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**No.: ICC-02/05-03/09
Date: 16 November 2010**

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN DARFUR, THE SUDAN

***IN THE CASE OF THE PROSECUTOR
V.***

ABDALLAH BANDA ABAKAER NOURAIN AND SALEH MOHAMMED JERBO JAMUS

Public Document

Prosecution's response to 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" filed on 10 November 2010

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Mr Karim A.A. Khan

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Brahim Koné

Ms Hélène Cissé

Mr Akin Akinbote

Colonel Frank Adaka

Sir Geoffrey Nice

Mr Rodney Dixon

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

Background

1. On 20 November 2008, the Prosecution submitted the "Prosecutor's Application under Article 58" requesting the issuance of a Warrant of Arrest or alternatively a Summons to Appear for Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain (Abdallah Banda) and Saleh Mohammed Jerbo Jamus (Saleh Jerbo).¹ On 27 August 2009, the Single Judge issued summonses in respect of Abdallah Banda and Saleh Jerbo to appear before the Court on 17 November 2009.²
2. On 17 June 2010 Abdallah Banda and Saleh Jerbo voluntarily appeared before Pre-Trial Chamber I³ (PTC). The confirmation hearing is currently due to begin on 8 December 2010.⁴
3. On 19 October 2010, the Prosecution filed the Document Containing the Charges (DCC),⁵ and it filed the List of Evidence on 22 October 2010.⁶
4. On 19 October 2010, the Prosecution and the Defence Counsel of the suspects filed the "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."⁷ In the Joint Submission, the parties informed the PTC that, for the limited purpose of the confirmation, the Defence does not contest any of the material facts alleged in the DCC and will not present evidence and the PTC may therefore consider such alleged facts to be proven.⁸

¹ ICC-02/05-02/09-21-Conf.

² ICC-02/05-03/09-2-US and ICC-02/05-03/09-3-US

³ ICC-02/05-03/09-T-4-ENG ET WT

⁴ ICC-02/05-03/09-81

⁵ ICC-02/05-03/09-79-Conf

⁶ ICC-02/05-03/09-84

⁷ ICC-02/05-03/09-80

⁸ *Id.*, para 5

5. On 10 November 2010, the Defence Teams filed a joint “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”. Specifically, the Defence requests that the Pre-Trial Chamber require the GoS to (a) grant visas to members of the Defence team so as to enable them to enter the Sudan, (b) allow members of the Defence team access to several named areas in Sudan, and (c) permit unhindered and unmonitored Defence investigations.⁹
6. On 15 November 2010, the PTC directed the Prosecution to submit written observations to the request of the Defence.¹⁰

Submissions

7. Article 57 of the Rome Statute establishes the authority of the Pre-Trial Chamber to seek cooperation on behalf of the Defence. Rule 116 of the Rules of Procedure and Evidence authorizes the Chamber to issue the order if it is satisfied that “such an order would facilitate the collection of evidence that may be material to the determination of the issues being adjudicated or to the proper preparation of the person’s defence”. Accordingly, the Chamber has the authority to seek assistance on the suspects’ behalf from the GoS.
8. The Prosecution does not object in principle to the request. That said, however, it is not obvious that the assistance sought would, at this time, *facilitate* the collection of evidence that “may be material to the determination of the issues being adjudicated or to the proper preparation of the person’s defence”. As noted previously, in the Joint Submission referred to in paragraph 4 above, the Defence does not contest any of the material facts alleged in the DCC and will not present any evidence for the

⁹ ICC-02/05-03/09-95 at pages 12-14

¹⁰ ICC-02/05-03/09-98

purposes of confirmation¹¹. The Pre-Trial Chamber may therefore consider the facts to be proven for those purposes. As such, it is not clear what evidence the Defence would propose to collect that is material to the issues or to the preparation of the defence at the confirmation stage. While collected evidence could be material to the determination of trial issues at some future stage, it cannot be assumed that the PTC will confirm the charges.

9. Moreover, the particular complications of making a request to the GoS cannot be ignored. It is beyond serious dispute that a request made at this time will not be granted. Following the issuance of the Warrant of Arrest against Ahmad Harun and Ali Kushayb on 27 April 2007, the GoS publicly ceased all forms of cooperation with the Court. The GoS Foreign Ministry issued a paper in which it categorically stated that *"the country has decided not to work with the International Criminal Court and it maintains, by every legal argument, that the International Criminal Court has no right to extend its powers over Sudanese territory or its jurisdiction over Sudanese citizens"*.¹²
10. The Prosecution has, in a number of filings, drawn the Chamber's attention to the clearly evinced intentions of the GoS not to cooperate with the Court.¹³ This culminated in the PTC decision of 25 May 2010 in which it made a finding pursuant to Article 87 that the GoS is not cooperating with the Court, contrary to United Nations Security Council Resolution 1593 and its obligations under the UN Charter. On that basis, the PTC referred the GoS's non cooperation with the Court to the UNSC for appropriate action.¹⁴

