

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-02/05-03/09
Date: 18 November 2011

TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

**Prosecution's Response to Defence Application for Leave to Reply to the
Prosecution's Response to the Defence Request for Disclosure**

Sources: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

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Victims and Witnesses Unit

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Detention Section

Victims Participation and Reparations Section

Other

Submissions

1. The Prosecution requests the Trial Chamber to deny the Defence Application for Leave to Reply to the Prosecution's Response to the Defence Request for Disclosure ("The Defence Application")¹. Contrary to the Defence's submissions, the Prosecution's Response² does not raise new issues, misinterpret the applicable law, or misrepresent the facts.

2. The key argument of the Prosecution in its Response to the Defence Request for Disclosure is that the material sought is irrelevant to the issues in this case and accordingly not disclosable.³ That response, and the justifications therefore, could and should have been anticipated. Accordingly, the Defence has not shown good cause justifying leave to reply in writing or orally at a hearing.

3. The specific points raised by the Defence are unmeritorious. For instance, the Defence incorrectly characterizes the Prosecution's position as arguing that disclosure is not warranted due to the volume of the material requested (over 5000 pages). The Prosecution mentioned the 5000 pages to explain to the Trial Chamber (a different Chamber to the one that determined the *Al Bashir* Arrest Warrant Application) the volume of material sought, since the Defence request did not include that fact. The additional reference to the public availability of some of the material was made to indicate that the Defence request was unreasonable. The Defence admitted that the material was public.⁴

¹ ICC-02/05-03/09-255.

² ICC-02/05-03/09-251 + Conf-Anxs A & B.

³ ICC-02/05-03/09-251, paragraph 3: "The material requested by the Defence is not relevant to any of these issues."

⁴ ICC-02/05-03/09-251-Conf-AnxA, page 3, line seven, paragraph 4, and page 13, line 3, paragraph 1.

4. Nor is there justification to reply to the Prosecution statement, at paragraph 7 of its Response, that “the Defence did not explain how it understood [additional] facts [proposed by the Defence] to be relevant to the three contested issues remaining in this case, nor did the Prosecution see a correlation”. The Chamber can assess that statement and determine if in fact the Defence did explain or if there is a correlation, without the benefit of a Defence reply.

5. The Defence also refers to the “...*new and distinct legal question as to whether the Prosecution may be relieved of its disclosure obligations where an accused before the Court may be able to testify to his own motives and indeed whether he is required to do so in order to relieve the Prosecution of the inconvenience of disclosing Article 67(2) and Rule 77 evidence.*”⁵ Without regard to the mischaracterisation of the Prosecution’s submission, the Prosecution notes that the Defence itself raised the issue of motive and discussed it at length.⁶ Consequently, the issue of motive is not a “new and distinct legal question”. The Defence failure to foresee a Prosecution response regarding the relevance of motive to justify disclosure does not justify a reply.

6. The Defence argues that the Prosecution’s submissions “...*as to the elements of the crimes charged and to the guilt or innocence of Messrs. Banda and Jerbo, which are matters for trial, were unforeseeable*”.⁷ Again, the Defence made extensive submissions regarding the parameters and relevance of the elements “in accordance with the Charter of the United Nations” and “peacekeeping mission” in its initial request for disclosure⁸ and thus should have foreseen that the Prosecution would respond.

⁵ ICC-02/05-03/09-255, paragraph 9.

⁶ ICC-02/05-03/09-235, paragraphs 16-19.

⁷ ICC-02/05-03/09-255, paragraph 11.

⁸ ICC-02/05-03/09-235, paragraphs 20-25.

7. Accordingly, the Prosecution requests the Trial Chamber to reject the Defence Application.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is centered on the page.

Luis Moreno – Ocampo
Prosecutor

Dated this 18th Day of November 2011
At The Hague, The Netherlands