

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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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 the Defence Application to File Supplementary
Material**

Sources: Office of the Prosecutor

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

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I. Introduction

1. On 6 January 2012, the Defence requested a temporary stay of the proceedings.¹ On 9 February, it filed the Defence Application to File Supplementary Material (Defence Application),² appending Defence Annexes A and B, pursuant to Regulation 28 of the Regulations of the Court (“the Regulations”). Defence Annex A comprises of curricula vitae together with letters (and in one case a statement) of four individuals, addressed to lead co-counsel for the Defence, expressing their agreement with the Defence argument that the Accused cannot be guaranteed a fair trial. Defence Annex B is a letter from the United Nations.
2. Judicial decisions should not be influenced by polling the outside legal community, even less so by a limited and selective poll. Nor is the submission of outside opinions through a supplementary filing of additional information sanctioned by the Statute, Rules, Regulations, or any other authority. The Prosecution thus opposes the submission of Defence Annex A and requests that the documents contained therein be expunged from the record of the case.
3. The Prosecution does not object in substance to the document contained in Defence Annex B.

II. Submissions

a) Documents in Annex A to the Defence Application

4. The chambers of this Court have set out the parameters of the exercise of the discretionary power under Regulation 28 by the chamber when moved by a

¹ ICC-02/05-03/09-274 + Anxs A, B, D, E, I, M, O + Conf-Anxs C, J, L, N and Conf-Exp-Anxs F, G, H and K.

² ICC-02/05-03/09-292

party to do so. Indeed, as acknowledged by the Defence,³ supplementary material may be submitted pursuant to Regulation 28 when it may *be of assistance* to the Chamber in deciding the issue *sub judice*⁴. Accordingly, where the supplementary material proposed for submission is not *of assistance* to the Chamber in deciding the outstanding issue, the application ought to be denied.⁵ Put simply, Regulation 28 of the Regulations should not be used by parties as a vehicle to reopen the door during litigation only to overload the Chamber with superfluous, unnecessary or prejudicial material.

5. At the outset, the Prosecution submits that personal opinions on the ultimate legal issue to be resolved do not constitute the kind of materials contemplated by Regulation 28. There is no reason why the personal views on the merits of an issue of an outside lawyer, with no standing before the Chamber, should be accepted into the Court's record. These four lawyers, though experienced, offer no unique expertise or perspective that the parties, participants, and judges all lack. Nor is it appropriate as a procedural matter to allow the late submission of such materials to augment or confirm the submission of a party, thereby effectively allowing the party to exceed page and filing date restrictions by submitting new arguments or reiterating previous positions. Perhaps most importantly, to the extent that these letters may create the appearance that the Chamber can or might be influenced by the opinions of third parties, their inclusion in the record discredits the Court or, at a minimum, permits a perception of impropriety.
6. Nor is there any special circumstance in this case that might warrant the extraordinary step of accepting outside opinions. First, the issue at hand is

³ ICC-02/05-03/09-292, paragraph 5 and footnote 4.

⁴ ICC-01/04-01/10-455, pp. 3-4 ; see also ICC-01/04-01/07-522 OA3, para. 16 ; ICC-01/04-01/07-476, paras 16-20; ICC-01/04-01/06-1476, para. 3.

⁵ See e.g. ICC-01/04-01/10-455; ICC-01/04-01/06-1476.

whether, under the existing facts of this case, the fair trial rights of the two Accused persons have been breached to the extent that a temporary stay of proceedings is warranted. Both the Defence and the Prosecution have provided detailed written submissions.⁶ This issue is not complicated or beyond the comprehension of professional judges. The Chamber has not deemed it necessary to invite observations from *amici curiae* on this issue, as it is able to do under Rule 103 of the Rules of the Court (“Rules”). And indeed, two Chambers have resolved issues relating to the staying of proceedings and numerous decisions address, in a variety of formulations, the fair trial rights of accused persons.⁷

7. Second, the letters and statement contained in this annex⁸ express opinions endorsing the Defence position that are predicated upon an incomplete understanding of the facts and were given without having read the Prosecution’s responsive arguments. There is no indication that the opinions expressed by the authors have been formed other than on the basis of the Defence Request for a Temporary Stay of Proceedings⁹ and its accompanying annexes. Any opinions founded on such a limited basis, and that appear to be

⁶ On 164 of February 2012 the Chamber also granted leave to the Defence to reply to the Prosecution’s response on certain identified issues (see ICC-02/05-03/09-294-Red).

⁷ ICC-01/04-01/06-1401; ICC-01/04-01/06-1486; ICC-01/04-01/06-2582; ICC-01/04-01/10-264; ICC-01/04-01/06-772; ICC-01/04-01/06-2690-Red2.

⁸ The Prosecution observes that of the 35 pages contained in Defence Annex A, only on 6 pages cover the actual letters and statement in question. The remaining pages relate to the profiles and qualifications of the lawyers and the respective cover sheets.

