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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernandez 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 Document

Defence Reply to the “Observations en Réponse des Représentants Légaux Communs à la Version Publique Expurgée de la Soumission du Procureur relative au Projet de Protocole Concernant la Gestion des Informations Non Publiques et des Contacts par une Partie des Témoins de la Partie Adverse (ICC-02/05-03/09-389-31/08/2012) avec la Version Publique de son Annexe A (ICC-02/05-03/09-AnxA-31/08/2012)”

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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I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully submit their reply to the Common Legal Representatives' ("CLR") request to add provisions regulating the CLR's involvement in Defence interviews conducted with individuals with dual status as a Prosecution witness and victim ("Dual Status Victims") to any final protocol regulating the contact of a party with witnesses of the opposing party ("Opposing Witnesses Protocol").¹
2. The involvement of the CLR with regards to the Defence interviews raises two main concerns, namely (i) the danger of interference by the CLR with the Defence investigation, and (ii) the risk of contamination of evidence before the Court. The involvement of the CLR may, therefore, be prejudicial to the rights of Mr. Banda and Mr. Jerbo and to the Trial Chamber's efforts to establish the truth.
3. Furthermore, on a procedural level the CLR's involvement also goes to issues of confidentiality of the case material.
4. In order to avoid any such prejudice and maintain the confidentiality of the case material, the Defence respectfully request that the Trial Chamber reject the provisions proposed by the CLR. Rather, the Defence seek the inclusion of the following procedure and terms, in the event that the Trial Chamber adopts an Opposing Witnesses Protocol:

¹ See "Observations en Réponse des Représentants Légaux Communs à la Version Publique Expurgée de la Soumission du Procureur relative au Projet de Protocole Concernant la Gestion des Informations Non Publiques et des Contacts par une Partie des Témoins de la Partie Adverse (ICC-02/05-03/09-389-31/08/2012) avec la Version Publique de son Annexe A (ICC-02/05-03/09-AnxA-31/08/2012)", 21 September 2012, ICC-02/05-03/09-396 ("Observations").

- a. A Dual Status Victim may only be interviewed by the Defence where the latter has submitted a request to do so to the Prosecution.
- b. The Dual Status Victim shall be informed by the Prosecution about the Defence's request and that the CLR may be present during the interview.
- c. The Prosecution shall also inform the CLR of the Defence's request.
- d. The CLR shall not be present during the interview unless requested by the Dual Status Victim.
- e. If the Defence consider that the presence of the CLR is inappropriate, the Defence shall have the right to raise the matter with the Trial Chamber.
- f. The CLR who attend any Defence interview with a Dual Status Victim shall only advise the latter on his or her rights as a victim and shall not in any other way interfere or obstruct before or during the interview.
- g. The CLR shall not discuss information as to the scope and content of the interview or confidential case material referred to during the interview with any other victim they represent or any other person.
- h. The Defence may request the Trial Chamber to impose more stringent procedures to ensure necessary confidentiality on a case-by-case basis.

II. Procedural Background

- 5. On 31 August 2012, the "Public Redacted Version of Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party With Witnesses of the Opposing Party, and Prosecution's Update on Expert Witness"² was filed. Confidential Annex A of the Prosecution's

² ICC-02/05-03/09-389-Red ("Prosecution's Submission").

Submission³ was reclassified as “public” pursuant to the Trial Chamber’s decision on 30 August 2012.⁴

6. On 18 September 2012, the “Public Redacted Version of “Defence Response to Prosecution’s Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party” and its Annex A were submitted.⁵
7. On 21 September 2012, the CLR submitted their Observations which included the request that the following provisions be included in the Prosecution’s Proposed Protocol:
 - a. *Si la défense souhaite contacter de quelque façon que ce soit et/ou interviewer , rencontrer une victime à double statut de victime et témoin du procureur, elle a l’obligation d’en prévenir à l’avance les représentants légaux communs, avant de prendre quelque initiative que ce soit, et dans un délai préalable raisonnable pour leur permettre de prendre les dispositions qu’ils estimeraient nécessaires pour assister les victimes/témoins (au moins trois semaines à l’avance) (sic).*
 - b. *Dans ce cas ci-dessus, les représentants légaux communs, en la personne du conseil principal, prendront les mesures idoines pour que le ou les représentant(s) légal (légaux) commun(s) puisse(nt) assister à la rencontre ou à l’interview de la victime à double statut de victime et de témoin du procureur, quelque que soit le moyen de contact ou de communication envisagé (sic).⁶*

