

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 19 October 2010

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Sylvia Steiner

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

**Joint Submission by the
Office of the Prosecutor and the Defence as to Agreed Facts and submissions
regarding modalities for the conduct of the Confirmation hearing**

Sources: Office of the Prosecutor
Defence Team of Abdallah Banda Abakaer Nourain
Defence Team of Saleh Mohammed Jerbo Jamus

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

Mr Essa Faal

Counsel for the Defence

Mr Karim A. A. Khan

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

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Background

1. On 27 August 2009, Pre-Trial Chamber I issued its Second Decision on the Prosecutor's Application under Article 58¹, in which it issued summonses to appear for Mr. Abdallah Banda Abakaer Nourain ("Banda") and Mr. Saleh Mohammed Jerbo Jamus ("Jerbo").
2. Banda and Jerbo voluntarily submitted to the authority of the Court in answer to the summonses issued. This resulted in an initial appearance for Messrs Banda and Jerbo on 17 June 2010. At this first hearing, and pursuant to Rule 121(1) of the ICC Rules of Procedure and Evidence, the Pre-Trial Chamber scheduled that the confirmation of charges hearing commence on 22 November 2010.²
3. On 19 October 2010, the Prosecution filed its Document Containing the Charges ("DCC") in accordance with Article 61(3) of the Rome Statute ("Statute") and Rule 121(3) of the Rules of Procedure and Evidence ("Rules").
4. Discussions between the Office of the Prosecutor and Defence Counsel for Banda and Jerbo (jointly the "Parties") have resulted in certain agreements being reached, which are the subject of the present joint filing. The extent of the agreements reached has also persuaded the Parties to make submissions regarding the modalities for the proper and efficient conduct of the confirmation hearing, for consideration by the Pre-Trial Chamber.

II. Agreement on facts reached by the Office of the Prosecutor and the Defence

5. Pursuant to this joint filing, the Parties inform the Pre-Trial Chamber that the Defence does not contest any of the material facts alleged in the DCC for the purposes of confirmation, and that the Pre-trial Chamber may therefore consider such alleged facts to be proven for the purposes of confirmation of the charges, in accordance with Rule 69 of the Rules. For ease of reference, the Parties annex hereto, as Annex "A", a copy of the DCC, representing the uncontested material facts.

¹ ICC-02/05-03/09-1.

² ICC-02/05-03/09-T-4-ENG, p. 18, lines 24-25 to p. 19, line 1.

6. Consequently, the Defence hereby informs the Pre-Trial Chamber, that, at the confirmation hearing, it shall not “[o]bject to the charges” contained in the DCC, “[c]hallenge the evidence presented by the Prosecutor” or otherwise “[p]resent evidence”³.
7. Given the Parties’ agreement, set out above, and in recognition of the limited scope of confirmation⁴, the accused persons’ right to expeditious proceedings⁵, and the need to conserve – when not inconsistent with the interests of justice – the ~~time and material resources of the Court, the Parties hereby notify the Pre-Trial Chamber that, unless required by the Chamber:~~
 - i. They shall not be calling any *viva voce* witnesses at confirmation;
 - ii. They do not intend to raise any issues related to jurisdiction, admissibility or the proper conduct of the proceedings prior to or at confirmation⁶;
 - iii. The Defence do not anticipate making any oral submissions at the confirmation hearing and will be able to confirm this prior to the hearing;
 - iv. The Prosecution reserves the right to make a short presentation aimed at clarifying various aspects of the case; and
 - v. The Parties shall make all other submissions as to the merits at the confirmation hearing, including the presentation of evidence, in writing only.
8. The Parties acknowledge that notwithstanding these proposals, the ultimate decision as to whether the charges alleged by the Prosecution are confirmed

³ Rome Statute (“Statute”), Article 61(6).

⁴ “[T]he confirmation hearing is neither a trial before the trial nor a mini-trial...” PTC I, *Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Conf, para. 39, citing ICC-02/05-02/09-35, para. 10; ICC-01/04-01/07-T-25-ENG, p. 14, lines 5-11; ICC-01/04-01/07-474, para. 100; ICC-01/04-01/07-717, para. 64.

