

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 12 September 2013

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

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

Public

**Public Redacted Version of the Decision on the third defence application
pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms. Fatou Bensouda

Mr. Adebowale Omofade

Counsel for the Defence

Mr. Karim A.A. Khan

Mr. Nicholas Koumjian

Legal Representatives of Victims

Ms. Hélène Cissé

Mr. Jens Dieckmann

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

Competent authorities of the
Government of the Federal Republic of
Nigeria

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IV (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, after considering Articles 57(3)(b), 64(6)(a), 87(1)(a), 87(6), 93, 96 and 97 of the Rome Statute (“Statute”) and Rules 116, 176 and 177 of the Rules of Procedure and Evidence (“Rules”), renders the following Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute.

I. Background and Submissions

1. On 3 July 2013, the defence filed the “Public Redacted Version of ‘Defence Application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of Nigeria’ filed on 3 July 2013” (“Application”).¹ In the Application, the defence submits that eighteen months have passed without receiving any response from the Government of the Federal Republic of Nigeria (“Nigeria”) regarding a defence request to be provided with documents which are material to the preparation of the defence.² The defence argues that sending a formal cooperation request to Nigeria is warranted because: (i) the documents requested are identified with sufficient specificity,³ (ii) the documents requested are relevant⁴ and (iii) the defence has exhausted all available avenues to obtain the documents sought, making a cooperation request necessary.⁵
2. Ultimately, the defence requests the Chamber to seek cooperation from Nigeria in providing the documents or categories of documents identified in a confidential *ex*

¹ Public Redacted Version of ‘Defence Application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of Nigeria’ filed on 3 July 2013, 3 July 2013, ICC-02/05-03/09-489-Red together with three confidential *ex parte* annexes. A confidential *ex parte* Registry and Defence only Application was filed on 3 July 2013.

² ICC-02/05-03/09-489-Red, paragraph 1. *See also* ICC-02/05-03/09-489-Conf-Exp-AnxB.

³ ICC-02/05-03/09-489-Red, paragraph 16.

⁴ ICC-02/05-03/09-489-Red, paragraphs 17-18.

⁵ ICC-02/05-03/09-489-Red, paragraphs 19-21.

parte Annex A to the Application (“Annex A”)⁶ through the appropriate diplomatic channels pursuant to Article 87(1)(a) of the Statute.⁷

II. Analysis

3. The Chamber recalls its previous findings that, pursuant to Articles 64(6)(a) and 61(11) of the Statute, a Trial Chamber may be competent to deal with requests for cooperation.⁸ As Nigeria is a State Party to the Statute,⁹ this Chamber has the authority to request its cooperation pursuant to Article 87(1)(a) of the Statute.¹⁰ As specified in Article 93(1)(i) of the Statute, the “provision of records and documents, including official records and documents[,]” may be the subject of a cooperation request. Accordingly, the Chamber will consider the merits of the present Application.
4. The Chamber also recalls its previous interpretation of the central aspects underlying a cooperation request pursuant to Article 57(3)(b) of the Statute, namely the requirements of (i) specificity; (ii) relevance; and (iii) necessity.¹¹
5. Turning to the merits of the Application, the Chamber notes that five documents, or categories of documents, are sought in Annex A of the Application. The Chamber will proceed to analyse which of these requests satisfy the requirements for issuing a formal cooperation request to Nigeria.

⁶ Confidential *ex parte* annex A to ICC-02/05-03/09-489-Conf-Exp.

⁷ ICC-02/05-03/09-489-Red, paragraph 26.

⁸ Decision on “Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union”, 1 July 2011, ICC-02/05-03/09-170, paragraph 6.

⁹ Nigeria deposited its instrument of ratification of the Rome Statute on 27 September 2001.

¹⁰ Article 87(1)(a) of the Statute provides that: “The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession”.

¹¹ Public Redacted Decision on the second defence's application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 12 December 2011, ICC-02/05-03/09-268-Red, paragraph 13; ICC-02/05-03/09-170, paragraphs 14-28.

6. As to specificity and relevance, the Chamber is satisfied that all items contained in Annex A are identified with sufficient specificity and are relevant as being “material [...] to the proper preparation of the person’s defence” within the meaning of Rule 116(1)(a) of the Rules.¹²
7. As to necessity, the Chamber takes note of the defence’s efforts to seek the documents from Nigeria and the Prosecution with respect to items 1 to 4.¹³ The Chamber is satisfied that the defence has exhausted all available avenues to obtain the documents sought and that the necessity criterion is therefore met.
8. With respect to item 5, the Chamber notes that it previously requested the African Union to disclose this category of documents on 21 December 2011.¹⁴ Despite the fact that the request made by the defence in the present Application uses different language from previous applications, the Chamber understands from the defence’s submissions that item 5 is the same category of documents which the African Union was previously requested to provide.¹⁵ [REDACTED].¹⁶ Therefore, the Chamber considers that, in order to decide whether it is necessary to request these documents from Nigeria, it is appropriate to seek first an update from the African Union as to the time frame for provision of this information, after which the Chamber will decide whether it is necessary to transmit an additional request for cooperation to Nigeria.

¹² Rule 116(1)(a) of the Rules provides that: “1. The Pre-Trial Chamber shall issue an order or seek cooperation under article 57, paragraph 3 (b), where it is satisfied: (a) That such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence”.

¹³ See ICC-02/05-03/09-489-Red, paragraphs 19-20. See also ICC-02/05-03/09-489-Conf-Exp, paragraphs 4-5.

¹⁴ ICC-02/05-03/09-268-Red, paragraph 21.

¹⁵ See ICC-02/05-03/09-489-Red, paras 18, 21.

¹⁶ [REDACTED].

9. For the foregoing reasons, the Chamber hereby:
- (a) **grants** the Application in relation to items 1 to 4 of ICC-02/05-03/09-489-Conf-Exp-AnxA;
 - (b) **orders** the Registrar (a) to transmit forthwith a cooperation request pursuant to Article 87(1)(a) of the Statute asking for the assistance of Nigeria in this matter; (b) to serve the request on Nigeria through the proper channels of communication as provided for in Rules 176(2) and 177(1) of the Rules; and (c) to report back to the Chamber on the implementation of the request no later than thirty days after notification of the present Decision;
 - (c) **invites** the representatives of Nigeria to engage in consultations with the Court, by way of a written communication to the Registrar, in case it identifies problems, such as insufficient information to execute the request or if the execution of the request in its current form would require Nigeria to breach a pre-existing treaty obligation which may impede or prevent the execution of the cooperation request;
 - (d) **invites** the Nigerian representatives to do so without delay so as to resolve any such matter; and
 - (e) **orders** the Registrar to engage in further consultations with the African Union as to the time frame in which the organisation intends to provide the documents and report thereon to the Chamber by 25 September 2013.

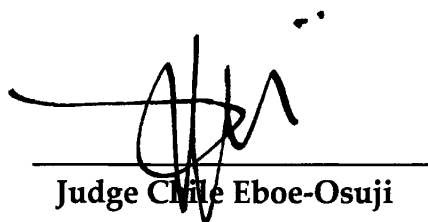
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Silvia Fernández de Gurmendi



Judge Chile Eboe-Osuji

Dated 12 September 2013

At The Hague, The Netherlands