³ ICC-02/05-03/09-389-Conf.

⁴ Annex A: Prosecution’s Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party With Witnesses of the Opposing Party, and Prosecution’s Update on Expert Witness, 27 August 2012, ICC-02/05-03/09-389-AnxA (“Prosecution’s Proposed Protocol”).

⁵ ICC-02/05-03/09-394-Red + AnxA.

⁶ See Observations, para. 16.

III. Applicable Law

8. The present reply is submitted pursuant to Rule 91(2) of the Rules of Procedure and Evidence, which entitles the Defence to reply to any oral or written observation submitted by the legal representatives for victims.

IV. Submissions

A. Preventing Interference with the Defence Investigation and Contamination of Evidence To Be Heard By the Trial Chamber

9. As stated above, there are two main concerns regarding the involvement of the CLR in the Defence interviews. Firstly, the danger that the CLR may interfere, be it inadvertently, with the Defence investigation, and secondly, the risk of contamination of evidence before the Court due to the CLR's actions. These concerns overlap to a certain extent.
10. As to the first point, the Defence find the CLR's proposition that any proper Defence preparation as to the issue of the legality of the attack against the MGS Haskanita is frustrating the victims' rights to justice and reparation is as astonishing as it is disquieting.⁷ The submissions by the CLR, regrettably, revealed skewed and inappropriate interpretation of their mandate and role in the present case. Simply put, the Defence submit that the primary objective of the CLR in representing the views of the victims should be to ascertain the truth rather than a rigid decision to counter Defence theory that the attack in the circumstances of the case was not illegal.
11. The Defence respectfully submit that the CLR interpretation of their role and how they intend to intervene runs the risk of obstructing Defence's

⁷ See Observations, paras. 11 and 12.

investigation and the utility of any interview with Dual Status Victims. This would violate Mr. Banda's and Mr. Jerbo's rights pursuant to Article 67(1)(b) of the Rome Statute ("Statute").⁸

12. With regards to the second point, the Defence note that the CLR are representing all the victims in this case. It is therefore perhaps obvious that there is a risk that the CLR may transfer information from one Dual Status Victim to the other and contaminate any information provided by those Dual Status Victims during a Defence interview or their later testimony, unless proper and formal precautions are taken to prevent this occurrence. The necessity for such precautions gives right to the present response.

13. The parties and participants are prohibited from rehearsing witnesses' evidence.⁹ The reason for such prohibition is that it "may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness".¹⁰ In the same vein, if the CLR discusses the contents of his or her evidence with the Dual Status Victim or discusses that evidence with other Dual Status Victims that will influence their evidence. This would clearly hinder the Trial Chamber's function to establish the truth pursuant to Articles 54(1)(a) and 69(3) of the Statute,¹¹ and Mr. Banda's and Mr. Jerbo's right to a fair trial.¹²

⁸ In this context it is also pertinent to note that any interference by the CLR with the Defence's efforts as to investigating the legality of the attack will undoubtedly influence a Dual Status Victim's testimony in the courtroom.

⁹ ICC-01/04-01/06-1049, para. 57. See also in the present case, Decision on the re-interviews of six witnesses by the prosecution, 6 June 2012, ICC-02/05-03/09-158, para. 15.

¹⁰ ICC-01/04-01/06-1049, para. 52; and ICC-02/05-03/09-158, para. 15.

