

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 17 November 2010

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF *THE PROSECUTOR V. ABDALLAH BANDA ABAKAER
NOURAIN AND SALEH MOHAMMED JERBO JAMUS***

Public

**Decision on the “Defence Application pursuant to article 57(3)(b) of the Statute for
an order for the preparation and transmission of a cooperation request to the
Government of the Republic of Sudan”**

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Mr Essa Faal, Senior Trial Lawyer

Counsel for the Defence
Mr Karim A.A. Khan

Legal Representatives of Victims
Mr Brahim Koné
Ms Hélène Cissé
Mr Akin Akinbote
Colonel Frank Adaka
Sir Geoffrey Nice & Mr Rodney Dixon

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I, Judge Cuno Tarfusser, acting as Single Judge of Pre-Trial Chamber I in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*¹;

NOTING the “Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan” dated 10 November 2010 (“Defence Application”) ²;

NOTING the observations submitted by the Office of the Prosecutor on 16 November 2010³;

NOTING article 57(3)(b) of the Rome Statute (“Statute”);

ISSUE THE FOLLOWING DECISION

1. The Defence Application is based on article 57(3)(b) of the Statute and is aimed at obtaining from the Pre-Trial Chamber a request addressed to the Republic of Sudan to provide various forms of assistance to the Defence team, with a view to allowing them to “properly prepare their case”. More specifically, the Defence submits that such proper preparation requires that the team be in a position “to visit various locations within Sudan in order to conduct investigations and locate and interview witnesses”⁴. In its view, the granting of the Application at this stage is necessary in light of the failure of the various attempts made by the Defence to achieve the purpose of entering Sudan, both by way of a request to the Registry of the Court⁵ and by way of requests directly addressed to the Republic of Sudan⁶. It further argues that Security Council Resolution 1593/2005, referring the situation of Darfur to the Court, provides an appropriate legal basis for the Chamber to request the cooperation of the

¹ ICC-02/05-210.

² ICC-02/05-03/09-95+Anx.

³ ICC-02/05-03-09-101.

⁴ ICC-02/05-03/09-95, paragraph 6.

⁵ ICC-02/05-03/09-95, annex A.

⁶ ICC-02/05-03/09-95, Annexes C and D.

Republic of Sudan pursuant to article 57(3)(b) of the Statute and rule 116(1) of the Rules and lists various reasons preventing it from otherwise achieving the desired goal.

2. Article 57(3) (b) of the Statute provides that the Pre-Trial Chamber may, “upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be *necessary* to assist the person in the preparation of his or her defence” (emphasis added).

3. The Defence Application fails to elaborate on the reasons which would make the requested order by the Chamber “necessary” at this particular stage of the proceedings, in particular in light of the strategy pursued by the Defence in respect of the forthcoming confirmation hearing. On 19 October 2010, the Defence and the Prosecutor filed their “Joint Submission by the Office of the Prosecutor and the Defence as to Agree Facts and submissions regarding modalities for the conduct of the Confirmation hearing”⁷, stating *inter alia* the following (i) that “the Defence does not contest any of the material facts alleged in the DCC for the purposes of confirmation”⁸; (ii) that, at the confirmation hearing, the Defence “shall not ‘object to the charges’ contained in the DCC, ‘challenge the evidence presented by the Prosecutor’ or otherwise ‘present evidence’”⁹.

4. These statements clarify that any investigative step which might be taken, as well as any evidentiary material which might be collected, following an order issued pursuant to article 57(3)(b) would serve no purpose for the pre-trial phase of the case, namely in respect of the confirmation hearing which will conclude it. It appears significant that the Defence Application (as opposed to the request initially addressed by the Defence to the Registry) only refers to the need to “prepare its case”, or to “the

⁷ ICC-02/05-03/09-80.

⁸ ICC-02/05-03/09-80, Paragraph 5.

⁹ ICC-02/05-03/09-80, paragraph 6.

proper preparation of the defence”, and that no mention is made of the confirmation hearing. Accordingly and in light of the upcoming commencement of the confirmation hearing, the Single Judge takes the view that the requested orders and measures do not qualify as “necessary” in respect of the pre-trial phase.

5. In the event that one or more of the charges brought against the suspects were to be confirmed and the case were therefore to proceed to trial, the Defence would always be entitled to file a new application with the Trial Chamber. Pursuant to article 61(11) of the Statute, after the pre-trial stage of the proceedings is exhausted, the responsibility for the conduct of subsequent proceedings shall be transferred to the Trial Chamber constituted by the Presidency, which Chamber is vested with “any function of the Pre-Trial Chamber that is relevant and capable fo application in those proceedings”. Accordingly, the proper addressee of an application under article 57(3)(b) of the Statute following the confirmation of the charges would be the Trial Chamber.

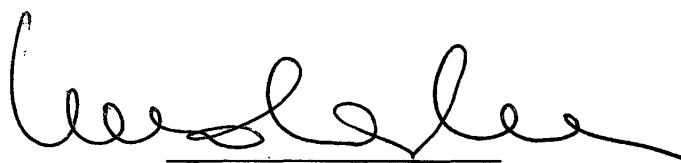
6. Having found that the Defence Application fails to meet the requirement of necessity set forth by article 57(3)(b) of the Statute, there is no need for the Single Judge to address the issue as to whether a request for cooperation to the Republic of Sudan would be supported by an appropriate legal basis.

FOR THESE REASONS,

REJECT

the Defence Application.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Single Judge

The Hague, The Netherlands , Wednesday, 17 November 2010