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

Date: **28 May 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**

**Defence Observations on the Common Legal Representatives' and the Registry's  
proposals on the severance of the case**

**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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Mr. Nicholas Koumjian

**Legal Representatives of the Victims**

Ms. Hélène Cissé  
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**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**

Mr. Herman von Hebel

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. Pursuant to the Trial Chamber's order of 16 May 2013, the Defence for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus ("Defence") file these further submissions concerning the feasibility and possible time frame for obtaining an official document certifying Mr. Jerbo's death and the possible severance of the case against Mr. Jerbo from the case against Mr. Abdallah Banda Abakaer Nourain.<sup>1</sup>

## II. Submissions

### *The feasibility and possible time frame for obtaining an official document certifying Mr. Jerbo's death*

2. It is not feasible for the Defence to obtain an official document certifying Mr. Jerbo's death. As the Trial Chamber is aware, the Defence have no access to Darfur and receive no cooperation from the Government of Sudan.<sup>2</sup> Not only is Darfur an active conflict zone but, due to the Government of Sudan's active opposition to the Court, the situation in the region remains highly insecure to individuals who cooperate with or are connected to the Court, with the exception, as set out below, of the Common Legal Representatives.
3. In particular, the possibility of the Defence's very limited contacts on the ground being able to obtain an official death certificate and then to transmit same to the Defence is extremely unlikely.<sup>3</sup> First, the circumstances of Mr. Jerbo's death – he was killed in an ambush by forces from the Justice and Equality Movement ("JEM") faction led by Jibril Ibrahim in the area of Furawiya and buried close to where he was killed without his body having been taken to a hospital, morgue or other government installation – make it extremely doubtful that an official document certifying his death can be

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<sup>1</sup> ICC-02/05-03/09-476.

<sup>2</sup> See, e.g., ICC-02/05-03/09-274.

<sup>3</sup> *Contra* the Common Legal Representative's Observations at ICC-02/05-03/09-472, para. 46.

obtained. Second, as the matter of Mr. Jerbo's death certificate in connection with his ICC case is in the public domain, and as alluded to above, any individual requesting a death certificate for Mr. Jerbo from the Sudanese authorities may be suspected by the Government of Sudan of cooperating with the Court. The Defence certainly will not ask their contacts to put themselves at risk by requesting such a death certificate from the Sudanese authorities. Therefore, while the Common Legal Representatives observe that a death certificate is the usual official document delivered by a hospital or a health centre to relatives in order to certify a person's death,<sup>4</sup> such observations are clearly inapposite.

4. The Defence observe that Mr. Jerbo was a member of the JEM faction led by Mohamed Bashar. This faction has entered into a peace agreement with the Government of Sudan sponsored by the Government of Qatar, the United Nations-African Union Mission in Darfur and the African Union, and supported by, *inter alia*, the European Union. Subsequent to the killing of Mr. Jerbo, Mr. Bashar and at least 10 members of his entourage were killed on 12 May 2013 by forces belonging to the JEM faction led by Jibril Ibrahim.<sup>5</sup>
5. In the unique circumstances of this case, the only participants with the apparent ability to investigate in Darfur are the Common Legal Representatives.<sup>6</sup> Given the close ties between clients of the Common Legal Representatives and the Government of Sudan, particularly those recruited by the Sudan Workers Trade Unions Federation and the Sudan International

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<sup>4</sup> ICC-02/05-03/09-472, para. 11.

<sup>5</sup> See, e.g., "International condemnation of Sudan DDPD signatory leader's slaying", 15 May 2013, available at <http://www.radiodabanga.org/node/49021>, last accessed on 20 May 2013.

<sup>6</sup> The former legal representatives of victims A6046 and A6047 were able to travel to the *locus in quo* (see ICC-02/05-03/09-115, para. 14 and ICC-02/05-03/09-228, para. 56). Although the Chamber has now appointed the Common Legal Representatives to represent these two victims, the former legal representatives may still assist their clients in some capacity outside of the courtroom, or pass information to the Common Legal Representatives. Similarly, the Defence submit that it is possible that the same access to Sudan that was accorded to the former legal representatives may now be accorded to the Common Legal Representatives.

Defence Group,<sup>7</sup> it is apparent that the Common Legal Representatives have contact with groups under the government's influence and control.<sup>8</sup> While the Common Legal Representatives have no disclosure obligations relative to the Defence or obligation to make use of whatever access and contacts they may have to aid the Court, it appears that the only participants in these proceedings who may be in any position to assist the Trial Chamber to obtain a death certificate for Mr. Jerbo are the Common Legal Representatives.

6. The Defence acknowledge that the absence of a death certificate is unusual. However, the situation in Darfur is unique. The Defence have no reason to doubt the information that Mr. Jerbo is deceased and repeat the proposals set out in the confidential Defence update<sup>9</sup> to facilitate the Registry and/or Chamber's verification of both Mr. Jerbo's death and the non-existence of official government documentation recording his death.<sup>10</sup>

Severance of the case against Mr. Jerbo from the case against Mr. Banda

7. Given that Mr. Jerbo is now deceased, on behalf of Mr. Banda, the Defence do not oppose the severance of the case against Mr. Jerbo from that of Mr. Banda.

### **III. Conclusion**

8. The Defence are still assessing the impact of Mr. Jerbo's death on their investigative abilities, capabilities and resources in respect of the preparation of the defence case for Mr. Banda. The Defence reserve the right to make further submissions on the consequences (if any) on their trial preparations.

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<sup>7</sup> ICC-02/05-03/09-96, para. 4.

<sup>8</sup> *Supra* note 7.

<sup>9</sup> Update to Defence Notification of the Death of Mr Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09-466-Conf), 10 May 2013, ICC-02/05-03/09-475-Conf.

<sup>10</sup> *Ibid.*, paras. 8-9.

9. In the meantime, the Defence will continue to keep the Chamber informed of any relevant information received concerning the death of Mr. Jerbo.

Respectfully Submitted,



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Mr. Karim A. A. Khan QC

Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus



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Mr. Nicholas Koumjian

Co-Lead Counsel

Dated this 28<sup>th</sup> Day of May 2013

At The Hague, Netherlands

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