

**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**

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**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”),<sup>1</sup> 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.<sup>2</sup>
2. On 10 November 2011, the prosecution filed its “Prosecution Response to Defence Request for Disclosure” (“prosecution’s Response”),<sup>3</sup> 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”).<sup>4</sup> 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

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

<sup>2</sup> ICC-02/05-03/09-235, paragraph 1.

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

<sup>4</sup> 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[...].<sup>5</sup>The 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> The prosecution concludes that the defence has not shown good cause justifying leave to reply and that leave should be rejected.<sup>9</sup>
5. Having considered the above submissions, the Chamber does not deem it necessary to convene a hearing as requested by the defence<sup>10</sup> 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.

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

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

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

<sup>8</sup> 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.

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

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

6. For the reasons above, the Chamber,

**(i) grants** the defence's Application; and

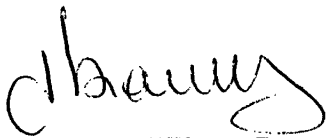
**(ii) orders** the defence to file its reply in writing by 16.00 on 30 November 2011.

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



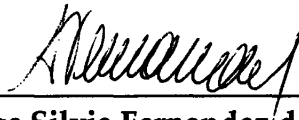
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**Judge Joyce Aluoch**  
**Presiding Judge**



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**Judge Fatoumata Dembele Diarra**



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**Judge Silvia Fernandez de Gurmendi**

Dated this 24 November 2011

At The Hague, The Netherlands