⁵ Article 64(2) of the Statute. See also Appeals Chamber, *Situation in the DRC*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 11 (“The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.”); PTC I, *Lubanga*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 54.

⁶ Rule 122(2)-(3) of the Rules of Procedure and Evidence governs the raising of issues of jurisdiction, admissibility and the proper conduct of proceedings at the confirmation stage.

remains with the Pre-Trial Chamber. The Parties do not, by this filing, seek to arrogate to themselves that responsibility bestowed on the Chamber.

9. In light of the foregoing, it appears likely that the confirmation hearing will be very significantly shortened. The Defence hereby informs the Pre Trial Chamber⁷ that, should this be the case, Banda and Jerbo are willing to waive their right to be present at the confirmation hearing and request that it be held in their absence, pursuant to Article 61(2)(a) of the Statute and Rule 124 of the Rules, their interests, ~~at the formal hearing itself, being safeguarded by their counsel.~~ They will also not request to observe the hearing from outside the courtroom through the use of communications technology pursuant to Rule 124(3). Given that the issue of interpretation into Zaghawa has been specifically highlighted by the Registrar as a difficulty that may require an adjournment of the scheduled confirmation hearing,⁸ the present proposal will also help avoid unnecessary delay, ensure the suspects' right to an expeditious hearing, whilst also securing the essential purpose of confirmation as envisaged under the Rome Statute.
10. An important consequence of this joint filing is that the Presiding Judge may consider it appropriate to direct, in accordance with his authority under Rule 122(1) of the Rules, that the proceedings be conducted, to the extent possible, on the papers.⁹ This would result in a greatly curtailed hearing requiring no more than one court session. Upon completion of its review of the written evidence and written submissions, the Parties acknowledge the Pre-Trial Chamber's authority pursuant to Article 61(7)(c)(i) to request that further evidence be provided, or to require a more complete presentation of the alleged facts pursuant

⁷ Pursuant to Rule 124 of the ICC Rules of Procedure and Evidence. The Defence respectfully inform the Pre-Trial Chamber that Messrs Banda and Jerbo are aware of their right to attend the confirmation hearing, and have been informed of this joint motion in all material particulars, including on the issue of waiving their right to attend, in accordance with the requirements of Rule 124(2) of the Rules. The Defence wish to emphasise that if, for any reason, the Pre-Trial Chamber have a preference that the suspects physically submit again to the jurisdiction of the court and attend the confirmation hearing, they are willing to do so and comply with any and all orders of the Court in that regard.

⁸ Report of the Registrar on Zaghawa interpretation to be provided during the Confirmation of Charges Hearing, 28 September 2010, ICC-02/05-03/09-73.

⁹ Should the Presiding Judge consider this appropriate, this could include allowing the views and concerns of victims to be presented in writing, pursuant to Article 68(3).

to Rule 69 of the Rules, which can be similarly submitted in writing, should the Pre-Trial Chamber consider that appropriate.

11. The Parties acknowledge the rights of the victims to participate in the hearing "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial" (Article 68(3)). The Parties note that Rule 91(2) authorizes the Chamber to confine the interventions of the victims' representatives to "written observations or submissions", if "the circumstances of the case" call for it. The Parties respectfully submit that "the circumstances of the case", including the extremely limited oral submissions of the Parties and the factors set out in paragraph 7 above, militate in favour of such a ruling. While the Parties do not object to the Legal Representatives of the Victims making oral submissions, the Parties are of the view that it is appropriate in the circumstances for them to file written observations or submissions before, during or after the hearing instead.
12. The Parties are willing to provide clarification on the above submissions at any scheduled Status Conference.

Respectfully Submitted,



Luis Moreno-Ocampo

Prosecutor



Karim A. A. Khan

Counsel for Abdallah Banda Abakaer Nourain
and

Saleh Mohammed Jerbo Jamus

Dated this 19th Day of October 2010

At The Hague, The Netherlands