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

Date: **18 January 2012**

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

Defence Request for an Oral Hearing

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 Victims

**Unrepresented Applicants
(Participation/Reparation)**

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States' Representatives

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**Victims Participation and Reparations
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I. INTRODUCTION

1. On 6 January 2012, the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") submitted its Request for a Temporary Stay of Proceedings¹ ("Request"). The Request explains the unique factual circumstances which have made it impossible for Mr Banda and Mr Jerbo to present an effective defence and preclude the Trial Chamber from determining the truth.² The Defence submit that the result is that the minimum guarantees of a fair trial under Article 67(1) of the Rome Statute cannot be met and that a temporary stay is therefore required.³
2. Due to the importance and novelty of the issues addressed in the Request and to assist the Trial Chamber in resolving the mixed questions of fact and law which arise therein, the Defence hereby ask the Trial Chamber to grant an oral hearing on the Request.

II. APPLICABLE LAW

3. Article 64(2) of the Statute provides that:

"the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

4. In addition, Rule 132(2) of the Rules of Procedure and Evidence provides that:

"in order to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber may confer with the parties by holding status conferences as necessary."

5. The Defence submit that the Trial Chamber's obligation to ensure a trial is "fair" and is "conducted with full respect for the rights of the accused" under Article 64(2), read together with the Trial Chamber's inherent discretion to

¹ ICC-02/05-03/09-274.

² Request, paras. 4 – 17.

³ Request, paras. 24 – 35.

manage trial proceedings, allows the Trial Chamber to hold an oral hearing on an application for a temporary stay of proceedings.

6. Alternatively, the Defence submit that the Trial Chamber may convene an oral hearing on the Request by way of a status conference, in order to facilitate the fair and expeditious conduct of proceedings.

III. SUBMISSIONS

7. An oral hearing would assist the Chamber to determine the Request. Central to the Request is the factual account of the severe impediments currently afflicting any Defence investigations. An oral hearing could greatly enhance the Trial Chamber's consideration of this issue, because it allows the interaction of oral argument. It would allow the Trial Chamber to question the Defence about the steps that the Defence have taken to try to carry out an effective investigation, and at the same time it would afford the Defence the opportunity to address directly any concerns that the Trial Chamber might have. It would also allow a dialogue between the Chamber and the Defence about the absence of alternative remedies short of a stay of proceedings.⁴
8. In addition, the situation in Darfur continues to evolve. An oral hearing would allow the Defence and other parties and participants to provide the Chamber with the most up to date position possible.
9. Further, the issues raised by the Request concern mixed questions of fact and law. In determining whether a fair trial is possible in this case, the Trial Chamber will have to consider complex factual material, as well as legal arguments about the extent of the Mr Banda and Mr Jerbo's rights to a fair trial under the Statute. The Request is not a purely technical legal matter,

⁴ The Trial Chamber envisaged that an oral hearing would assist "to explore the avenues of investigation" in response to an earlier application: Decision on "Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan", 1 July 2011, ICC-02/05-03/09-169, para. 26.

which can readily be resolved on paper. Rather, the interaction of factual and legal issues is a strong indicator that an oral hearing is required.⁵

10. The importance of an application to stay proceedings does not need explanation. The decision to impose even a temporary stay has a significant impact on all the parties and participants.⁶

11. In particular, the Request is of fundamental importance to Mr Banda and Mr Jerbo. A temporary stay would significantly affect the course of proceedings against them. Further, the matters raised in the Request go to the heart of their right to a fair trial and ultimately their ability to defend themselves against the serious charges brought by the Prosecutor.⁷ A temporary stay would also have a significant impact on the Prosecutor and on the participants in this trial.

12. The Request also raises novel issues. As observed in the Request, Mr Banda and Mr Jerbo find themselves in a unique situation. This is the first case pending trial in which the United Nations Security Council has referred a non-State Party to the Rome Statute, in circumstances where the non-State Party decides not to cooperate with the Court.⁸ It is the first case pending trial in which neither the Defence, nor the Prosecution are able to enter the country in which the alleged crimes occurred. Thus, the Request requires the Chamber to apply the right to a fair trial to an entirely novel situation. Further, this may

⁵ The need to determine mixed questions of fact and law is regarded by the European Court of Human Rights as one indicator that an oral hearing is required in civil cases. For example, in *Dory v. Sweden*, 28394/95, 12 February 2003, no oral hearing was required because the issue turned on “the correct interpretation of written medical evidence”. However, in *Salomonsson v. Sweden*, 38978/97, 12 November 2002, an oral hearing was required because the issue “was not limited to matters of law but also extended to factual issues”.

⁶ The Defence note that the stay of proceedings ordered in *Prosecutor v. Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401 followed on from the discussion of the issue during a Case Status Conference.

⁷ The Defence accept that the determination of the Request is not the determination of the charges against Mr. Banda and Jerbo, and hence Article 67(1) does not strictly require a public hearing. But given the importance of this Request to Mr. Banda and Jerbo’s rights and on the Prosecution and other participants, the Defence submit that a public hearing is desirable.

⁸ Request, para. 2.

present a significant issue for the future of the Court because it raises questions about the role and obligations of the Security Council when it refers a situation to the Court in the absence of State cooperation and in the absence of an international force capable of supporting investigations. The importance of this new situation means that an oral hearing should be convened.

13. The Request is also novel because it is the first application for a stay of proceedings before the Court founded on the submission that a fair trial is not possible due to the lack of cooperation of a State and the resulting inability of the Defence to investigate, rather than on the basis of alleged abuses of process by the Prosecution.

IV. REQUEST FOR RELIEF

14. The Defence respectfully request the Trial Chamber to grant an oral hearing on the Request.

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 18th Day of January 2012

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