

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-03/09  
Date: 10 February 2014

**TRIAL CHAMBER IV**

**Before:** Judge Joyce Aluoch, Presiding Judge  
Judge Silvia Fernández de Gurmendi  
Judge Chile Eboe-Osuji

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN***

**Public**

**Decision on Application for Leave to Reply to Defence Observations on the Annexes to Prosecution Filing ICC-02/05-03/09-517-Red (ICC-02/05-03/09-529-Conf) and related matters**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Ms. Fatou Bensouda

Mr. Julian Nicholls

**Counsel for the Defence**

Mr. Karim A.A. Khan

**Legal Representatives of Applicants**

**Legal Representatives of Victims**

**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**

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**Registrar**

Mr. Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

Trial Chamber IV (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, after considering Articles 64(7), 67(1) and 68(3) of the Rome Statute and Regulations 23 *bis*, 24(5) and 34 of the Regulations of the Court, issues the Decision on Application for Leave to Reply to Defence Observations on the Annexes to Prosecution Filing ICC-02/05-03/09-517-Red (ICC-02/05-03/09-529-Conf) and related matters.

1. On 28 August 2013, the Appeals Chamber rendered the “Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January entitled ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’” (“*Banda & Jerbo OA 4 Judgment*”),<sup>1</sup> reversing the decision of the Chamber<sup>2</sup> and directing the Chamber to decide anew on the “Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor” of 20 October 2011 (“Disclosure Request”).<sup>3</sup>
2. On 21 October 2013, the Office of the Prosecutor (“prosecution”), on the Chamber’s direction,<sup>4</sup> filed a table setting out the 232 items in the *Al Bashir* Material<sup>5</sup> which contain information sought by the defence in the Disclosure Request. This table was

<sup>1</sup> Appeals Chamber, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09-501, OA 4.

<sup>2</sup> Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, 23 January 2013, ICC-02/05-03/09-443.

<sup>3</sup> ICC-02/05-03/09-235.

<sup>4</sup> Order to the prosecution following the Appeals Chamber’s “Judgment of 28 August 2013 against Trial Chamber IV’s ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”, 25 September 2013, ICC-02/05-03/09-507, paragraph 2(b)(i). This order excluded material for which the prosecution was to seek re-classification before Pre-Trial Chamber II. See ICC-02/05-03/09-507, paragraph 2(a).

<sup>5</sup> The “*Al Bashir* Material” stands for documents that were confidentially submitted by the prosecution in support of its application for a warrant of arrest against Omar Hassan Ahmad Al Bashir.

filed as an annex *ex parte*, prosecution only.<sup>6</sup> On the Chamber's order,<sup>7</sup> a lesser redacted version of this table was filed on 10 December 2013 ("Table").<sup>8</sup>

3. On 10 January 2014, the defence filed its observations on the Table ("Defence Observations").<sup>9</sup>
4. On 16 January 2014, the prosecution applied for leave to reply to the Defence Observations ("Application").<sup>10</sup> The prosecution argues that the Defence Observations raise new and distinct issues of law and fact which the prosecution has not had the opportunity to address.<sup>11</sup> The prosecution also argues that the defence mischaracterises certain aspects of the *Banda & Jerbo* OA 4 Judgment, the clarification of which would be of assistance to the Chamber.<sup>12</sup>
5. On 20 January 2014, the defence responded to the Reply Application, submitting that it should be rejected ("Response").<sup>13</sup> The defence argues that good cause does not exist for filing a reply because "the fact that the Prosecution deliberately chose not to address [the application of the correct legal standard] [...] does not mean that the Prosecution should now be permitted to open these original brief submissions [...]".<sup>14</sup> The defence also argues that, in view of the submissions received and the

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<sup>6</sup> ICC-02/05-03/09-517-Conf-Exp-AnxA.

<sup>7</sup> Order for lesser redacted version of ICC-02/05-03/09-517-Conf-AnxA-Red, 5 December 2013, ICC-02/05-03/09-526 (recounts additional procedural history prior to this order).

<sup>8</sup> ICC-02/05-03/09-517-Conf-AnxA-Red2.

<sup>9</sup> Public redacted version of "Defence Observations on the Annexes to Prosecution filing ICC-02/05-03/09-517-Red", 10 January 2014, ICC-02/05-03/09-529-Red (confidential version notified same day with two confidential annexes).

<sup>10</sup> Application for leave to reply to Defence observations on the annexes to Prosecution filing ICC-02/05-03/09-517-Red (ICC-02/05-03/09-529-Conf), 16 January 2014, ICC-02/05-03/09-531-Conf.

<sup>11</sup> ICC-02/05-03/09-531-Conf, paragraphs 2, 4-5.

<sup>12</sup> ICC-02/05-03/09-531-Conf, paragraphs 2, 6-7.