⁹ Three of the individuals cited in Defence Annex A state that they base their response on a review of the Request for a Stay of Proceedings. See in particular **Annex A1** at ICC-02/05-03/09-292-AnxA, page 4 (“**Having reviewed the defence’s filing for a temporary stay of proceedings (ICC-02/05-03/09-274) in the case of Mr. Abdallah Banda and Mr. Saleh Jerbo before the International Criminal Court, I write to express my serious misgivings about the predicament of your clients.**”[emphasis added]); **Annex A2** at ICC-02/05-03/09-292-AnxA, page 10 (“**I write in support of the request for a temporary stay of proceedings which your Defence team filed on 6th January 2012 in the case of Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09).**”[emphasis added]); **Annex A3** at ICC-02/05-03/09-292-AnxA, page 15 (“**The procedural barriers encountered by the Defense Team and detailed in the Defense Request for a Temporary Stay of Proceedings dated 6 January 2012 are severe and persistent.**”[emphasis added]). The fourth individual merely refers to the letter of Judge Goldstone annexed to the Request for a Stay of Proceedings (ICC-02/05-03/09-274-AnxO) - see **Annex A4** at ICC-02/05-03/09-292-AnxA, page 33 (“**I have read the letter in support of the Defence Application written by Mr. Justice (Retired) Richard Goldstone and dated December 30, 2011 and I agree with it in entirety.**”). None refer to or cite any other source of case-specific information.

based on no other material in the case, are necessarily of questionable reliability and therefore can be of no assistance to the Chamber.¹⁰

8. Third, the opinions contained in Defence Annex A repeat submissions already made by the Defence in its request for a temporary stay of proceedings. They provide no new information. They are thus purely superfluous. As PTC I has stated, where the issue at hand has already been “...adequately addressed in the submissions”, additional submissions via Regulation 28 “...would not be of assistance to the Chamber in its determination...”¹¹.

9. In light of the absence of any particular need for this information, the Prosecution submits that there is no justification to create a new process not provided in the Rules or Regulations whereby outside lawyers may submit their opinions in support of a party position. In that regard, the Prosecution disagrees with the Defence implication that the letters should be included in the record because they would “be of assistance” to the Chamber “...on a basis similar to that envisaged in Rule 103”.¹² Nothing in the process followed by the Defence adhered to the procedures “envisaged in Rule 103”. And the Defence Application fails to meet the Rule’s requirements as laid down in prior ICC cases.¹³ First, an application under Rule 103 cannot be made by a “party” to the proceedings.¹⁴ Second, an applicant may only submit observations pursuant to Rule 103 of the Rules if the Chamber “invite[s] or grant[s] leave” to do so.¹⁵ The requirement that the Chamber decide this first, before the materials are submitted, is critically important to guarantee that the Chamber will not be exposed to unsolicited and

¹⁰ The Prosecution notes that none of the authors have sought to avail themselves of the procedure in Rule 103 of the Rules of the Court.

¹¹ ICC-01/04-01/10-455, page 4

¹² ICC-02/05-03/09-292, para 2.

¹³ Appeals Chamber, “Decision on ‘Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, ICC- 01/04-01/06-1289, para. 8.

¹⁴ ICC-01/09-35, para 6.

¹⁵ ICC-01/09-14, para 6; See also ICC-01/04-01/06-1289, para. 8.

prejudicial influences. Chambers thus have criticised would-be *amici* who make substantive submissions without prior authorisation.¹⁶ Accordingly, there can be no basis upon which the opinion letters that the Defence appended to its application should even have been filed. Finally, as noted previously, the opinions of four outside lawyers based on a one-sided presentation of facts offer no apparent assistance to the Chamber.

b) Documents in Annex B to the Defence Application

10. As regards the letter contained in Defence Annex B, the Prosecution observes that at paragraph 17 and footnote 35 of its request for a temporary stay of the proceedings, the Defence alluded to letters that were transmitted to a number of bodies, including OCHA, for which responses were still outstanding. Defence Annex B appears to be a letter from the United Nations in response to the Defence letter.¹⁷ Accordingly, the Prosecution does not object to its submission.

¹⁶ICC-01/09-01/11-84, para 5 & 6; ICC-01/09-14, para 9; ICC-01/04-01/06-1289; ICC-01/04-373; ICC-01/04-01/06-919-tEN; ICC-02/04-01/05-342; ICC-01/05-01/08-602, paras. 8 & 9.

¹⁷ The fact that the Defence received the letter from OCHA contained in Defence Annex B as recently as 2 February 2012 (see ICC-02/05-03/09-292, para. 3) further confirms that the Defence letters transmitted to the organisations and bodies referred to in footnote 35 of the Defence Request for Temporary Stay of Proceedings are still under consideration and being responded to.

III. Conclusion

11. For the reasons set out above, the Prosecution respectfully requests the Trial Chamber to reject the Defence Request in so far as it relates to Annex A of the Defence Application.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is centered on the page. The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Luis Moreno – Ocampo, Prosecutor

Dated this 17th day of February 2012

At The Hague, The Netherlands