

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 21 December 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 document

**Public redacted Decision on the second defence's 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

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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
African Union

Trial Chamber IV (“Chamber”) of the International Criminal Court (“Court”) renders the following Decision on the second defence’s application pursuant to Articles 57(3)(b) and 64(6)(a) of the Rome Statute (“Statute”).

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 Statute¹ to obtain documents said to be material to the preparation of the defence and a fair hearing.²
2. On 1 July 2011, the Chamber rendered its “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’” (“Decision”).³ In its Decision, the Chamber held that it may seek cooperation from intergovernmental organisations when the requirements of specificity, relevance, and necessity are met.⁴ It found that only some of the documents the defence sought to obtain had been identified to the requisite standard,⁵ while others had “not been sufficiently identified” so as to meet the requirement of specificity, since they referred to broad categories of documents without any type of limitation, be it temporal or otherwise.⁶

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 to 32.

³ 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.

⁴ ICC-02/05-03/09-170, paragraph 14.

⁵ ICC-02/05-03/09-170, paragraphs 18 and 19.

⁶ ICC-02/05-03/09-170, paragraph 20.

3. The Chamber further held that of those documents that had been sufficiently identified only some met the criterion of relevance.⁷ While the Chamber was satisfied that the defence had exhausted the steps to obtain the cooperation from the AU,⁸ it considered that it had not explained which steps, if any, it had undertaken to explore whether the documents in question or documents of similar value could be obtained from the Office of the Prosecutor ("prosecution").⁹ The Chamber thus concluded that the defence should first attempt to obtain these documents in accordance with Rule 77 of the Rules of Procedure and Evidence ("Rules"), before seeking the assistance of the Chamber.¹⁰
4. On 20 October 2011, the defence filed the "Second 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" ("Application"),¹¹ requesting the Chamber to ask the AU to provide the documents listed in confidential Annexure C to its Application within 28 days.¹²
5. The defence submits that it had exhausted all available steps before resorting to a renewed application before the Chamber.¹³ The defence sets out that, on 19 July 2011, it wrote to the prosecution requesting the disclosure of a detailed number of

⁷ ICC-02/05-03/09-170, paragraph 23 and 24.

⁸ ICC-02/05-03/09-170, paragraph 26.

⁹ ICC-02/05-03/09-170, paragraph 27.

¹⁰ ICC-02/05-03/09-170, paragraph 28.

¹¹ Second 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, 20 October 2011, ICC-02/05-03/09-234.

¹² ICC-02/05-03/09-234, paragraph 28.

¹³ ICC-02/05-03/09-234, paragraph 2.

AU documents.¹⁴ The documents requested amounted to 24 specific requests in total.¹⁵

6. On 29 August 2011, the prosecution informed the defence that it had not identified any documents or materials falling within the scope of the defence request in relation to 21 out of the 24 requests.¹⁶
7. Concerning the remaining three categories, namely items 13, 14 and 21, the prosecution made the following observations: in relation to item 14, the prosecution indicated that it had identified four documents within this category. It was further indicated that these documents were subject to a request for redactions pending before the Chamber.¹⁷ In relation to requested information falling under items 13 and 21, the prosecution informed the defence that it had identified material that may fall into these categories.¹⁸ It also conveyed to the defence that it intended to file an *ex parte* application before the Chamber in relation to this material.¹⁹
8. The defence further submits that it has resumed its efforts to contact the AU. In its Application, it details the steps undertaken and informs that they have so far been to no avail.²⁰
9. The prosecution has not filed a response to the Application.

¹⁴ ICC-02/05-03/09-234, paragraph 6.

¹⁵ ICC-02/05-03/09-234, paragraph 6 ; ICC-02/05-03/09-234-Conf-Exp-AnxA, pages 5 to 8.

¹⁶ ICC-02/05-03/09-234, paragraph 7.

¹⁷ ICC-02/05-03/09-234, paragraph 7.

¹⁸ ICC-02/05-03/09-234, paragraph 8.

¹⁹ ICC-02/05-03/09-234, paragraph 8.

²⁰ ICC-02/05-03/09-234, paragraph 10.

10. On 16 December 2011, with regard to item 14, the Chamber issued the “Decision on the prosecution's application for redactions ICC-02/05-03/09-206-Conf-Exp”,²¹ in which it granted protective measures to identifying information of [REDACTED].

II. Relevant provisions

11. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions: Articles 57(3)(b), 64(6)(a), 87(6), 93, 96(2)(a) of the Statute, and Rules 81(4), 116(1), 176(2), 176(4) and 177(2) of the Rules, Regulation 42(1) of the Regulations of the Court (“Regulations”) as well as paragraph 3 of the Security Council Resolution 1593 (2005) which states:

Security Council Resolution 1593 (2005)²²

[...]

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;

[...]

