



Original: English

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

Date: 03 July 2013

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public

Public Redacted Version of “Defence Application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of Nigeria” filed on 3 July 2013

Sources: 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

Ms. Fatou Bensouda
Mr. Adebowale Omofade

Counsel for the Defence

Mr. Karim A. A. Khan QC
Mr. Nicholas Koumjian

Legal Representatives of the Victims

Ms. Hélène Cissé
Mr. Jens Dieckmann

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

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. For over eighteen months the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") have been waiting for a response from the Government of Nigeria to their request for assistance. The only response received to date has been "the extra-judicial reaction of silence".¹ In these circumstances, the Defence are compelled to request that the Trial Chamber issue a request for cooperation to the Government of Nigeria, a State Party, to provide the documents listed in the attached confidential *ex parte* Annexure A pursuant to Articles 57(3)(b), 64(6)(a), 86, 87 and 93(1)(i) of the Rome Statute ("Statute").
2. The classification of Annexure A is appropriate because the list of documents reveals the direction and focus of the Defence investigation. There is nothing in the Statute or in the Rules of Procedure and Evidence to require the Defence to disclose such information to the Prosecution. To do so would prejudice the Defence investigation and trial tactics. The same classification and reasoning applies equally to Annexures B and C.²

II. Background

3. [REDACTED].³ The Defence [REDACTED] sought to obtain the documents listed in confidential and *ex parte* Annexure A which are material to the preparation of the Defence.
4. [REDACTED].⁴

¹ ICC-02/05-03/09-410, Concurring Separate Opinion of Judge Eboe-Osuji, para. 92.

² The Defence will submit a public redacted version of this filing, which will include redactions applied to information that reveals concrete investigative steps undertaken since this information was previously classified confidential *ex parte* Defence only and redactions to other information in relation to Defence investigation.

³ [REDACTED].

⁴ [REDACTED].

5. [REDACTED].
6. [REDACTED]⁵
7. [REDACTED]. [REDACTED].
8. This request for assistance has now been outstanding for eighteen months. The Defence have received no substantive response from the Government of Nigeria either directly or through the Registry.

III. Applicable Law

9. In reliance on Articles 57(3)(b), 61(11) and 64(6)(a) of the Statute, this Trial Chamber has previously held that it can exercise any function of the Pre-Trial Chamber that is relevant and capable of application, including making a request for cooperation to a State pursuant to Part 9 of the Statute.⁶ The relevant provisions of Part 9 of the Statute are set out below.
10. Article 86 of the Statute, entitled “General Obligation to Cooperate”, provides that:

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

⁵ [REDACTED].

⁶ ICC-02/05-03/09-169, para. 13.

11. Article 87(1)(a) of the Statute provides that:

The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession. (Emphasis added.)

12. Article 93(1) of the Statute provides in part that:

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[.]

[...]

13. Nigeria is a State party to the Statute.⁷ Accordingly, the clear effect of Articles 86, 87 and 93(1)(i) is that the Trial Chamber has the power to request Nigeria to cooperate with the Court by providing records and documents.

14. In considering a previous Defence application, which requested the Trial Chamber to seek cooperation from a State, Trial Chamber IV held that:

“The Chamber may seek cooperation under Part 9 when the requirements of (i) specificity (ii) relevance and (iii) necessity are met.”⁸

⁷ Nigeria signed the Rome Statute on 1 June 2000 and deposited its instrument of ratification on 27 September 2001.

IV. The Requirements of Specificity, Relevance and Necessity are Met

15. In accordance with the principle of publicity, the Defence set out below general arguments in respect of the requirements of specificity, relevance and necessity. Any specific arguments, which reveal the identity or nature of Defence investigations, are addressed in confidential and *ex parte* Annexure A.

16. This Trial Chamber has previously held, in reliance on Article 96(2) of the Statute, that specificity requires 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”.⁹ Further, the Trial Chamber held that such a request should 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”.¹⁰ The Defence submit that the documents itemised in confidential and *ex parte* Annexure A consist either of single documents, or of a narrowly defined category of documents. There should be little difficulty in the Government of Nigeria identifying the requested documents. It is submitted that all of the documents or categories of documents are identified with sufficient specificity.

⁸ ICC-02/05-03/09-169, para. 17. Although the State in question in that application, the Government of Sudan, was not a State Party to the Statute, the Chamber held that the Government of Sudan’s obligation to cooperate pursuant to the relevant United Nations Security Council Resolution was “confined to the provisions of the Statute” (*ibid.*, para. 15) and hence the above considerations apply equally to requests for cooperation from a State Party.

⁹ ICC-02/05-03/09-170, para. 15.

