

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 March 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

Decision on the “Defence Application to File Supplementary Material”

Decision 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

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 Article 64(6)(f) of the Rome Statute (“Statute”), Rule 103 of the Rules of Procedure and Evidence (“Rules”) and Regulation 28 of the Regulations of the Court (“Regulations”), issues the following Decision on the “Defence Application to File Supplementary Material”.

I. Background and submissions

1. On 6 January 2012, the defence for Messrs Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus (“defence”) filed a “Defence Request for a Temporary Stay of Proceedings” (“defence Request”).¹
2. On 9 February 2012, the defence filed its “Defence Application to File Supplementary Material” (“Application”),² together with a public Annex A (“Annex A”) containing opinions from four “leading scholars and practitioners in the field of international criminal law”³ and a confidential letter in Annex B (“Letter”), which is a response by one information provider rejecting the cooperation request sent to it by the defence. The defence requests, pursuant to Regulation 28 of the Regulations and “on a basis similar to that envisaged in Rule 103 of the Rules of Procedure and Evidence”,⁴ leave to submit the letters and a statement provided in both annexes, arguing that they do not raise any new facts or arguments and as such are not prejudicial to the Office of the Prosecutor (“prosecution”). The defence refers to the Court jurisprudence on instances where Regulation 28 of the Regulations was relied upon in the event that supplementary

¹ Defence Request for a Temporary Stay of Proceedings, 6 February 2012, ICC-02/05-03/09-274.

² Defence Application to File Supplementary Material, 9 February 2012, ICC-02/05-03/09-292.

³ ICC-02/05-03/09-292, paragraph 2.

⁴ ICC-02/05-03/09-292, paragraphs 2 and 5.

material filed by a participant may be of assistance to the Chamber in deciding on the issue *sub judice*.⁵

3. On 17 February 2012, both the prosecution⁶ and the legal representatives for victims (“legal representatives”)⁷ filed their responses to the defence Application.
4. The prosecution requests that the submission of Annex A be rejected but does not object to the submission of the confidential Letter in Annex B, as the defence already alluded to it in its initial Request.⁸ In opposing the inclusion of Annex A in the record of the case, the prosecution argues, *inter alia*, that Regulation 28 should not be mistakenly used to allow late submissions of supplementary material that is “superfluous, unnecessary and prejudicial”.⁹ It further submits that the four external lawyers may have “no unique expertise” on the issue at stake, “incomplete understanding of the facts” and may be of “questionable reliability”.¹⁰ As a result, the filing of the personal views of these lawyers is of no assistance to the Chamber and replicates the initial defence Request.¹¹ Finally, the prosecution notes that the Chamber did not deem it necessary to invite observations from *amici curiae*, and argues that the Application submitting letters in Annex A cannot be considered to meet the requirements under Rule 103 of the Rules, which states the appropriate procedure for receiving *amici curiae* observations.¹²

⁵ ICC-02/05-03/09-292, paragraph 5 and footnote 4.

⁶ Prosecution’s Response to the Defence Application to File Supplementary Material, 17 February 2010, ICC-02/05-03/09-297.

⁷ Réponse des Représentants légaux Communs, 17 February 2012, ICC-02/05-03/09-296.

⁸ ICC-02/05-03/09-297, paragraph 10.

⁹ ICC-02/05-03/09-297, paragraphs 4 and 5.

¹⁰ ICC-02/05-03/09-297, paragraphs 5 and 7.

¹¹ ICC-02/05-03/09-297, paragraphs 7 and 8.

¹² ICC-02/05-03/09-297, footnote 10 and paragraph 9.