III. Analysis and Conclusions

12. The Chamber recalls its previous findings in relation to the interpretation of the language of Article 57(3)(b) of the Statute and Rule 116(1) of the Rules.²³ It further recalls its conclusion that pursuant to Articles 64(6)(a) and 61(11) of the Statute, it is

²¹ Decision on the prosecution's application for redactions ICC-02/05-03/09-206-Conf-Exp, 16 December 2011 (notified on 19 December 2011), ICC-02/05-03/09-266-Conf.

²² S/RES/1593 (2005), adopted by the Security Council at its 5158th meeting, on 31 March 2005.

²³ ICC-02/05-03/09-170, paragraph 6.

competent to deal with requests for cooperation.²⁴ Accordingly, the Chamber will consider the merits of the present Application.

13. As previously held by this Chamber, the AU is an intergovernmental organisation within the meaning of Article 87(6) of the Statute.²⁵ In this respect, the Chamber adopts its previous interpretation of Article 87(6) and the forms of cooperation and assistance it may ask for under Part IX of the Statute.²⁶ It also adopts 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.²⁷

14. In the present Application, the defence submits that mindful of the Chamber's guidance as to the requirement of specificity, the defence has "added limitations so that the documents sought are now identified as precisely as possible."²⁸

15. In relation to the requirement of relevance, the defence submits, relying on authorities of this Court, that the definition set out in Rule 116(1)(a) of the Rules should not be narrowly construed.²⁹ It argues that in light of the delimitation of the issues in the case, objects and material may be material to the proper preparation of the accused persons' defence, even if not strictly related to the contested issues. In particular, the defence refers to material that may impact upon the credibility of

²⁴ ICC-02/05-03/09-170, paragraph 6.

²⁵ ICC-02/05-03/09-170, paragraph 8.

²⁶ ICC-02/05-03/09-170, paragraphs 8 *et seq.*

²⁷ ICC-02/03-03/09-170, paragraph 14 *et seq.*

²⁸ ICC-02/03-02/05-234, paragraph 17.

²⁹ ICC-02/05-03/09-234, paragraphs 20 and 21.

witnesses.³⁰ The defence asserts that the documents are “plainly material to the proper preparation of the [d]efence and to the three contested issues.”³¹

16. In relation to the requirement of necessity, the defence submits that the request is necessary because it is unable to obtain the documents directly from the AU, nor is it able to obtain them from the United Nations, or the prosecution.³² While the defence acknowledges that documents under items 13 and 21 of the list submitted to the Chamber on an *ex parte* basis,³³ may be disclosed following a ruling by the Chamber on the related *ex parte* applications pending before it, the defence requests the Chamber to treat both the Application as well as the prosecutor’s *ex parte* requests in parallel.³⁴ Furthermore, in relation to item 14, the defence indicates that it understands that the prosecution is presently applying to the Chamber for redactions to these items.³⁵

a. Items 13, 14 and 21

17. As acknowledged by the defence, documents possibly falling under items 13, 14 and 21 were subject to *ex parte* requests pending before this Chamber at the time the Application was filed.
18. At this stage, documents possibly belonging to items 13 and 21 remain subject to *ex parte* proceedings pending before this Chamber. Consequently, the Chamber considers the request for cooperation in relation to these items premature.

³⁰ ICC-02/05-03/09-234, paragraph 21.

³¹ ICC-02/05-03/09-234, paragraph 22.

³² ICC-02/05-03/09-234, paragraph 23.

³³ ICC-02/05-03/09-234-Conf-Exp-AnxC.

³⁴ ICC-02/05-03/09-234, paragraph 23.

³⁵ ICC-02/05-03/09-234, paragraph 7.

19. With regards to documents under item 14, the Chamber recalls that the defence has received four documents belonging to this category from the prosecution.³⁶ It further notes both its decision of 16 December 2011 authorising redactions to identifying information [REDACTED],³⁷ as well as the defence's contention that the provision of four documents is not representative of "a complete set".³⁸

20. In its Decision of 1 July 2011, the Chamber already held that the documents under category 14 had been sufficiently identified and were relevant.³⁹ Accordingly, the requirements for applying for a cooperation request with respect to additional items under category 14 have been met. The present Decision applies provided that protective measures such as redactions to identifying information [REDACTED] sought under this category are applied before disclosure to the defence.

b. Items previously found to fulfil the criteria of specificity and relevance

21. The Chamber has previously found that documents identified under items 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 were relevant⁴⁰ and sufficiently identified.⁴¹ It held, however, that the defence should seek the documents from the prosecution before resorting to the Chamber.⁴²

22. In light of the information provided by the defence as regards the efforts undertaken to obtain these documents, namely the request sent to the prosecution on 19 July 2011, as well as the renewed efforts of directly contacting the AU, the

³⁶ ICC-02/05-03/09-234, paragraph 7 footnote 13.

³⁷ ICC-02/05-03/09-266-Conf, paragraphs 8 to 10.