<sup>13</sup> Defence response to the Prosecution's "Application for leave to reply to Defence Observations on the Annexes to Prosecution filing ICC-02/05-03/09-517-Red (ICC-02/05-03/09-529-Conf)", 20 January 2014, ICC-02/05-03/09-532-Conf.

<sup>14</sup> ICC-02/05-03/09-532-Conf, paragraphs 2-3.

*Banda & Jerbo* OA 4 Judgment, a sufficient amount of material has already been filed before the Chamber.<sup>15</sup>

6. On 5 February 2014, the Common Legal Representative (“CLR”) filed observations in response to the Defence Observations (“CLR Observations”).<sup>16</sup>
7. On the same date, the prosecution filed an addendum which indicated that an additional 17 items from the *Al Bashir* material should be added to the ones in the Table (“Addendum”).<sup>17</sup> A confidential redacted version of the Addendum was filed on 6 February 2014.<sup>18</sup>
8. On 10 February 2014, the defence requested that the CLR Observations be dismissed for being filed out of time and for not relating to a matter which engages the personal interests of the victims.<sup>19</sup>
9. The Chamber finds that the Defence Observations raise certain legal and factual issues that the prosecution should be given the opportunity to reply to. In particular, it would be of assistance to receive an additional submission on whether: (i) the five categories of information identified by the defence<sup>20</sup> reflect information which is *prima facie* material to the preparation of the defence and, if so, (ii) whether the *Al Bashir* material, according to the prosecution, falls within these five categories.

<sup>15</sup> ICC-02/05-03/09-532-Conf, paragraph 4.

<sup>16</sup> Observations en réponse des représentants légaux communs à la soumission ICC02/05-03/09-529 de la Défense du 10 Janvier 2014, 5 February 2014, ICC-02/05-03/09-537 (with eight annexes).

<sup>17</sup> Addendum to the Prosecution’s submission of information pursuant to the Trial Chamber’s Order of 25 September 2013, 5 February 2014, ICC-02/05-03/09-538-Conf-Exp (with two confidential *ex parte* annexes).

<sup>18</sup> Confidential redacted version of “Addendum to the Prosecution’s submission of information pursuant to the Trial Chamber’s Order of 25 September 2013” [ICC-02/05-03/09-538-Conf-Exp], 6 February 2014, (with confidential redacted version of Annex A).

<sup>19</sup> Defence response to the “Observations en réponse des représentants légaux communs à la soumission ICC-02/05-03/09-529 de la Défense du 10 Janvier 2014”, 10 February 2014, ICC-02/05-03/09-539.

<sup>20</sup> See ICC-02/05-03/09-529-Red, paragraph 8.

10. However, as to the CLR Observations, the Chamber notes that the CLR filed these observations without seeking leave of the Chamber as required by Regulation 24(5) of the Regulations. The Chamber accordingly will not accept the CLR Observations or consider them in its decision on the Disclosure Request.
11. As to the prosecution's Addendum, in the interests of resolving the Disclosure Request sufficiently in advance of the upcoming trial, the Chamber, pursuant to Regulation 34 of the Regulations, will order any defence responses to this filing on an expedited basis. The matters raised in the Addendum do not affect the personal interests of the victims and the Chamber does not consider it necessary to receive any response from the CLR to the Addendum.
12. As a final matter, although the prosecution provided reasons for a "confidential" level of classification in its Application,<sup>21</sup> the Chamber is not persuaded that the prosecution refers to any confidential information in the Application and notes the defence submission that it filed its Response confidentially only to follow the prosecution's chosen classification.<sup>22</sup> Pursuant to the principle of publicity of proceedings, the Chamber finds that both filings should be classified as public.
13. For the foregoing reasons, the Chamber hereby:
- (a) **grants** the Application;
  - (b) **orders** the prosecution to file its reply by 13 February 2014;
  - (c) **rejects** the CLR Observations;
  - (d) **orders** the defence to file a response, if any, to the Addendum by 17 February 2014; and

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<sup>21</sup> ICC-02/05-03/09-531-Conf, paragraph 3.

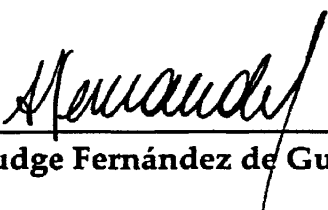
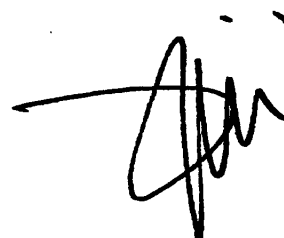
<sup>22</sup> ICC-02/05-03/09-531-Conf, paragraph 3; ICC-02/05-03/09-532-Conf, paragraph 5.

- (e) orders the Registry to reclassify as public the Application (ICC-02/05-03/09-531-Conf) and Response (ICC-02/05-03/09-532-Conf).

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



**Judge Joyce Aluoch**

  
**Judge Fernández de Gurmendi**

**Judge Chile Eboe-Osuji**

Dated 10 February 2014

At The Hague, The Netherlands