

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 30 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 for leave to Appeal the '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' of 17 November 2010"

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 “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” dated 17 November 2010 (“Decision”)², rejecting the Defence Application pursuant to article 57(3)(b)³;

NOTING the “Defence Application for leave to Appeal the ‘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’ of 17 November 2010” dated 19 November 2010 (“Defence Application”)⁴;

NOTING the “Prosecution’s Response to Defence Application for Leave to Appeal the 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’” dated 29 November 2010⁵;

HEREBY ISSUE THIS DECISION.

The Defence Application

1. The Defence argues that its Application satisfies all the requirements set forth by article 82(1)(d) of the Statute of the Court and that, accordingly, leave to appeal the Decision should be granted. More specifically, (i) it identifies the issue

¹ ICC-02/05-210.

² ICC-02/05-03/09-102.

³ ICC-02/05-03/09-95.

⁴ ICC-02/05-03/09-105.

⁵ ICC-02/05-03/09-108.

raised by the Decision in the question “whether Article 57(3)(b) is available in the pre-trial phase in respect of the preparation of the person’s defence, beyond confirmation”; (ii) it submits that the issue thus identified significantly affects the fair and expeditious conduct of the proceedings, since failure by the Defence to secure the relief and assistance sought from the Pre-trial Chamber under the authority of article 57(3)(b) of the Statute results in it being “prevented from carrying out vital strands of its investigation until receipt of the confirmation decision”; this in turn, prejudices its preparation for trial, given that it compromises their ability to conduct an investigation in a timely manner; (iii) it maintains that the immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings by ensuring that the proceedings follow the right course, namely “by avoiding delay”.

Decision by the Single Judge

2. The Single Judge wishes to highlight that he will decide on the Defence Application being guided by two fundamental principles. First, the exceptional nature of the remedy of interlocutory appeals within the framework of the statutory instruments of the Court, and the ensuing necessity that the provision be construed restrictively. As first pointed out by Pre-Trial Chamber II, any application for leave to appeal must be determined *inter alia* in light of “the restrictive character” of the remedy⁶.

3. Second, the cumulative nature of the requirements set forth in article 82(1)(d) of the Statute, as highlighted by the case law of the Court since as early as 2005⁷, and confirmed ever since. The party applying for leave to appeal needs to demonstrate both that the relevant issue significantly affects the fair and

⁶ ICC-02/04-01/05-20.

⁷ ICC-02/04-01/05-20.

expeditious conduct of the proceedings and that immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings. It flows from this that failure by the applicant to establish either of such requirements will exempt the Chamber from considering whether the other one has been met.

4. The Single Judge takes the view that the Defence Application fails to satisfy at least one of the criteria required by article 82(1)(d) of the Statute and should therefore be rejected. More specifically, the Defence fails to meet the second requirement set forth by the provision, i.e. it fails to persuade the Single Judge that an immediate resolution for the identified issue by the Appeals Chamber “may materially advance the proceedings”, for the reasons detailed below.

5. In the opinion of the Single Judge, granting an appeal on the issue at stake would not result in advancing the proceedings, and even less in advancing them “materially”. First, the very triggering of an interlocutory phase would *per se* result in delaying the Defence’s opportunity to reiterate its request under article 57(3)(b), namely until the moment when the Appeals Chamber would issue its decision. Even if the decision by the Appeals Chamber were to be taken as expeditiously as feasible, it is only when that decision would be available that the Defence would be able to reiterate its request with the proper Chamber, as identified by the Appeals Chamber. That time would sit by definition somewhere between December 2010 and the first few months of the year 2011. The confirmation decision, which exhausts the pre-trial phase and (if the charges are confirmed) triggers the opening of the trial phase of the case, will be issued no later than 60 days after the end of the confirmation hearing, which will be taking place on 8 December 2010. If the charges are confirmed, the Defence will be equally able to address its request under article 57(3)(b) to the Trial Chamber, on the basis of the Decision. Therefore, even in what would be the most favourable

scenario for the Defence (i.e., that the Appeals Chamber were to deliver its judgment before the end of the pre-trial phase), the decision by the Appeals Chamber would only precede the confirmation decision by few days. Moreover, since the issuance of decisions by the Appeals Chamber is not subject to a specific time-frame, there is no guarantee that the upper Chamber would actually decide before the issuance of the decision on the confirmation of the charges. Accordingly, the appellate phase would in all likelihood have little, if any, impact on the timing of the proceedings and, in particular, in determining the moment in time when the Defence will be able to seek anew assistance from a Chamber for the purposes of article 57(3)(b).

6. Second, even assuming the decision by the Appeals Chamber would be issued prior to the decision on the confirmation of the charges, such an advance could hardly qualify as “material”, a requirement which clearly witnesses to the restrictive and exceptional nature of the interlocutory appeal within the framework of the statutory instruments of the Court. A time-span of few days or weeks at the most, *vis-à-vis* proceedings which have already taken more than a year since the issuance of the summonses to appear for both suspects, cannot be regarded as possessing the degree of importance and significance which article 82(1)(d) unequivocally requires for leave to appeal to be granted. In this respect, the Single Judge notes that failure by the Defence to submit its request under article 57(3)(b) at an earlier stage makes the Defence’s claims as to the urgency of the requested assistance less compelling. It is hard to see why waiting for a handful of weeks at the most would now result in irreparable prejudice to investigative activities, when such activities could well have been undertaken (and the appropriate assistance by the Chamber requested) at an earlier stage.

7. Having found that an immediate resolution by the Appeals Chamber may not materially advance the proceedings, the Defence Application must be

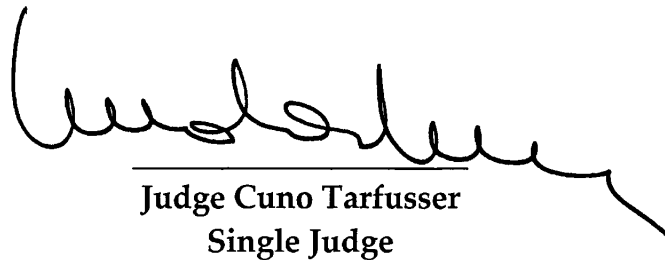
rejected, without a need for the Single Judge to address the arguments submitted by the Defence in respect of the alleged impact of the issue on the fair and expeditious conduct of the proceedings.

FOR THESE REASONS,

REJECT

the Defence Application.

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



Judge Cuno Tarfusser
Single Judge

Dated this Tuesday, 30 November 2010

At The Hague, The Netherlands