

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: 16 January 2014

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF

THE PROSECUTOR v.

ABDALLAH BANDA ABAKAER NOURAIN

Confidential Document

**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)**

Source: 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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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution requests leave, pursuant to Regulations 24(5) of the Regulations of the Court, to reply to the “Defence Observations on the Annexes to Prosecution filing ICC-02/05-03/09-517-Red”,¹ (“Submission” or “Defence Submission”).
2. Good cause² exists for a brief reply to the Defence Submission. The Defence Submission raises “new and distinct issues of law and fact” which the Prosecutor has not had the opportunity to address.³ Moreover, the Defence mischaracterises certain aspects of the recent findings of the Appeals Chamber - the clarification of which “would be of assistance to the Chamber”.⁴
3. The Prosecution submits this Request confidentially, because it is a request for leave to reply to a confidential document and because it refers to the contents of a confidential annex.⁵

Submissions

4. First, in the Submission, the Defence introduces a new category of alleged Rule 77 materiality - not linked to the contested issues in the case - titled “Defence investigations and trial preparations.”⁶ As conceded by the Defence,⁷ this is a category that has not previously featured in Defence submissions. Hence, it is a category and argument that the Prosecution has not had an opportunity to address. This new argument alone warrants granting of leave to reply.

¹ ICC-02/05-03/09-529-Conf.

² Regarding the standard of “good cause” *see, e.g.*, ICC-01/05-01/08-294, para.3.

³ Regarding “new and distinct issues of law and fact”, *see* ICC-01/04-01/10-61, page 3.

⁴ ICC-02/05-03/09-147, para.5

⁵ See Regulation 23*bis*.

⁶ Defence Submission, para.8.

⁷ Defence Submission, para.8.

5. If granted leave to reply, the Prosecution will set out why such a category of purported relevance – which is so broad as to be of virtually no utility - does not meet the *prima facie* threshold. The Prosecution will clarify that the new category is a tautology which, if accepted, would allow the Defence to argue the materiality of any information merely by labelling it as necessary for Defence investigations / preparation.
6. Second, the Defence appears to be proceeding under the erroneous assumption that the Appeals Chamber has rejected the definition of the scope of materiality adopted by the Trial Chamber. The Defence claims that “[t]he test is not relevance to the contested issues”.⁸ However, the Appeals Chamber has made no such finding.
7. If granted leave to reply, the Prosecution will:
 - Clarify that the Appeals Chamber did not reject the Trial Chamber's original findings on materiality, in which the Trial Chamber correctly focussed the question of materiality on the three contested issues.⁹
 - Clarify that the Appeals Chamber merely set out a new procedure for Rule 77 analysis which separates the assessment of materiality from assessment of restrictions on disclosure,¹⁰ but did not set out a new scope for Rule 77 materiality.
 - Set out how the Trial Chamber’s original findings on materiality do not contradict the threshold of *prima facie* materiality set by the Appeals Chamber.¹¹

⁸ Defence Submission, para.6.

⁹ ICC-02/05-03/09-443, paras. 18, 20- 22, 24.

¹⁰ ICC-02/05-03/09-501, para.1. The Issue that was certified for appeal by the Trial Chamber in the context of materiality was limited to the contested issues - i.e. “[W]hether the Trial Chamber erred in its application of Rule 77 by (a) *interpreting the scope of the Contested Issues too narrowly* for the purposes of the Defence Request for Disclosure...”. See ICC-02/05-03/09-457, para.21.Emphasis added.

¹¹ ICC-02/05-03/09-443, para.14.

- Clarify why, in light of the above, no new or additional analysis is required by the Trial Chamber regarding the scope of materiality since the scope adopted by the Trial Chamber remains valid and can be applied without change as the first part of the new procedure for Rule 77 analysis.

Relief Requested

8. Based on the above submissions, the Prosecution respectfully requests the Trial Chamber to grant it leave to reply to the Defence Observations under Regulations 24(5).



Fatou Bensouda
Prosecutor

Dated this 16th day of January 2014

At The Hague, The Netherlands