



Original: English

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

Date: 20 October 2011

**TRIAL CHAMBER IV**

**Before:**

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

**SITUATION IN THE DARFUR, SUDAN**

**IN THE CASE OF *THE PROSECUTOR***

***v.***

***ABDALLAH BANDA ABAKAER NOURAIN***

***&***

***SALEH MOHAMMED JERBO JAMUS***

**Public Document**

**with Confidential Annexures A and B, Confidential and *Ex Parte* Annexure C  
available only to the Registry and Defence, and Public Annexure D**

**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**

**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**

Mr. Luis Moreno-Ocampo

Ms. Fatou Bensouda

Mr. Adebowale Omofade

**Counsel for the Defence**

Mr. Karim A. A. Khan QC

Mr. Nicholas Koumjian

Mr. Ibrahim Yilla

**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**

Ms. Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“Defence”) request the Trial Chamber to “ask” the African Union to provide the documents listed in the attached confidential and *ex parte* Annexure C<sup>1</sup> to their Defence counsel pursuant to Articles 57(3)(b), 64(6)(a) and 87(6) of the Rome Statute (“Statute”).
2. Having exhausted all steps available to the Defence to try to obtain the requested documents, including making requests to the African Union, the United Nations<sup>2</sup> and the Office of the Prosecutor (“OTP”),<sup>3</sup> the Defence submit that the intervention of the Trial Chamber is now required.

## II. Background

3. On 11 May 2011, the Defence submitted an application requesting the Trial Chamber to seek the cooperation of the African Union to obtain documents that are material to the preparation of the defence.<sup>4</sup> The Defence outlined in the Application their “extensive efforts”<sup>5</sup> to try to obtain the documents sought.<sup>6</sup>

---

<sup>1</sup> This classification 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. Moreover, to do so might prejudice the defence investigation.

<sup>2</sup> The Trial Chamber acknowledged this fact in respect of the AU and UN specifically in the “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”, ICC-02/05-03/09-170, 1 July 3011 (“the Decision”), para. 26.

<sup>3</sup> The Trial Chamber considered that another possible source of the requested documents was the OTP pursuant to a Rule 77 request (Decision, para. 28).

<sup>4</sup> “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”, ICC-02/05-03/09-146, 11 May 2011 (“Original Application”).

<sup>5</sup> Decision, para. 26.

<sup>6</sup> Original Application, paras 5-12.

4. On 16 May 2011, the Defence and the OTP submitted their “Joint Submission regarding the Contested Issues at the Trial of the Accused Persons”.<sup>7</sup> In it the Parties indicated that they had agreed to contest only the following specific issues at trial:
  - i. Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;
  - ii. If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and
  - iii. Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.
  
5. On 1 July 2011, the Trial Chamber issued the Decision in which it rejected the Defence’s Original Application. The Trial Chamber held that its assistance was not necessary, because “the defence should first seek to obtain these documents in accordance with Rule 77 of the Rules [from the Prosecutor] before seeking the assistance of the Chamber”.<sup>8</sup> Further, in relation to some of the categories of documents requested, the Trial Chamber ruled that they had not been sufficiently identified so as to meet the requirement of specificity,<sup>9</sup> or that they were not relevant.<sup>10</sup>
  
6. On 19 July 2011, the Defence wrote to the Prosecution to request disclosure of the African Union documents, which were listed in an annexure to that letter. In this letter (confidential Annexure A)<sup>11</sup> and in order to address the Trial

---

<sup>7</sup> ICC-02/05-03/09-148.

<sup>8</sup> Decision, paras 27-28.

<sup>9</sup> *Ibid*, para. 20.

<sup>10</sup> *Ibid*, para. 24.

<sup>11</sup> This classification is appropriate because the letter and annex 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 public. Moreover, to do so might prejudice the defence investigation.

Chamber's previous concerns, the Defence further refined the categories of documents so as to satisfy the requirement of specificity.

7. On 29 August 2011, the Prosecution replied to the Defence request. The Prosecution response (confidential Annexure B) included a table which indicates that in relation to 21 of the 24 requests, the Prosecution had not identified any documents or materials falling within the scope of the Defence request. In relation to category 14, the Prosecution indicated that it had found four documents within this category.<sup>12</sup> The Defence understand that the Prosecution is presently applying to the Chamber for redactions to these documents.<sup>13</sup>
  
8. In relation to categories 13 and 21, the Defence understand that the Prosecution has identified material that may fall within these categories and intend to make an *ex parte* application to the Chamber in respect of these documents. The Defence has addressed its concerns about the nature of this *ex parte* procedure in a separate filing.<sup>14</sup>
  
9. On 28 September 2011, the Trial Chamber issued its "Decision on the Joint Submission regarding the contested issues and the agreed facts".<sup>15</sup> The Trial Chamber held that the trial will proceed only on the contested issues, and further that the parties shall not present evidence or make submissions other than on the issues which are contested.
  
10. On 12 October 2011, the Defence again telephoned African Union Headquarters in Addis Ababa seeking any information on the status of its

---

<sup>12</sup> The Defence note that, considering the specific request made at point 14, provision of 4 documents does not represent a complete set.

