

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **20 January 2014**

TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

Confidential

Defence response to the Prosecution's "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)"

Sources: Defence for Abdallah Banda Abakaer Nourain

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

The Office of the Prosecutor

Ms. Fatou Bensouda
Mr. James Stewart
Mr. Julian Nicholls

Counsel for the Defence

Mr. Karim A. A. Khan QC

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The defence for Abdallah Banda Abakaer Nourain ("Defence") opposes the Prosecution's *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) ("Request")*.¹

II. Submissions

2. Good cause does not exist for leave to reply to the Defence Submission² to be granted to the Prosecution. At core, the two grounds advanced by the Prosecution in the Request collapse into a dispute about the correct legal standard to be applied to disclosure under Rule 77 of the Rules of Procedure and Evidence.³ The Defence position, relying on statements of the Appeals Chamber, is that the test is not relevance to the contested issues; it is *prima facie* materiality to the preparation of the defence.⁴ The Prosecution take the contrary position.⁵
3. Central to the question of disclosure is the application of the correct legal standard. This is a question which the Prosecution should reasonably have anticipated would be addressed by the Defence in detail in its observations. The fact that the Prosecution deliberately chose to address this central question in its original submissions via one statement, repeated three times,⁶ does not mean that the Prosecution should now be permitted to re-open these original brief submissions in order to remedy what it clearly believes is a failure to properly articulate and legally justify its position. In any event, despite the brevity of the Prosecution's submissions, its position is, nevertheless, clear and no further submissions are warranted.

¹ ICC-02/05-03/09-517-Red.

² As defined at paragraph 1 of the Request.

³ The two grounds are identified at paragraphs 4 and 6 of the Request.

⁴ Defence Submission, paras. 5 – 7.

⁵ ICC-02/05-03/09-517-Red, paras. 3, 12 and 32.

⁶ *Ibid.*

4. Further, the original request for disclosure has been outstanding since October 2011.⁷ Both parties have made extensive submissions on the request, the latest being in respect of the annexes to filing ICC-02/05-03/09-571-Red. There is also a detailed and considered Appeals Chamber judgement providing guidance on the application of Rule 77.⁸ The Defence submits there is sufficient material before the Trial Chamber to rule on the question of disclosure, including the question of the correct legal standard. This is particularly the case when the Prosecution effectively (albeit improperly) argues the terms of its proposed reply in the body of the Request.⁹

III. Classification

5. The Defence submits this filing on a confidential basis pursuant to Regulation 23*bis*(2) of the Regulations of the Court. However, in the interests of the publicity of these proceedings, the Defence has no objection to this filing being reclassified as "public" because it does not refer to any confidential material.

IV. Relief Requested

6. For the reasons set out above, the Defence respectfully requests that the Trial Chamber reject the Request.

⁷ ICC-02/05-03/09-235. As noted at footnote 13 of filing 235, the Defence first requested disclosure of the material from the Prosecution in an email dated 19 July 2011.

⁸ ICC-02/05-03/09-501.

⁹ Request, paras. 5 and 7.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel
for Abdallah Banda Abakaer Nourain

Dated this 20th day of January 2014

At The Hague, Netherlands