

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 24 September 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

Public

**Public Redacted Version of “Defence Application for Leave to Reply to
‘Prosecution response to the Defence application for leave to appeal the 11
September 2014 arrest warrant decision or for reconsideration of the same’”**

Sources: Defence Team of Abdallah Banda Abakaer Nourain

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

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**Victims Participation and Reparations
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Other

I. Introduction

1. Pursuant to Regulation 24(5) of the Regulation of the Court (“Regulations”), the defence for Abdallah Banda Abakaer Nourain (“Defence”) seeks leave to reply to the *Prosecution response to the Defence application for leave to appeal the 11 September 2014 arrest warrant decision or for reconsideration of the same* (“Response”).¹
2. While ostensibly fashioned as a “response” to the *Defence Application for Leave to Appeal the Decision on “Warrant of arrest for Abdallah Banda Abakaer Nourain” and in the alternative Request for Reconsideration* (“Application”),² the Response is in large measure an independent application for reconsideration of the decision issuing an arrest warrant against Mr. Banda (“Decision”)³ on wholly different grounds than those raised in the Application. Indeed, the Response requests in effect that the Trial Chamber reconsider its dismissal⁴ of the *Prosecution application for an order requiring an undertaking from the Accused that he will appear for trial on 18 November 2014*.⁵
3. Notwithstanding the Defence’s procedural right pursuant to Regulation 24(1) of the Regulations to respond to this independent application for reconsideration, out of an abundance caution and for sake of judicial economy the Defence defers to the Trial Chamber and seeks leave to reply to the submissions in the Response that the Defence has made a “U-turn”⁶ and “advanced for the first time in the Defence application” that [REDACTED]:
 - i. “[REDACTED]”
 - ii. “[REDACTED].”⁷

¹ 22 September 2014, ICC-02/05-03/09-609-Conf-Exp.

² 17 September 2014, ICC-02/05-03/09-608-Conf-Exp.

³ Warrant of arrest for Abdallah Banda Abakaer Nourain, 11 September 2014, ICC-02/05-03/09-606. Judge Eboe-Osuji’s dissent to the Decision was issued on 15 September 2014 (ICC-02/05-03/09-606-Anx).

⁴ Decision, para. 26(i).

⁵ 9 September 2014, ICC-02/05-03/09-603-Conf.

⁶ Response, para. 3.

⁷ Response, para. 2 (internal citations to Application omitted).

4. The Response misrepresents the Defence's consistent submissions [REDACTED].
- Further, as submitted above, the Response constitutes an independent application for reconsideration with respect to which the Regulations mandate the Defence be provided an opportunity to respond. The Defence accordingly submits that the test for leave to reply is satisfied with respect to the above identified issues raised in the Response, particularly in the context of litigation pertaining to essential issues in the case – the issuance of an arrest warrant and the suspension of all preparations for trial.

II. Confidentiality

5. Pursuant to Regulation 23*bis*(2) of the Regulations, this filing is submitted on a confidential and *ex parte* basis as it relates and refers to previous filings that are so classified.

III. Applicable Law

6. A Chamber may grant leave to reply when the moving party has shown "good cause".⁸ Both Pre-Trial and Trial Chambers have deemed good cause to exist when new and distinct issues of law and fact are raised in the response and where the importance and potential effect of the issues contained in the original application and response necessitate additional submissions being made.⁹ This Chamber has specifically held that good cause may be shown where facts have been misrepresented.¹⁰

⁸ See e.g. *Prosecutor v. Bemba*, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294, para. 3: "Having considered the Application, the Single Judge is of the opinion that the Defence has shown good cause to grant leave to reply to the Prosecutor's Response."

⁹ See e.g. *Prosecutor v. Mbarushimana*, Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material", ICC-01/04-01/10-61, 24 February 2011; *Prosecutor v. Katanga & Ngudjolo*, Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the *Regulations of the Court*), 27 March 2009, ICC- 01/04-01/07-1004-tENG.

¹⁰ Redacted Order on the defence Application for Leave to Reply to the "Prosecution's Response to the 'Defence Request for a Temporary Stay of Proceedings' and to the 'Defence Request for an Oral Hearing'", 16 February 2012, ICC-02/05-03/09-294-Red, para. 6(iv).

IV. Submissions

7. The Defence respectfully requests leave to reply to the Response's submission that the Defence "advanced for the first time in the Defence application" that [REDACTED]:
 - i. "[REDACTED]"
 - ii. "[REDACTED]." ¹¹

8. The Defence seeks leave to clarify to the Chamber how the Prosecution has mischaracterised the Defence's consistent submissions [REDACTED]. Given that the Response is at its core an independent application for reconsideration of the Decision on the basis of the above-identified issues, the Defence submits that correcting the Prosecution's misrepresentation will assist the Trial Chamber in determining the legal basis of this independent reconsideration application.

9. In particular, should the Chamber grant leave to reply to the Response, the Defence will file succinct submissions that demonstrate that:
 - i. The Defence's submissions [REDACTED] have remained consistent;
 - ii. The Response has misinterpreted and selectively quoted ¹² the ambit and meaning of the *Decision as to the Further Steps for the Trial Proceedings* ¹³ as it pertains to [REDACTED]; and therefore
 - iii. The independent application for reconsideration contained in the Response is wholly lacking in legal basis and should be rejected.

¹¹ Response, para. 2 (internal citations to Application omitted).

¹² Response, para. 8 ("The July Decision, in turn, was premised on the understanding that it was 'necessary to ensure the cooperation of Sudan . . . to facilitate [the Accused's] presence at the trial'" .)

¹³ 14 July 2014, ICC-02/05-03/09-590-Conf.

V. Relief Requested

10. Based on the foregoing submissions the Defence respectfully requests that the Trial Chamber grant the Defence leave to reply to the critical matters identified at paragraph 7 above.

Respectfully Submitted,



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

Dated this 24th Day of September 2014
At The Hague, the Netherlands