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No.: ICC-02/05-03/09
Date: 29 November 2010

TRIAL CHAMBER II

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF THE PROSECUTOR

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBOA JAMUS

Public

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" (ICC-02/05-03/09-102)

Source: Office of the Prosecutor

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

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Other

Background

1. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus are charged with offenses relating to an attack on AMIS peacekeeping forces in Darfur, Sudan. They appeared pursuant to a summons and are presently released pending the confirmation hearing. By agreement between the parties, the Defence does not contest any of the material facts alleged in the DCC and the Chamber may therefore consider such alleged facts to be proven.¹ In addition, the parties proposed to make all submissions “as to the merits at the confirmation hearing, including the presentation of evidence, in writing only”, without prejudice to the Prosecution’s “right to make a short presentation aimed at clarifying various aspects of the case”.² On this basis, the confirmation hearing shall commence on 8 December 2010 and shall be held during two afternoon sessions and, if necessary, on the following day.³
2. On 10 November 2010, the suspects (“Defence”) filed 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” (“Defence Request”).⁴ The Prosecution responded that it “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”.⁵
3. On 17 November 2010, the Single Judge rejected the Defence Request,⁶ finding that it currently “fails to meet the requirement of necessity set forth by article

¹ ICC-02/05-03/09-80, para. 5

² ICC-02/05-03/09-80, para. 7

³ ICC-02/05-03/09-103, pp. 4-6.

⁴ ICC-02/05-03/09-95.

⁵ ICC-02/05-03/09-101.

⁶ ICC-02/05-03/09-102 (“Decision”).

57(3)(b)”.⁷ The Single Judge explained that if charges are confirmed the Defence may file an application with the Trial Chamber.⁸

4. On 19 November 2010, the Defence filed an application for leave to appeal the Decision (“Application”)⁹ on the issue of “whether or not the assistance sought under Article 57(3)(b) has to be ‘necessary’ only for the confirmation hearing, or whether it should be granted if ‘necessary to assist the person in the preparation of his or her defence’, whether at confirmation *or* at trial”.¹⁰
5. On 24 November 2010, the Pre-Trial Chamber requested that the Prosecution submit views on the Defence request by 29 November 2010.¹¹

Submissions

6. As stated above, the Prosecution did not oppose in principle the Defence request. It adheres to that position. The Defence has the right to seek legal assistance from the Court in obtaining evidence.
7. In the earlier filing, however, the Prosecution also submitted non-oppositional observations. Upon review of that filing, the Prosecution submits that it may have been inappropriate for it to have added any observations on this matter.
8. In accordance with UN Security Council Resolution 1593, 2005, the Government of the Sudan has a duty to cooperate with the Court and therefore to facilitate the Defence’s request.
9. Consequently, the Prosecution does not oppose in principle the merits of the issue advanced by the Defence. That said, however, the Prosecution submits that the application for leave to appeal does not appear to meet all necessary requirements under Article 82(1)(d), notably the need to demonstrate a clear impact on the fair and expeditious conduct of the proceedings or the outcome of the trial. Nor is it

⁷ Decision, para. 6.

⁸ Decision, para. 5.

⁹ ICC-02/05-03/09-105.

¹⁰ Application, paras. 9, 10.

¹¹ ICC-02/05-03/09-106.

likely that the proposed appeal would materially advance the proceedings, based on the imminence of the confirmation hearing and the fact that, if the charges are confirmed, the suspects may thereafter renew the request before this Chamber or the Trial Chamber.



Luis Moreno-Ocampo
Prosecutor

Dated this 29 day of November, 2010

At The Hague, The Netherlands