<sup>13</sup> On 30 August 2011, the Prosecution provisionally disclosed redacted version of these documents pending the Chamber's decision on the matter.

<sup>14</sup> ICC-02/05-03/09-224-Conf.

<sup>15</sup> ICC-02/05-03/09-227.

requests for information. The Defence was unable to reach Ms. Diarra, the Deputy Legal Counsel of the African Union. The Defence did speak to a secretary in the Office of the Director of the Department of Peace and Security, providing the dates of its two written requests for information (7 October 2010 and 10 January 2011), the reference number of the African Union's response to the Defence dated 20 October 2010, and a telephone number and email address at which the Defence could be contacted.<sup>16</sup> No substantive response has been received from the African Union. More than year has now passed since the Defence's original request for information.

11. As in its Original Application, the specific documents sought are detailed in a table in confidential and *ex parte* Annexure C. As detailed in that Annexure, all the documents have been, or are likely to be, in the possession of the African Union.
12. As set out above and in its Original Application, the Defence has made "extensive efforts"<sup>17</sup> to gain access to the documents. It is left with no alternative but to make this application for the Trial Chamber's assistance.

### **III. Applicable Law**

13. As determined in the Decision, the effect of United Nations Security Council Resolution 1593/2005 and Articles 57(3)(b), 61(11), 64(6), 87(6) of the Statute and Rule 116(1) of the Rules of Procedure and Evidence ("Rules") is to confer upon the Trial Chamber the power to ask the African Union to provide documents in the circumstances of this case.<sup>18</sup>

---

<sup>16</sup> An affidavit describing the circumstances of this call are included as Public Annexure D.

<sup>17</sup> Decision, para. 26.

<sup>18</sup> Decision, paras 6 – 14.

14. Applying these provisions, the Trial Chamber concluded in the Decision that “the Chamber may seek cooperation from intergovernmental organisations when the requirements of: (i) specificity; (ii) relevance; and (iii) necessity have been made”.<sup>19</sup>

#### IV. Specificity

15. The Defence submit that the underlying purpose of the requirement of specificity is to allow the recipient of a request to “be able to identify the requested documents”.<sup>20</sup> Thus, as the Decision recognised,<sup>21</sup> requests for categories of documents are not prohibited, so long as the category is “defined with sufficient clarity to enable ready identification [...] of the documents falling within that category.”<sup>22</sup>

16. Further, the Defence accept that a request should not be “unduly onerous”.<sup>23</sup> But this does not mean that all requests that are “onerous” – for example because they involve the production of hundreds of documents – should be rejected. Rather, the word “unduly” indicates that that the number of documents and the difficulty of producing the documents must be balanced against the importance of the documents for the trial.<sup>24</sup>

17. The Defence also accept that imposing limitations, including temporal limitations, can assist in sufficiently identifying categories of documents. This

---

<sup>19</sup> *Ibid*, para. 14.

<sup>20</sup> *Prosecutor v. Milutinović et al*, IT-05-87-AR108Bis.2, 12 May 2006. “Decision on the Request of the United States of America for Review”, para. 15; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-AR108bis, “Decision on the Request of the Republic of Croatia for Review of a Binding Order”, 9 September 1999, para. 38.

<sup>21</sup> *Ibid*, para. 19.

<sup>22</sup> *Prosecutor v. Milutinović et al*, IT-05-87-AR108Bis.2, 12 May 2006, “Decision on the Request of the United States of America for Review”, para. 15. Thus, for example, in that case, a request by the Ojdanić defence team for a broad category of documents which was initially rejected, was subsequently accepted because the defence team made their request more specific by adding temporal and geographic limits and narrowing the subject matter.

<sup>23</sup> *Prosecutor v. Blaskić*, “Judgment on the Request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997”, 29 October 1997, para. 32.

<sup>24</sup> This point was made expressly by the Appeals Chamber of the ICTY in *Prosecutor v Kordić and Čerkez*, *ibid*, para. 41.

approach is consistent with the *ad hoc* tribunals.<sup>25</sup> Thus, in upholding a decision to approve a similar request for cooperation, the Appeals Chamber of the ICTY noted with approval that the Trial Chamber took into account that the request was “temporally circumscribed, geographically limited, and is narrowed to communications involving himself [General Ojdanić] and any of 23 people specifically listed in Annexure A to the Application”.<sup>26</sup> In the Decision, the Trial Chamber held that a number of the documents “have not been sufficiently identified since they refer to broad categories of documents without any type of limitation, be it temporal or otherwise”.<sup>27</sup> Mindful of this guidance, the Defence have added limitations so that the documents sought are now identified as precisely as possible.

18. Further, submissions on specificity in respect of each document are provided in confidential and *ex parte* Annexure C.

## V. Relevance

19. 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*”.

20. The Defence submit that this standard ought not to be construed narrowly. Indeed, the Appeals Chamber has held that the similar phrase “material to the preparation of the defence” in Rule 77 “must be interpreted broadly”<sup>28</sup> so that

---

<sup>25</sup> Article 21(1)(b) of the Statute provides that “The Court shall apply: [...] where appropriate, [...] the principles and rules of international law.” Thus, the relevant jurisprudence of other international courts and tribunals, which operate in a similar context to the ICC, is of persuasive authority.