¹¹ ICC-02/05-03/09-80 para 7(i),(ii) and (iii)

¹² See ICC-02/05-72-US-Exp and Annex A ICC-02/05-72-US-Exp-Anx A , 13 April 2007, para 6;

¹³ ICC-02/05-01/07-36-US-Exp , 27 May 2008;

¹⁴ ICC-02/05-01/07-57, 25 May 2010, page 8

11. In view of the categorical stance of non-cooperation with the Court¹⁵, it is clear that any request for assistance or cooperation addressed to the GoS will not be honoured. The Court does not have any means of enforcing compliance by States with its orders. In the event of non compliance, the only option available to the Court is to bring the matter to the attention of the Assembly of States Parties or the UNSC. The PTC has already done so to no avail.
12. It is conceivable, although at this point unlikely, that the GoS may in the future revise its present policy of non cooperation with the Court. In the interim, however, the Prosecution notes that the Defence may pursue viable alternatives for accessing witnesses and collecting evidence. The alternatives are, in fact, the same measures relied upon by the Prosecution in its investigation, which was similarly handicapped by the refusal of the GoS to cooperate and by the risks to investigators and potential witnesses from on-the-ground investigations in Darfur. The Defence can identify potential witnesses who can be interviewed outside of the Sudan at the expense and facilitation of the Court. Additionally, the Defence may use local resources such as lawyers, investigators and interpreters. Even though the Defence argues that it cannot be expected to utilize individuals that they have not met or vetted for vital

¹⁵ *President Omar al-Bashir* took a public oath on Monday, swearing "thrice in the name of Almighty God that I shall never hand any Sudanese national to a foreign court." "thrice in the name of Almighty God that [he] shall never hand any Sudanese national to a foreign court", [*Warren Hoge* , International War-Crimes Prosecutor Gets List of 51 Sudan Suspects, New York Times, 6 April 2006, 6. ; Justice Minister *Mohammed Ali Mardi* declared, in reaction to the arrest warrant decision of the PTC, that "Sudan has nothing to do with this decision and had already announced that it would not cooperate with the ICC when it comes to trying Sudanese nationals outside of Sudan". 241 [*Maggie Farley* , U.N. Court Seeks the Arrests of a State Official and a Militia Leader, but Sudan Appears Unlikely to Hand Them Over, Los Angeles Times, 3 May 2007, 3.]; On 14 May 2008, President Omar Al Bashir confirmed publicly to a gathering of Militia/Janjaweed: "we will not hand over any Sudanese to the International Court.", ICC-02/05-01/07-48-Conf, para 23; On 10 March 2008, commenting on the arrest warrants for Ahmad Harun and Ali Kushayb, the Sudanese Minister of Information, Zahawi Ibrahim Malik, said "*Sudan is not a party to the ICC. There is no trial for these two people. If we consider there have been any crimes, we will put them on trial ourselves.*" Ahmad Harun himself told Al Hayat newspaper in a March 2008 interview that "*the International Criminal Court has no place in this crisis at all.*" ICC-02/05-01/07-48-Conf, para 21

tasks, the Prosecution notes that same Defence Counsel has in the past employed such resources in the *Abu Garda* case.¹⁶ In that instance the Defence did not notify Chamber that they encountered any problems in either identifying qualified or suitable individuals to carry out assigned tasks. Nor did they express difficulties with the vetting of such individuals.

13. Because the Defence will not face greater restrictions on its ability to investigate than the Prosecution encountered and continues to encounter in this case, the reliance on alternatives to State cooperation does not offend the principle of equality of arms. That principle requires that each party must be accorded a reasonable opportunity to present its case including his evidence, under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent; both parties are entitled to equality of treatment, and an accused must not be placed at an unfair disadvantage.¹⁷ Any deliberate failure on the part of the Defence to explore viable alternatives in investigating its case should preclude it from later making a claim of unfairness or inequality of arms.

¹⁶ DAR-D05-0001-0016

¹⁷ The principle of equality of arms does not extend to conditions outside the control of the court that prevented a party from accessing evidence. *See Prosecutor v. Duško Tadić*, Judgement, Case No.: IT-94-1-A, 15 July 1999, para. 49; see also *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgement (Reasons), Case No. ICTR-95-1-A, 1 June 2001, para. 73.

14. In conclusion, the Prosecution does not oppose the Defence request in principle but suggests that it is premature, given the Joint Agreement regarding the confirmation proceeding and the current unequivocal GoS refusal to cooperate, and it notes the other viable options that are presently available to the defence.



Luis Moreno-Ocampo

Prosecutor

Dated this 16th day of November 2010

At The Hague, The Netherlands