

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 24 November 2011

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR *v.* ABDALLAH BANDA ABAKAER NOURAIN
AND SALEH MOHAMMED JERBO JAMUS**

URGENT

Public

Order on the defence's application for leave to reply

Order 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 Ade Omofade

Counsel for the Defence

Mr Karim A.A. Khan
Mr Nicholas Koumjian

Legal Representatives of Victims

Ms Hélène Cissé
Mr Jens Dieckmann

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IV (“Chamber”) of the International Criminal Court (“ICC”), acting pursuant to Regulations 24(5) and 34(c) of the Regulations of the Court (“Regulations”), issues the following Order on the defence’s application for leave to reply.

1. On 20 October 2011, the defence for Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“defence”) filed the “Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecution” (“Request for Disclosure”),¹ in which it requested, pursuant to Article 67(2) of the Rome Statute (“Statute”) and Rule 77 of the Rules of Procedure and Evidence (“Rules”), disclosure of material previously submitted by the Office of the Prosecutor (“prosecution”) in support of the prosecution’s application for the arrest of Omar Hassan Ahmad Al Bashir in the situation in the Darfur.²
2. On 10 November 2011, the prosecution filed its “Prosecution Response to Defence Request for Disclosure” (“prosecution’s Response”),³ opposing the Request for Disclosure.
3. On 17 November 2011, the defence filed the “Defence Application for Leave to Reply to the Prosecution’s Response to the Defence Request for Disclosure” (“defence’s Application”).⁴ The defence requests leave to reply through an oral hearing or alternatively, in writing. It submits that it should be afforded the opportunity to be heard in reply because the prosecution’s Response “raises various new issues of law, misinterprets the applicable law and misrepresents the facts in

¹ Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecution, 20 October 2011, ICC-02/05-03/09-235.

² ICC-02/05-03/09-235, paragraph 1.

³ Prosecution Response to Defence Request for Disclosure, 10 November 2011, ICC-02/05-03/09-251.

⁴ Defence Application for Leave to Reply to the Prosecution’s Response to the Defence Request for Disclosure, 17 November 2011 (notified on 18 November 2011), ICC-02/05-03/09-255.

an unanticipated way given the limited scope of the Defence Request for Disclosure[...].⁵The defence submits, *inter alia*, that the issue of whether the availability of public material or the agreement as to facts concluded by the parties impacts on the prosecution's disclosure obligations are issues that were not foreseeable and would warrant a reply.⁶ The defence further contends that the new and distinct issues of fact and law raised in the prosecution's Response are of importance and "undoubtedly impact on the ultimate determination of guilt or innocence" of both accused persons.⁷

4. On 18 November 2011, the prosecution opposed the defence's Application mainly contending that its response was foreseeable and addressed issues already raised by the defence in its Request for Disclosure.⁸ The prosecution concludes that the defence has not shown good cause justifying leave to reply and that leave should be rejected.⁹
5. Having considered the above submissions, the Chamber does not deem it necessary to convene a hearing as requested by the defence¹⁰ to address the parties' submissions on their respective legal arguments and positions in this case. However, the Chamber finds that the prosecution's Response indeed raises certain legal issues that the defence should be given the opportunity to reply to, especially as to the extent of the prosecution's disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules.

⁵ ICC-02/05-03/09-255, paragraphs 2, 5 and 8 to 14.

⁶ ICC-02/05-03/09-255, paragraphs 8 and 10 (b).

⁷ ICC-02/05-03/09-255, paragraphs 7 and 11.

⁸ Prosecution's Response to Defence Application for Leave to Reply to the Prosecution's Response to the defence Request for Disclosure, 18 November 2011 (notified on 21 November 2011), ICC-02/05-03/09-256, paragraphs 2, 5 and 6.

⁹ ICC-02/05-03/09-256, paragraphs 2 and 7.

¹⁰ ICC-02/05-03/09-255, paragraphs 12 to 15.

6. For the reasons above, the Chamber,

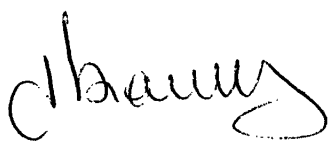
(i) grants the defence's Application; and

(ii) orders the defence to file its reply in writing by 16.00 on 30 November 2011.

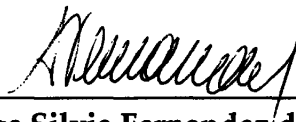
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Silvia Fernandez de Gurmendi

Dated this 24 November 2011

At The Hague, The Netherlands