

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 16 February 2012

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***

Public

**Redacted Order on the defence Application for Leave to Reply to the
“Prosecution’s Response to the ‘Defence Request for a Temporary Stay of
Proceedings’ and to the ‘Defence Request for an Oral Hearing’”**

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

Ms Fatou Bensouda

Counsel for the Defence

Mr Karim A.A. Khan

Mr Nicholas Koumjian

Legal Representatives of Victims

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 23*bis*(3), 24(5) and 34 of the Regulations of the Court, issues the following Order on the defence Application for Leave to Reply to the "Prosecution's Response to the 'Defence Request for a Temporary Stay of Proceedings' and to the 'Defence Request for an Oral Hearing'"

Background and submissions

1. On 6 and 18 January 2012 respectively, the defence for Messrs Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus ("defence") filed a "Defence Request for a Temporary Stay of Proceedings"¹ and a "Defence Request for an Oral Hearing" (together the "defence Requests").²
2. On 30 January 2012, upon the Chamber's instruction,³ the Office of the Prosecutor ("prosecution") filed confidentially the "Prosecution's Response to the 'Defence Request for a Temporary Stay of Proceedings' and to the 'Defence Request for an Oral Hearing'" ("Response").⁴ A public redacted version of the Response was filed on 1 February 2012.⁵
3. On 3 February 2012, the defence filed an application for leave to reply ("Application")⁶ to the prosecution's Response. The defence submits that there is good cause to allow it to reply on:

¹ Defence Request for Temporary Stay of Proceedings, 6 January 2012, ICC-02/05-03/09-274 with Public Annexures A, B, D, E, I, M and O, Confidential Annexures C, J, L and N, and Confidential and *ex parte* Annexures F, G, H and K available only to the Defence.

² Defence Request for an Oral Hearing, 18 January 2012, ICC-02/05-03/09-280.

³ Email from the Legal Officer to the Chamber to the prosecution on 19 January 2012 at 18:36.

⁴ Prosecution's Response to the "Defence Request for a Temporary Stay of Proceedings" and to the "Defence Request for an Oral Hearing", 30 January 2012, ICC-02/05-03/09-286-Conf.

⁵ Public Redacted Version of "Prosecution's Response to the "Defence Request for a Temporary Stay of Proceedings" and to the "Defence Request for an Oral Hearing"", filed on 30 January 2012, 1 February 2012, ICC-02/05-03/09-286-Red.

⁶ Defence Application for Leave to Reply to "Prosecution's Response to the 'Defence Request for a Temporary Stay of Proceedings' and to the 'Defence Request for an Oral Hearing'", 3 February 2012, ICC-02/05-03/09-288-Conf.

- i. the appropriate timing of the defence Requests;⁷
 - ii. the ECHR jurisprudence relied on in the Response;⁸
 - iii. whether an agreement pursuant to Rule 69 of the Rules of Procedure and Evidence (“Rules”) limits Mr Banda and Mr Jerbo’s fair trial rights on the remaining contested issues” ;⁹
 - iv. whether the defence is required to demonstrate that the unavailable evidence is “relevant”, “must relate to the heart of the case” and must have “a decisive impact” on the outcome of the case;¹⁰
 - v. alleged misrepresentations of facts;¹¹
 - vi. whether the Accused persons could be used as investigators;¹²
 - vii. alleged inconsistencies in the position of the prosecution on the usefulness of a judicial request to the Government of the Sudan (“GoS”) for cooperation.¹³
4. The defence contends that the Response advances three new legal issues (issues i, iii, and iv), which were not addressed in the initial defence Requests.¹⁴ Moreover, the defence submits that the prosecution misrepresented certain facts and jurisprudence or made statements that could mislead the Chamber (issues ii, v, vi

⁷ *Ibid.*, paragraph 8.

⁸ *Ibid.*, paragraph 9.

⁹ *Ibid.*, paragraph 10.

¹⁰ *Ibid.*, paragraph 11.

¹¹ *Ibid.*, paragraph 12, in relation to the assertion that the Defence has been able to “locate, meet with and interview potential witnesses [...] including in the Sudan and Chad”; that “[REDACTED]”; that Haskanita is in the Darfur liberated area; that “the Defence seem to have [REDACTED]”.

¹² *Ibid.*, paragraph 13.

¹³ *Ibid.*, paragraph 14.

¹⁴ *Ibid.*, paragraphs 8, 10 and 11.

and vii).¹⁵ Hence, it requests leave to reply either through an oral hearing or in writing.¹⁶

5. On 8 February 2012, the prosecution filed its response to the Application ("Response to the Application"),¹⁷ opposing the defence's request for leave to reply on the basis that its initial Response did not raise any new legal issues, misinterpret the applicable law or misrepresent the facts.¹⁸ The prosecution argues that none of these issues warrants a reply either because the defence, in its Application, has itself mischaracterised the prosecution's submissions in its Response (issues i, iii, vi and vii);¹⁹ because the issues are not new (issue iv); and because the Chamber, according to the prosecution, does not need further defence submissions (issue ii and v).²⁰

Analysis

6. The Chamber is satisfied that the prosecution's Response indeed raises certain issues that the defence should be given the opportunity to reply to. In particular, it would be of assistance to the Chamber to receive the defence's submissions on the issues identified below:

- i. the appropriate timing of the defence Requests;

¹⁵ *Ibid.*, paragraphs 9 and 12 to 14.

¹⁶ *Ibid.*, page 7.

¹⁷ Prosecution's Response to the Defence Application for Leave to Reply to the "Prosecution's Response to the Defence Request for a Temporary Stay of Proceedings" and to the "Defence Request for an Oral Hearing", 8 February 2012, ICC-02/05-03/09-291-Conf.

¹⁸ *Ibid.*, paragraph 2.

¹⁹ *Ibid.*, paragraphs 4, 6, 7, 11 and 14.

²⁰ *Ibid.*, paragraphs 5 and 8.

- ii. whether an agreement pursuant to Rule 69 of the Rules limits Mr Banda and Mr Jerbo's fair trial rights on the remaining contested issues;
- iii. whether the defence is required to demonstrate that the unavailable evidence is "relevant", "must relate to the heart of the case" and must have "a decisive impact" on the outcome of the case;
- iv. whether any of the following facts have been misrepresented:
 - a. that the Defence has been able to "locate, meet with and interview potential witnesses [...] including in the Sudan and Chad";
 - b. that "[REDACTED]";
 - c. that "the Defence seem to have [REDACTED]"; and
- v. whether the Accused persons could be used as investigators.

7. In the view of the Chamber, additional submissions on whether the ECHR jurisprudence has been misrepresented, on the assertion that "Haskanita is in the Darfur liberated area" and on the alleged inconsistencies in the position of the prosecution regarding the usefulness of a judicial request to the GoS for cooperation, are unnecessary. Therefore, leave to reply is denied on these issues.

8. The Chamber notes that the Application was filed confidential. In the view of the Chamber, a public or a public redacted version of the Application should be filed in the record of the case.

FOR THESE REASONS, THE CHAMBER

GRANTS the defence Application in relation to the issues identified in paragraph 6 above;

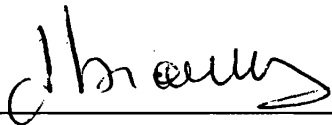
ORDERS the defence to file a public or, as the case may be, a public redacted version of its Application no later than 16:00 on 17 February 2012; and

ORDERS the defence to file its reply to the prosecution's Response no later than 16:00 on 23 February 2012.

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 16 February 2012

At The Hague, The Netherlands