¹¹ The Trial Chamber in *Lubanga* determined that "one of the principal goals of the work of the Court is to establish the truth". See e.g. *Prosecutor v. Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2012, ICC-01/04-01/06-1049, para. 47.

¹² Article 67(1) of the Statute.

14. The CLR's submissions regarding their presumed role reveal that rather than seeking the truth, the CLR seek a conviction of Mr. Banda and Mr. Jerbo. Indeed, in marked contrast to the Prosecution,¹³ the CLR are under no statutory obligation to investigate exculpatory evidence which would ensure a balanced enquiry and a proper search for the truth. Notwithstanding the absence of such a formal provision in the Statute the Defence submit that their role is not unregulated. The Defence believe that as officers of the Court, the CLR must be focus on establishing the truth as one of the core interests of the victims that they represent.

15. Therefore, in line with the express terms of Article 68(3) of the Statute and the Court's jurisprudence,¹⁴ pursuant to which Mr. Banda's and Mr. Jerbo's rights must be safeguarded even when the personal interests of victims are affected, the Defence propose a procedure and terms aiming at preventing interference with the Defence's investigation and preparation and the contamination of the evidence before the Court. The procedure and terms proposed by the Defence and discussed in the following will, therefore, ensure that the involvement of the CLR will not cause any prejudice to the rights of Mr. Banda and Mr. Jerbo under to the Statue or otherwise be detrimental to the Court's function in establishing truth.

Possibility of the Common Legal Representatives Not Being Present During Defence Interviews with Dual Status Victims

16. The Defence request that the Opposing Witnesses Protocol include the possibility of the CLR not being present at an interview if a Dual Status

¹³ Article 54(1)(a) of the Statute.

¹⁴ See e.g. Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decisions of the Appeals Chamber" of 2 February 2007, ICC-01/04-01/06-925, para. 28.

Victim does not request their presence or if the Defence consider that their presence is otherwise inappropriate.

17. The Defence's position is supported by the Court's jurisprudence. In *Lubanga*, the Trial Chamber ruled that the legal representatives "may" be present, rather than "shall".¹⁵ Moreover, the Trial Chamber provided for the possibility to exclude the legal representative if (a) the individual with dual status did not give his or her consent,¹⁶ or (b) "the [interviewing] party considers that the presence of the legal representative is inappropriate".¹⁷

Prohibition Of Inference With or Obstruction Of the Defence Interview By the Common Legal Representatives

18. It is the Defence's request that the CLR's involvement should not be permitted either to obstruct the proper purpose of the interview or to interfere with the Dual Status Victim's evidence. This was the course adopted by the *Lubanga* Trial Chamber in the very decision relied upon by the CLR in its submissions, which held that "[t]he presence of the legal representative must not obstruct a proper interview".¹⁸

¹⁵ See ICC-01/04-01/06-1379, para. 67. The Defence note that while in *Lubanga* the Trial Chamber endorsed "the agreement between the parties that as a general rule the legal representative may be present during an interview of an individual with dual status, provided there is consent from the individual concerned" no such agreement exists in the present case (emphasis added).

¹⁶ ICC-01/04-01/06-1379, para. 67.

¹⁷ *Ibid.*, para. 70. The Trial Chamber provided that in those circumstances the party shall "inform the legal representative of the interview and, unless a delay cannot be justified because of urgency, establish whether the party wishes to raise the matter with the Chamber and (when relevant) ensure that sufficient time is afforded to enable this to happen prior to the interview."

¹⁸ *Prosecutor v. Lubanga*, Decision on certain practicalities regarding individuals who have the dual status of witness and victim, 5 June 2008, ICC-01/04-01/06-1379, para. 69. The Defence also note that the *Lubanga* Trial Chamber only authorised that the legal representatives may be present at interviews and not that they may take "measures that they would consider necessary" as the CLR seek in this case. See ICC-01/04-01/06-1379, para. 67.

