

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09

Date: 1 July 2011

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi

SITUATION IN DARFUR, SUDAN

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

Public

**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”**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Counsel for the Defence

Mr Karim A.A. Khan

Mr Nicholas Koumjian

Legal Representatives of Victims

Mr Brahim Koné

Ms Hélène Cissé

Mr Akin Akinbote

Mr 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

Victims and Witnesses Unit**Detention Section****Victims Participation and Reparations
Section****Others**

Trial Chamber IV ("Chamber") of the International Criminal Court ("Court" or "ICC") acting pursuant to Articles 57(3)(b), 64(6)(a), 87(6), 93, 96(2)(a) of the Rome Statute ("Statute"), and Rule 116(1) of the Rules of Procedure and Evidence ("Rules") renders the following 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":

I. Background and Submissions

1. On 11 May 2011, the defence filed an application requesting the Chamber to seek cooperation from the African Union ("AU") pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute.¹ The defence seek cooperation from the AU to obtain documents that are said to be material to the proper preparation of the defence and to ensure a fair hearing.²
2. The defence submit that the documents are material to the proper preparation of their case because they are directly related to the events that form the subject matter of the trial, they are likely to contain relevant factual information pertaining to those events and they establish the necessary context to those events.³ The defence also submit that the documents they seek are necessary so that they are able to present "other evidence" at trial pursuant to Article 67 of the Statute.⁴
3. The defence set out a series of failed steps it undertook (via the Office of Legal Counsel of the AU and the United Nations ("UN") Department of Peacekeeping

¹ 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, 11 May 2011, ICC-02/05-03/09-146 and confidential and *ex parte* annexes A, B, C, F and H, confidential annexes D and G and public annex E.

² ICC-02/05-03/09-146, paragraphs 26-32.

³ ICC-02/05-03/09-146, paragraph 27.

⁴ ICC-02/05-03/09-146, paragraph 31.

Operations (“UNDPKO”)) in order to seek assistance in obtaining the documents.⁵ According to the defence it submitted two letters to the AU requesting copies of the relevant documents but they have been unsuccessful in getting a response from the AU.⁶ The defence also submitted a letter to the UNDPKO. In response to the defence’s letter, the UNDPKO confirmed that they were not in possession of the documents and suggested that the defence send its requests to the AU.⁷

4. The Office of the Prosecutor (“prosecution”) has not filed a response to the application.

II. Relevant provisions

5. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 57 of the Statute

Functions and powers of the Pre-Trial Chamber

[...]

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
 - (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

[...]

⁵ ICC-02/05-03/09-146, paragraphs 7-10. The AU Office of the Legal Counsel responded to the defence’s first letter and informed the defence that the letter had been forwarded to the Ag. Director of Peace & Security Department for his “necessary action.” The defence was provided with an email address for the AU Deputy Legal Counsel for further correspondence. The defence transmitted the second letter to the AU via email but were unsuccessful in getting a response. The defence claim that subsequent efforts to get an update on the status of the AU response have been futile.

⁶ ICC-02/05-03/09-146, paragraph 10.

⁷ ICC-02/05-03/09-146, paragraph 11.

Article 64 of the Statute**Functions and powers of the Trial Chamber**

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may as necessary:
 - (a) Exercise any function of the Pre-Trial Chamber referred to it in article 61(11).

[...]

Article 87 of the Statute**Requests for cooperation: general provisions**

[...]

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

[...]

Article 93 of the Statute**Other forms of cooperation**

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
 - [...]
 - (i) The provision of records and documents, including official records and documents;
 - [...]

Article 96 of the Statute**Contents of request for other forms of assistance under article 93**

[...]

2. The request shall, as applicable, contain or be supported by the following:
 - (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
 - (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
 - (c) A concise statement of the essential facts underlying the request;
 - (d) The reasons for and details of any procedure or requirement to be followed;
 - (e) Such information as may be required under the law of the requested State in order to execute the request; and

- (f) Any other information relevant in order for the assistance sought to be provided.

[...]

Rule 116 of the Rules

Collection of evidence at the request of the defence under Article 57,

Paragraph 3 (b)

1. The Pre-Trial Chamber shall issue an order or seek co-operation under article 57(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; and
 - (b) In a case of cooperation under Part 9, that sufficient information to comply with article 96, paragraph 2, has been provided.