³⁸ ICC-02/05-03/09-234, paragraph 7 footnote 12.

³⁹ ICC-02/05-03/09-170, paragraphs 19 and 23.

⁴⁰ ICC-02/05-03/09-170, paragraph 23.

⁴¹ ICC-02/05-03/09-170, paragraph 18.

⁴² ICC-02/05-03/09-170, paragraph 28.

Chamber is satisfied that the defence has exhausted all available avenues to obtain the documents from either the AU, the UN or the prosecution. Accordingly the criteria for applying for a cooperation request have been met.

c. Items previously found to fall short of fulfilling the criteria of specificity and relevance

23. In its Decision of 1 July 2011, the Chamber found that documents identified under items 11, 12, 15, 16, 17, 18, 19, 20, 22, 23, 24, and 25 did not meet the criteria of specificity and relevance.

24. The Chamber will thus analyse whether, based on the additional information provided by the defence in the present Application, the abovementioned items meet the criteria.

i. Items that have previously not been found to be sufficiently identified

25. In its Decision, the Chamber held that a category of documents may be requested as long as the category is “defined with sufficient clarity to enable ready identification” by the requested party of documents falling within that category.⁴³ The Chamber however found that items 15 to 25 of the first defence request pursuant to Article 57(3)(b) were not sufficiently identified as they referred to broad categories of documents without any type of limitation, be it temporal or otherwise.⁴⁴

⁴³ ICC-02/05-03/09-170, paragraph 19.

⁴⁴ ICC-02/05-03/09-170, paragraph 20.

26. In the present Application, the defence renews its request in relation to items 15 to 20 and 22 to 25,⁴⁵ submitting additional information as to the kind of documents it requests under each item.
27. With regard to items 15 and 16 the Chamber considers that the temporal and geographic limitations provided in confidential Annex C to the Application clearly define the documents sought. The Chamber also considers that, based on the information provided in the said Annex, the documents appear to be linked to the issues adjudicated in the case and may therefore be relevant to the preparation of the accused persons' defence.
28. In relation to items 17 to 20 and 22 to 25, the defence provides temporal limitations, and geographical limitations in the case of item 17. The defence further specifies the content and/or subject matter of the documents it seeks to obtain in relation to the abovementioned items in confidential Annex C to its Application. The Chamber considers that the documents sought are sufficiently identified and that they touch upon important issues in the case,⁴⁶ given that the temporal scope identified is finite and will thus assist the AU in identifying the relevant documents.
29. The Chamber is further persuaded that items 17 to 20 and 22 to 25 meet the requirement of relevance, as they may directly relate to the three contested issues being adjudicated. In relation to items 19, 22 and 23, the Chamber further considers that they may *prima facie* be relevant to the credibility of prosecution witnesses.

⁴⁵ While the defence also submits this request in relation to item 21, the Chamber will, for reasons set out above, not address this item at this point.

⁴⁶ See *The 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 to 15.

ii. Items that have previously not been found to be relevant

30. Based on the information provided by the defence in confidential Annex C to its Application, the Chamber is satisfied that there appears to be a link between the documents identified under items 11 and 12 and the issues being adjudicated in the case. Consequently, the Chamber is satisfied that documents under items 11 and 12 may be material to the proper preparation of the accused persons' defence. The documents under items 11 and 12 therefore meet the requirement of relevance.

31. FOR THE FOREGOING REASONS, THE CHAMBER

(i) GRANTS the defence request for cooperation in relation to items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 22, 23, 24, and 25;

(ii) GRANTS the defence request for cooperation in relation to item 14 subject to applicable protective measures as mentioned in paragraph 20;

(iii) CONSIDERS the request for cooperation in relation to items 13 and 21 to be premature;

(iv) DENIES the remainder of the Application;

(v) ORDERS the Registrar (a) to transmit forthwith a cooperation request pursuant to Article 87(6) of the Statute asking for the assistance of the African Union in this matter; (b) to serve the request on the African Union through the proper channels of communication as provided for in Rules 176(2) and (4) and 177(2) of the Rules; and

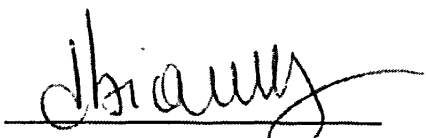
(c) to report back to the Chamber on the implementation of the request no later than 16.00 on 30 January 2012;

(vi) INVITES the representatives of the African Union to consult with the Chamber 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 the African Union to breach a pre-existing obligation which may impede or prevent the execution of the cooperation request; and **INVITES** the African Union to do so without delay so as to resolve any such matter.

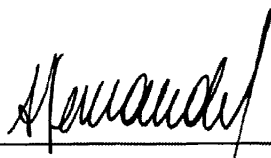
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fatoumata Dembele Diarra



Judge Fernández de Gurmendi

Dated this 21 December 2011

At The Hague, The Netherlands