is an essential part of the statutory rights of an accused to understand the evidence

²² This should apply to *all* witness statements which have not been translated to date.

²³ The Defence acknowledge that Rule 76(3) is subject to considerations of witness protection and confidentiality pursuant to Rule 76(4). However, these considerations are not at stake in the present case.

against him/her. Nowhere in the Statute and the Rules is this right limited or circumscribed on the basis of expediency or other practical considerations suggested by the Prosecution.²⁴

29. Any reading or proposal which seeks to limit this right would infringe the fair trial rights of Messrs. Banda and Jerbo to fully understand the allegations against them thereby depriving them of effective and meaningful participation in their defence. The Defence cannot waive this fundamental right. To give a simple example, the Defence will have to cross-examine the Prosecution witnesses at trial. In order to do so, the Defence must be able to take full instructions from Messrs Banda and Jerbo on the whole of the witness statement. Counsel are only advisers and cannot take instructions from partly informed clients. It is, therefore, not sufficient to have fully informed counsel and only partly informed Accused.
30. The Defence submit that the necessity to provide Zaghawa translations of witness statements was reasonably foreseeable for the Prosecution. However, seemingly ignoring their absolute statutory obligation, the settled jurisprudence of the Appeals Chamber on the matter,²⁵ and the positions which have been proposed by the Defence, the Prosecution have not yet started translating existing witness statements and, in doing so, have further delayed the proceedings.²⁶ The expectation that the Defence would waive an absolute right cannot justify this inactivity. All the more so, in light of the information provided by the Defence that it would agree to translations of witness summaries for the

²⁴ This is in contrast to the following erroneous statement by the Prosecution: "The procedure that we employ at this stage will largely depend on the extent to which our Rule 76 obligation is taken into account. And it brings me to another point, and our position - the Prosecution's position - is that Rule 76, whilst being an obligation on the part of the Prosecution, has to be interpreted in a very pragmatic and realistic manner. What we say is -- and I know the Defence have been conciliatory on this at the pre-trial stage, but what we say is there has to be a pragmatic manner in which we have to interpret documents that have to be provided to suspects or, indeed, accused persons in a language in which they speak and understand." See 02/05-03/09-T-10-ENG, 19 April 2011, p. 19, lines 7-16. See also the extract of the Prosecution's Email quoted in paragraph 18 of the present filing.

²⁵ See *Prosecutor v. Katanga & Ndgudjolo*, Judgment on Katanga's Language Appeal, ICC-01/04-01/07-522 OA3, 27 May 2008, paras. 37 and 50.

²⁶ As submitted in paragraph 4 above, the Prosecution is aware that Zaghawa translations are required since January 2010.

purposes of confirmation only. The Prosecution thus should have engaged earlier with the Defence had any question about the type of translations that would be required arisen. This was not done.

V. CONCLUSION AND RELIEF REQUESTED

31. The Defence submit that the approach proposed regarding the translation of the DCC, LoE and statements of Prosecution witnesses is reasonable and preserves the basic fair trial right of Messrs. Banda and Jerbo to understand the evidence against them and to advance a meaningful and effective defence.
32. For the reasons set out above, the Defence request the Trial Chamber to order the Prosecution to:
 - (i) provide to the Defence a Zaghawa translation in full of the DCC and of all existing, signed witness statements of the AMIS witnesses and third-party witnesses they intend to rely on at trial, as well as Witness 0439, as proposed above; and
 - (ii) proceed to produce complete and accurate signed witness statements for Witnesses 0307 and 0442 from these witnesses' existing interview transcripts, as well as for any newly interviewed or re-interviewed witnesses and to translate these statements into Zaghawa following the procedure proposed by the Defence in the present filing.

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 8th Day of August 2011

At Nairobi, Kenya

Dated this 8th Day of August 2011

At Dhaka, Bangladesh