[...]

Security Council Resolution 1593 (2005)⁸

[...]

2. The Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;
3. Invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

[...]

Article 2 of the Charter of the United Nations ("UN Charter")⁹

[...]

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

⁸ S/RES/1593 (2005), adopted by the Security Council at its 5158th meeting on 31 March 2005.

⁹ The UN Charter entered into force on 24 October 1945.

III. Analysis and Conclusions

6. The Chamber notes that the language of Article 57(3)(b) of the Statute and Rule 116(1) of the Rules suggests that the analysis and determination of cooperation requests for investigative measures falls, in principle, within the functions of the Pre-Trial Chambers.¹⁰ Pursuant to Articles 64(6)(a) and 61(11) of the Statute, a Trial Chamber may, however, exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings. The Chamber finds that dealing with requests for cooperation falls within that scope. Therefore, the Chamber will look at the merits of the defence's application.

7. According to the defence, the Court can seek cooperation from the AU pursuant to Article 87(6) of the Statute. The defence submit that the AU is "plainly an intergovernmental organization" because it operates between the governments of African States and that the Court has itself referred to the AU as an intergovernmental organization.¹¹ The defence further submit that the relief sought is consistent with the forms of cooperation that the Court could request from intergovernmental organizations as provided by Articles 57(3)(b) and 87(6) and Rule 116(1) and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY").¹²

8. The Chamber notes that it is not disputed that the AU is an intergovernmental organization in the sense of Article 87(6) of the Statute. In accordance with Article 87(6), the Court "may ask any intergovernmental organization to provide

¹⁰ It should be noted that "Except for the question of detention, the Pre-Trial Chamber was created to resolve all preliminary issues before committing the accused to the Trial Chamber (Gilbert Bitti, in: Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, page 1212). The expression "preliminary issues" encompasses Articles 56 and 57 (*ibid.*, page 1211).

¹¹ ICC-02/05-03/09-146, paragraphs 33-34.

¹² ICC-02/05-03/09-146, paragraph 36.

information or documents". The Court "may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate".

9. Similar to non-States parties, intergovernmental organizations are not under an obligation to cooperate with the Court pursuant to Part 9 of the Statute. Therefore, the cooperation between the Court and the AU, based on Article 87(6) is a voluntary one as the Court and the intergovernmental organization are placed on the same level as distinct international legal subjects.¹³
10. The voluntary character of the cooperation by the AU is not altered by Resolution 1593 (2005),¹⁴ by which the Security Council referred the situation in Darfur to the ICC Prosecutor. Paragraph 2 of Resolution 1593 (2005), "urges" all "concerned regional and other international organizations to cooperate fully". The word "urges" has been interpreted as not imposing a mandatory obligation in Security Council resolutions.¹⁵ Similarly, by paragraph 3 of Resolution 1593 (2005), the Council recognizes the particular importance of cooperation by the AU but only "invites" the Court and the AU to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court.
11. As a consequence, the Chamber is only empowered to "ask" the organization to provide such cooperation in accordance with Article 87(6) of the Statute. However, it is not suggested that the AU can simply ignore the ICC petition and Resolution 1593 (2005). The countries that constitute the AU are also members of the UN and

¹³ Claus Kress / Kimberley Prost, in: Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, page 1526.

¹⁴ S/RES/1593 (2005), adopted by the Security Council at its 5158th meeting on 31 March 2005.

¹⁵ See Security Council Report, Special Research Report: Security Council Action under Chapter VII: Myths and Realities, 23 June 2008, No.1, p. 4, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Research%20Report%20Chapter%20VII%2023%20June%202008.pdf>.

pursuant to Article 2 paragraph 5 of the UN Charter, they are obligated to give the UN "every assistance in any action it takes in accordance with the present Charter."¹⁶ Therefore, it is to be expected that the AU will deploy all their best efforts to comply bona fides with Security Council Resolution 1593 (2005), and cooperate fully with the Court.¹⁷

12. Article 87(6) is the only Article in the Statute that specifically addresses the issue of cooperation from intergovernmental organizations. Nevertheless, because Article 87 serves as a general provision of Part 9 (international cooperation and judicial assistance), the Article, including paragraph 6, should be read in conjunction with other relevant provisions on cooperation in Part 9 of the Statute.