5. The legal representatives request that the Application be rejected in its entirety as such an application cannot be received by the Chamber pursuant to Regulation 28 of the Regulations nor considered on the basis of Rule 103 of the Rules.¹³ They submit that Regulation 28 is not applicable in the present instance because this provision triggers the filing of additional information at the Chamber's initiative only and not at the initiative of a participant.¹⁴ The legal representatives further submit that the defence has not justified the reasons why and to which extent the opinions of leading scholars would be of assistance to the Chamber for the purpose of its determination on the defence Request.¹⁵ In the same line, the legal representatives also underline that the opinions appended in Annex A are general and vague in nature and as a result, are not useful to the Chamber.¹⁶ Finally, the legal representatives, based on an analysis of the relevant jurisprudence, argue that the defence's reliance on Rule 103 of the Rules is equally not appropriate in this case.¹⁷

II. Analysis and Conclusions

6. With regard to the legal basis of the Application, namely Regulation 28 of the Regulations, the Chamber finds such a legal basis inapposite as it applies, in principle, in instances where it is incumbent upon the Chamber to require additional information from a participant and not where a participant wishes to file supplementary material once the initial time-limit for responses has elapsed. In addition, had the defence requested leave to submit these letters "on a basis similar to that envisaged in Rule 103" of the Rules, the Chamber notes that Rule 103 sets out a procedure which has not been followed in the present case.

¹³ ICC-02/05-03/09-296, paragraph 10.

¹⁴ ICC-02/05-03/09-296, paragraphs 11 to 19.

¹⁵ ICC-02/05-03/09-296, paragraphs 20 to 25.

¹⁶ ICC-02/05-03/09-296, paragraphs 26 to 28 and 30.

¹⁷ ICC-02/05-03/09-296, paragraphs 31 to 47.

7. In any event, with regard to the need for supplementary material contained in the public Annex A, the Chamber agrees with the prosecution and the legal representatives on its general and repetitive nature. The Chamber further recalls its “Order on the request to file an *amicus curiae* brief on the defence request for a temporary stay of proceedings and the prosecution’s related request” issued on 23 February 2012,¹⁸ by which it rejected, pursuant to Rule 103 of the Rules, the application for receiving the observations of the Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia, as *amicus curiae*. This was denied “given the extensive scope of the filings made by the parties and participants”.¹⁹ In the present circumstances, the Chamber finds the information contained in Annex A unnecessary and of no assistance to it for the purpose of its final determination on the defence Request.
8. In relation to the confidential Annex B, the Chamber notes that the defence alluded to the Letter in its initial Request, specifying that at the time of its filing, responses to requests for cooperation sent by the defence to different institutions were still pending.²⁰ The Chamber acknowledges that the Letter in confidential Annex B constitutes a response to one of the defence cooperation requests. In these circumstances, the Letter is to be considered as part of the defence initial Request and does not, as suggested by the defence, raise any new facts or arguments. In addition, the Chamber finds that the Letter is not prejudicial to the prosecution. Indeed, the prosecution itself does not oppose its submission. Therefore, pursuant to Article 64(6)(f) of the Statute, the Chamber is of the view that the Letter should be

¹⁸ Order on the request to file an *amicus curiae* brief on the defence request for a temporary stay of proceedings and the prosecution’s related request”, 23 February 2012, ICC-02/05-03/09-302.

¹⁹ ICC-02/05-03/09-302, paragraph 5.

²⁰ ICC-02/05-03/09-274, paragraph 17 and footnote 35.

part of the record and should be considered, among other documents before it, for the purpose of its final determination on the defence Request.

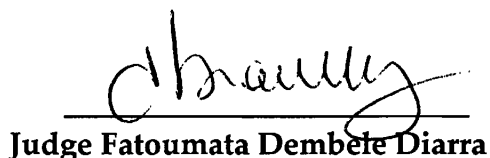
9. For the forgoing reasons, the Chamber hereby:

- (i) rejects the submission of Annex A to the extent that the Chamber will not consider it for the purpose of its determination on the defence Request; and
- (ii) accepts the submission of the Letter in confidential Annex B as part of the record of the case.

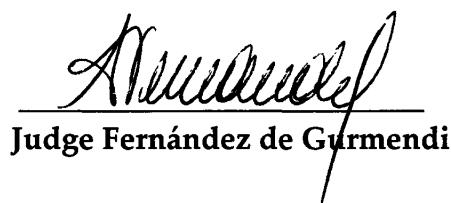
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fatoumata Dembele Diarra



Judge Fernández de Gurmendi

Dated this 9 March 2012

At The Hague, The Netherlands