19. The CLR's involvement should be limited to preserving the Dual Status Victim's rights as a person who the Court has accepted to have suffered physical and / or emotional harm. Any other interference before or during the interview, as well as during any breaks while the interview is not completed, including actions such as pre-interviewing the Dual Status Victim, discussing the person's evidence or other Dual Status Victims' evidence or the Defence's objectives in the interview, or interrupting of the Defence's line of questioning, should be prohibited.

Prohibition To Reveal Content Of the Defence Interview

20. The Defence request that the CLR be ordered not to disclose or discuss the scope and content of a Defence interview with a Dual Status Victim with any other clients, including other Dual Status Victims, since such discussions may contaminate any information provided by those clients during a potential Defence interview or their testimony before the Trial Chamber.¹⁹

B. Protection Of Confidential Case Material

21. In accordance with the existing jurisprudence of the Court,²⁰ in the event that the Defence refer to confidential case material during an interview with a Dual Status Victim, and in circumstances where the Defence do not object to

¹⁹ The Defence note that this general concern is heightened by the fact that certain Sudanese victims now represented by the CLR were, as the Defence and the Prosecution previously submitted (see ICC-02/05-03/09-113 and ICC-02/05-03/09-110, respectively) and the CLR themselves alluded (see ICC-02/05-03/09-230-Conf), recruited for participation in this case by entities tied to and working to promote the interests of the Government of Sudan ("GoS") and President Al Bashir. The actions of the GoS in Darfur are essential to the defence case (see e.g. ICC-02/05-03/09-235). Furthermore, the GoS does work against the authority of the Court, and in fact threatens all those who cooperate with the Court (e.g. ICC-02/05-03/09-274). Therefore, the Defence fear that there may be an additional danger to the safety of Defence witnesses and the integrity of the Defence evidence and case, as well as a particular risk of interference with the Trial Chamber's quest for the truth, arising from information being transmitted to those Sudanese victims.

²⁰ See *Prosecutor v. Katanga and Ngudjolo*, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788-tENG, para. 123.

the CLR's presence at the said interview, the Defence's request that the CLR be ordered not to disclose or discuss that information with any other victim they represent. The Defence, furthermore, reserves the right to request more stringent procedures to ensure necessary confidentiality on a case-by-case basis.

22. Since the Defence may use confidential case material during the interviews with Dual Status Victims, the requested presence of the CLR at interviews touches upon the issue of their access to confidential case material. In the *Lubanga*,²¹ *Katanga*,²² and *Bemba*²³ cases, relatively shortly before or shortly after the start of trial, the respective Trial Chambers issued decisions laying down the modalities of participation of victims for trial, which also contained provisions on their access to confidential case material.

23. In the *Lubanga* case this decision was issued after the trial date was set and provided that upon specific request the participating victims were to be provided by the Prosecution with a "suitably redacted form" of the confidential documents which were in the possession of the Prosecution "subject to a demonstration of relevance to their personal interests".²⁴

24. Later, on 22 January 2009, four days before the effective start of trial, the legal representatives were given full disclosure of witness statements and also of the confidential version of the Summary of Presentation of Evidence.²⁵

²¹ *Prosecutor v. Lubanga*, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119.

²² ICC-01/04-01/07-1788-tENG.

²³ *Prosecutor v. Bemba*, Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-CORR.

²⁴ ICC-01/04-01/06-1119, para. 111.

²⁵ Transcript of Hearing on 22 January 2009, ICC-01/04-01/06-T-105-ENG-ET WT, page 43, line 1 to page 44, line 18.

25. In *Katanga*, the decision on modalities of participation was issued after the trial had already started on 24 November 2009 and provided that the legal representatives should be given access to the entire case record via the Ringtail system.²⁶ The Trial Chamber also determined that the access to the evidence in the case could not be extended to include the clients of the legal representatives, the victims.²⁷

26. In *Bemba*, the decision on modalities of participation was issued shortly before the trial commenced and provided, *inter alia*, for the legal representatives to have access to redacted versions of the statements of the witnesses the Prosecution intended to rely upon at trial.²⁸

27. In the present case, the Trial Chamber has yet to rule on the modalities of victim participation at trial and any regime regulating access to confidential case material by the legal representatives of the victims. Thus, the CLR do not presently have automatic access to the confidential material in this case.