13. In accordance with Article 57(3)(b) of the Statute, the Chamber may "seek such cooperation pursuant to Part 9 as may be necessary to assist the Defence in the preparation of its case". Under the related Rule 116(1) of the Rules, the Pre-Trial Chamber shall issue an order or seek cooperation under Article 57(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; and (b) in a case of cooperation under Part 9, that sufficient information to comply with article 96, paragraph 2, has been provided."¹⁸ Article 96(2)¹⁹ provides the following: "The request shall, as applicable,

¹⁶ Article 2 (5) of the UN Charter.

¹⁷ The ICTY Appeals Chamber held that "states" under Article 29 of the ICTY Statute (Cooperation and judicial assistance) refers to all Member States of the United Nations, whether acting individually or collectively, and therefore, under a purposive construction of the Statute, Article 29 also applies to "collective enterprises undertaken by States" such as an international organisation or its competent organs: *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.1, Decision on Request of the North Atlantic Treaty Organisation for Review, 15 May 2006 ("Milutinović NATO Decision"), paragraph 8, citing *Prosecutor v. Simić*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be provided by SFOR and Others, 18 October 2000, paragraph 36).

¹⁸ See also Situation in the Democratic Republic of the Congo, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo ("DRC"), 25 April 2008, ICC-01/04-01/07-444.

¹⁹ Article 96(2)(a) is applicable to a cooperation request that is made to the Court. See Article 96(4).

contain or be supported by (a) a concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request; (b) as much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided; and (c) a concise statement of the essential facts underlying the request.”

14. The Chamber considers that the central aspects of the above-mentioned provisions concerning cooperation requests from State Parties can be applied, *mutatis mutandis*, when cooperation is sought from intergovernmental organizations. As a result, the Chamber may seek cooperation from intergovernmental organisations when the requirements of (i) specificity (ii) relevance and (iii) necessity have been met.
15. Specificity of requests for cooperation is a central aspect of the cooperation regime under Part 9. In addition to specifying the type of assistance that is required, the request needs to include the information detailed in Article 96 of the Statute. The latter provision establishes that the request shall contain as much detailed information as possible about the documents and include a concise statement of the essential facts underlying the request.
16. In this connection, the Chamber considers that any request for the production of documents issued pursuant to Part 9 of the Statute must, *inter alia*, identify specific documents and not broad categories.²⁰ In other words, documents must be identified as far as possible and in addition be limited in number. The Chamber

²⁰ See also ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108bis, Judgement on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1998, 29 October 1997, paragraph 32 (“*Blaškić Review*”). See also *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review, 12 May 2006, paragraphs 14–15; *Prosecutor v. Kordić and Čerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, Case No. IT-95-14/2-AR108bis, 9 September 1999 (“*Kordić Decision*”), paragraphs 38–39.

further considers that such a request must not be unduly onerous, in the sense that, a party cannot seek to obtain hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the requested party would be overly taxing and not strictly justified by the exigencies of the trial.²¹

17. The defence submit the specific documents sought are detailed in confidential and *ex parte* Annex A.²²

18. The Chamber notes that documents no. 1-6 and 8, 9 and 12 as mentioned in confidential Annexure A, each consist of just one document.²³ Furthermore, the defence provide the title of each document and set out which entity created the documents.²⁴ The Chamber therefore finds that these documents have been sufficiently identified.

19. Items no. 7, 10, 11, 13, 14 refer to categories of documents. The Chamber considers that the use of categories should not be prohibited as such.²⁵ A category of documents may be requested as long as it is “defined with sufficient clarity to enable ready identification” by the requested party of the documents falling within that category.²⁶ The Chamber notes that each category of documents sought by the defence’s application contains a specific limitation.²⁷ The Chamber therefore finds that these documents have also been sufficiently identified.

²¹ See also *Blaškić* Review, paragraph 32.

²² ICC-02/05-03/09-146, paragraph 26.

²³ ICC-02/05-03/09-146-Conf-Exp-AnxA.

²⁴ ICC-02/05-03/09-146-Conf-Exp-AnxA.

²⁵ See also *Kordić* Decision, paragraph 38.

²⁶ *Ibid.*, paragraph 39.