¹⁰ *Ibid.*, para. 16

17. The test for relevance as laid down by Rule 116(1)(a) is whether the documents are “material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence”.
18. In relation to document 5 in the table at Annexure A, the Trial Chamber has previously held that this category of documents is relevant.¹¹ There is no reason to depart from this conclusion. Further submissions on the relevance of Documents 1 – 4, which are relevant for exactly the same reasons as document 5, are set out in confidential and *ex parte* Annexure A.
19. In determining whether the third and final condition of necessity is met, this Trial Chamber has considered the various steps taken by the Defence to obtain the requested material including the exploration of possible alternative avenues.¹² It is necessary to make this application because the Defence have no other means of gaining access to the documents. First, the Government of Nigeria has not responded [REDACTED]. [REDACTED]. Since eighteen months have elapsed [REDACTED], and there has been no response of any kind, the Defence submit that it is now compelled to seek the Trial Chamber's assistance in order to obtain a response from Nigeria in sufficient time that it will be able to conduct any necessary follow-up investigations based on the disclosed documents before the start of trial. Further, given the circumstances and the complete lack of any communication regarding the status of the Defence’s request, the Defence submit that this application cannot be considered premature.

¹¹ The Trial Chamber held that the Report itself was relevant and sufficiently identified at ICC-02/05-03/09-170 paras. 19 and 23. The Trial Chamber subsequently held that the supporting documents were also relevant at ICC-02/05-03/09-268-RED, para. 30.

¹² ICC-02/05-03/09-169, para. 27.

20. Second, the Defence have no other means of obtaining the documents. Previously, in similar circumstances but in respect of different documentation/information, this Trial Chamber accepted that the Defence had exhausted all available avenues to obtain the documents sought because it had also explored the Prosecution as a possible source.¹³ The documents have not been disclosed to the Defence by the Prosecution. The deadline for final disclosure by the Prosecution has passed. Therefore, unless the Prosecution has failed to comply with its disclosure obligations pursuant to Rule 77 of the Rules, the documents are not in its possession or control and the Defence cannot therefore obtain the documents from the Prosecution.

21. In addition, the Trial Chamber will be aware that document 5 was amongst the documents which the Trial Chamber asked the African Union to disclose on 21 December 2011.¹⁴ [REDACTED],¹⁵ the Defence have not received any documents from the African Union to date. There is no other source from which the Defence could obtain the documents.

V. This Application is Necessary to Guarantee a Fair Trial

22. The Defence submit that this application is a necessary step in protecting Mr. Banda's right to a fair trial which is enshrined in Article 67 of the Statute.

23. Mr. Banda has, as a "minimum guarantee", the right to "adequate time and facilities for the preparation of the defence" under Article 67(1)(b). This provision is similar to Article 6(3)(b) of the European Convention on Human Rights and Article 14(3)(b) of the International Covenant on Civil and Political

¹³ ICC-02/05-03/09-268-Red, para. 22.

¹⁴ ICC-02/05-03/09-268-Red, para. 31.

¹⁵ [REDACTED].

Rights (“ICCPR”). “Adequate facilities” under the ICCPR is generally understood to comprise “access to the documents, records, etc, necessary for the preparation of the defence”.¹⁶ The European Court of Human Rights (“ECtHR”) also considers that “adequate facilities” includes the disclosure of documents, including the disclosure of potentially exonerating material.¹⁷ The Defence submit that Article 67(1)(b) protects the accused persons’ right to access these documents.

24. Mr. Banda also has, as a “minimum guarantee”, the right to “present other evidence” at trial. In reliance on this right, the Defence intend to present the documents provided by Nigeria (depending on their contents) as evidence at trial. Mr. Banda cannot exercise this right unless the documents are first provided to the Defence.

25. Requesting Nigeria to provide these documents is necessary so that the Defence have adequate facilities and so that the Defence are able to present evidence at trial. In order to ensure that the trial is fair, the Defence respectfully submit that it is necessary to grant this application.¹⁸

¹⁶ Nowak, CCPR Commentary 2nd revised edition, p. 332, para. 50.

¹⁷ *Natunen v. Finland*, ECtHR, Judgement, 30 June 2009, paras. 42 and 43; and *Rowe and Davis v. United Kingdom*, ECtHR, Judgement, 16 February 2000.

¹⁸ The Trial Chamber, of course, is obliged to ensure that “a trial is fair” pursuant to Article 64(2) of the Statute.

VI. Relief Requested

26. The Defence respectfully request the Trial Chamber to request cooperation from the Government of Nigeria in providing the documents identified in confidential and *ex parte* Annexure A through the appropriate diplomatic channels pursuant to Article 87(1)(a) of the Statute.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain

Dated this 3rd day of July 2013

At Nairobi, Kenya

Dated this 3rd day of July 2013

At Los Angeles, United States of America