<sup>26</sup> *Prosecutor v. Milutinović et al*, IT-05-87-AR108bis-2, “Decision on Request of the United States of America for Review”, 12 May 2006, para. 14. This case is pertinent to the case at hand, because the initial defence application was refused because it was too broad. The defence were given permission to reformulate their request. The defence added limitations to their request, with the result that it was approved by the Trial Chamber and the Appeal Chamber.

<sup>27</sup> *Ibid*, para. 20.

<sup>28</sup> *Prosecutor v Lubanga*, “Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008”, ICC-01/04-01/06-1433, 11 July 2008, para. 78.



it includes “all objects that are relevant for the preparation of the defence”<sup>29</sup>. In a subsequent decision applying the above decision of the Appeals Chamber, Trial Chamber I held that this included material “that may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case”.<sup>30</sup>

21. The “issues being adjudicated” in this case are now delimited by the Trial Chamber’s Decision on the Joint Submission regarding the contested issues and the agreed facts. But evidence may be material to the proper preparation of Messrs. Banda and Jerbo’s (“the Accused persons”) defence, even if not directly related to the contested issues. For instance, documents that impact on the credibility of witnesses are clearly material to the proper preparation of the defence. Moreover, the Defence case is still at the investigative stage and so it is necessary to cast the net broadly, in order that material that will lead the defence to evidence which is relevant to the contested issues is not excluded.

22. It is submitted that these documents are plainly material to the proper preparation of the Defence and to the three contested issues. The Defence sets out further submissions on relevance in confidential and *ex parte* Annexure C.

## **VI. Necessity**

23. It is necessary to make this application because, as stated above, the Defence has no other means of gaining access to these documents. Firstly, the African Union has never provided a substantive response to the Defence request for access to these documents. This application is the only way for the Defence to get the documents from the African Union. Secondly, the Defence cannot get

---

<sup>29</sup> *Ibid*, para. 77.

<sup>30</sup> *Prosecutor v Lubanga*, “Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses”, ICC-01/04-01/06-2624, 12 November 2010, para. 16.

these documents from the United Nations, since they do not possess the documents.<sup>31</sup> Finally, following the Trial Chamber's Decision, the Defence requested these documents from the Prosecution. As set out above, the Prosecution confirmed that they do not have the majority of the documents. The Defence acknowledge that documents falling within categories 13 and 21 of the attached confidential and *ex parte* Annexure C may be disclosed by the Prosecution following a ruling by the Trial Chamber on the Prosecution's *ex parte* application to the Chamber in respect of these documents (see paragraph 8 above). The Defence submit that the Trial Chamber can address the present application alongside the Prosecution's *ex parte* application. As the present proceedings are currently in the trial phase and a trial date may be set imminently, the Defence submit that it is prudent and expedient to make this application now rather than await the result of the Prosecution's *ex parte* application.

## **VII. This Application is Necessary to Protect a Fair Hearing**

24. The Defence submit that this application is a necessary step in protecting the Accused persons' right to a fair hearing which is enshrined in Article 67 of the Statute.
25. The Accused persons have, 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 Rights. "*Adequate facilities*" under the International Covenant on Civil and Political Rights is generally understood to comprise "*access to the documents,*

---

<sup>31</sup> Confidential and *ex parte* Annexure E to the Original Application makes it clear that the UN does not have the documents.

records, etc, necessary for the preparation of the defence”.<sup>32</sup> The European Court of Human Rights also considers that “adequate facilities” includes the disclosure of documents, including the disclosure of potentially exonerating material.<sup>33</sup> The Defence submit that Article 67(1)(b) protects the accused persons’ right to access these documents.

26. The accused persons also have, 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 the African Union (depending on their contents) as evidence at trial. They cannot exercise this right, unless the documents are first provided to the Defence.

27. Asking the African Union 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.<sup>34</sup>

### **Relief Requested**

28. In accordance with the Trial Chamber’s directions set out in the Decision, the Defence have sought the documents from the Prosecution, but with limited success. The Defence, therefore, have no option but to return to the Trial Chamber to ask the African Union to provide the information and documents listed in the confidential and *ex parte* Annexure C to the Defence within 28 days.

---

<sup>32</sup> Nowak, CCPR Commentary (2<sup>nd</sup> revised edition), p. 332, para. 50.

<sup>33</sup> *Natunen v. Finland*, ECHR Application Number 21002/04, *Can v. Austria*, 9300/81, para. 53, Series A Volume 96, *Rowe and Davis v. United Kingdom*, Application Number 28901/95.

<sup>34</sup> The Trial Chamber, of course, is obliged to ensure that “a trial is fair” pursuant to Article 64(2) of the Statute.

Respectfully Submitted,



---

Mr. Karim A. A. Khan QC  
Lead Counsel



---

Mr. Nicholas Koumjian  
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 20th Day of October 2011  
At The Hague, The Netherlands

Dated this 20th Day of October 2011  
At The Hague, The Netherlands