²⁷ For example “any written record of [document] of [date]” or “any correspondence between [entity] and [entity] concerning [subject]”.

20. The Chamber, however, finds that items no. 15-25 have not been sufficiently identified since they refer to broad categories of documents without any type of limitation, be it temporal or otherwise. Since, they do not meet the condition of specificity, the Chamber needs therefore not examine whether these documents comply with the other requirements for cooperation as outlined above.
21. The Chamber will now analyze whether the requirements of relevance and necessity have been met in relation to the remaining documents, namely documents no. 1-14.
22. Concerning relevance, the defence submit that the documents are “plainly material” to the proper preparation of their case because they are directly related to the events that form the subject matter of the trial, they are likely to contain relevant factual information pertaining to those events and they establish the necessary context to those events.²⁸ The defence also submit that the application is a necessary step in providing for a fair hearing as enshrined in Article 67 of the Statute.²⁹ The defence submit that the accused have, as a “minimum guarantee” pursuant to Article 67, the right to “present other evidence” at trial. In reliance on this right, the accused intend to present the documents to be provided by the AU (depending on their contents) as evidence at trial. The defence argue that they cannot exercise this right unless the documents are first provided to the defence.³⁰
23. Based on the information contained in the Annex A, the Chamber notes that there appears to be a link between documents 1-10 and 13-14 and issues relevant to the defence. Accordingly, the Chamber is satisfied that documents 1-10 and 13-14 may be “material [...] to the proper preparation of the person’s defence” in accordance

²⁸ ICC-02/05-03/09-146, paragraph 27.

²⁹ ICC-02/05-03/09-146, paragraph 29.

³⁰ ICC-02/05-03/09-146, paragraph 31.

with Rule 116(1)(a) of the Rules. The requirement of relevance has therefore also been met.

24. Concerning documents no. 11 and 12, the Chamber is not satisfied, based on the information provided by the defence, that they meet the requirement of Rule 116(1)(a) of the Rules.

25. Regarding necessity, the defence submit that it is necessary to make this application because the defence have no other means of gaining access to these documents. The defence further submit that the AU has not provided access to the documents and that they cannot obtain these documents from either the Prosecutor or the UN since neither possesses the documents.³¹

26. The Chamber notes the defence's extensive efforts to obtain the documents in question from both the AU and the UN. The Chamber further notes that the defence's efforts with both organizations have been unsuccessful, either because the organization has not responded yet to the defence's request or it responded that it was not in possession of any documentation of the kinds sought by the defence.³² In light of the explanations and the supporting material provided by the defence, the Chamber is satisfied that the defence have exhausted the steps to obtain the cooperation from the AU and the UN before resorting to the intervention of the Chamber.

27. The defence contend in a footnote to their request that they cannot obtain these documents from the Prosecutor and submit that although some of the documents are referred to by two prosecution witnesses, these documents were not gathered

³¹ ICC-02/05-03/09-146, paragraph 28.

³² ICC-02/05-03/09-146, paragraphs 5-13.

by the prosecution.³³ The defence, however, do not explain what steps, if any, they have undertaken to explore whether these documents or documents of similar value are in the possession of the Prosecutor. Furthermore, the Chamber notes that all other documents requested have also as a source documents already in the possession of the prosecution. It appears thus likely that the additional documents requested or others of similar value may also be in the possession of the prosecution. If this were indeed the case, the assistance of this Chamber would not be necessary pursuant to Article 57(3)(b) of the Statute.

28. In light of the aforementioned, the Chamber considers that the defence should first seek to obtain these documents in accordance with Rule 77 of the Rules before seeking the assistance of the Chamber.

³³ ICC-02/05-03/09-146, paragraph 28 and footnote 7.

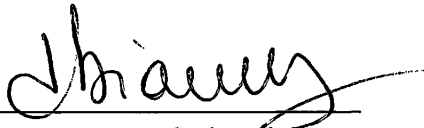
FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the defence application.

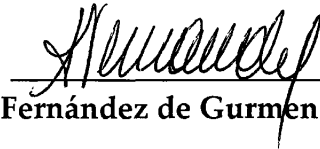
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fatoumata Dembele Diarra



Judge Fernández de Gurmendi

Dated this 1 July 2011

At The Hague, The Netherlands