28. If no further direction is given by the Trial Chamber in relation to confidential material, the consequence of the presence of the CLR during Defence interviews with Dual Status Victims would be that the Defence would be prevented from addressing any issues and areas which fall within the area of confidential information. This would potentially render the Defence's line of investigation and interviewing with the particular Dual Status Victim ineffective, which in turn may amount to a violation of Mr. Banda's and Mr. Jerbo's right to adequate facilities for the preparation of the defence pursuant to Article 67(1)(b) of the Statute. Alternatively, the Defence would be obliged to delay those interviews until after the CLR are given access to the

²⁶ ICC-01/04-01/07-1788-tENG, para. 122 and p. 45.

²⁷ ICC-01/04-01/07-1788-tENG, para. 123.

²⁸ ICC-01/05-01/08-807-CORR, p. 44.

confidential case material closer to the trial start. This would further delay the Defence investigation and preparation and, thus, negatively affect Mr. Banda and Mr. Jerbo's right to adequate facilities for the preparation of the defence and to be tried without undue delay.²⁹

29. The Defence submit that it would be premature to give the CLR general access to the confidential case material at this stage of the proceedings. As set out above, the legal representatives were only accorded such access in other cases before the Court at a later stage in proceedings, either much closer to the start of trial or during the trial.³⁰

30. Therefore, the Defence submit that the only solution to the problems presented by references to confidential material during interviews with Dual Status Victims at which the CLR is present, is that the CLR should be instructed not to disclose or discuss this information with any other victim they represent, as well as any other person.³¹

Relief requested

For the reasons above, the Defence respectfully request that the Trial Chamber reject the Common Legal Representatives proposed additions to any final protocol regulating the contact of a party with witnesses of the opposing party.

²⁹ Articles 67(1)(b) and (c) of the Statute.

³⁰ The Defence reserve their right to make further submissions on the general access of the CLR and the victims to confidential case material at any later stage of the proceedings.

³¹ The Defence note that the prohibition to reveal confidential information will also further prevent the contamination of the evidence given by the Dual Status Victims since the CLR will be prevented from disclosing to the Dual Status Victims confidential statements by other witnesses, which are not available to them.

Further, the Defence respectfully request that in the event the Trial Chamber adopts a protocol regulating the contact of a party with witnesses of the opposing party, that protocol include the following provisions:

- a. A witness, including an individual with dual status as a Prosecution witness and victim ("Dual Status Victim"), who a party intends either to call or to rely on his or her statement at trial may only be interviewed by the opposing party where the opposing party has submitted a request to do so to the calling party and the VWU.*
- b. The Dual Status Victim shall be informed by the Prosecution about the Defence's request and the possibility that the Common Legal Representatives ("CLR") may be present during the interview by the Defence.*
- c. The Prosecution shall also inform the CLR of the Defence's request.*
- d. The CLR shall not be present during the interview unless requested by the Dual Status Victim.*
- e. If the Defence consider that the presence of the CLR is inappropriate, the Defence shall have the right to raise the matter with the Trial Chamber.*
- f. The CLR who attend any Defence interview with a Dual Status Victim shall only advise the latter on his or her rights as a victim, i.e. a person who the Court has accepted to have suffered physical and / or emotional harm, and shall not in any other way interfere or obstruct before or during the interview.*

- g. The CLR shall not discuss information as to the scope and content of the interview or confidential case material referred to during the interview with any other victim they represent or any other person.*
- h. The Defence may request the Trial Chamber to impose more stringent procedures to ensure necessary confidentiality on a case-by-case basis.*

Respectfully Submitted,



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Dated this 4th Day of October 2012
At Nairobi, Kenya

Dated this 4th Day of October 2012
At Yerevan, Armenia