

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 14 January 2014

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

Public

Public Redacted Version of “Consolidated Defence Applications pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of cooperation requests to the Governments of Rwanda, Ghana and Nigeria”

Sources: Defence Team of Abdallah Banda Abakaer Nourain

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

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I. Introduction

1. Trial in this case is scheduled to commence on 5 May 2014.¹ As part of its trial preparations, the Defence for Abdallah Banda Abakaer Nourain (“Defence”) has sought assistance from the governments of the Republic of Rwanda (“Rwanda”), the Republic of Ghana (“Ghana”) and, for a second time, the Federal Republic of Nigeria (“Nigeria”). To date, no substantive response has been received to any of these requests. In addition, progress with respect to the Defence’s first request for assistance from Nigeria appears to have stalled.²
2. Mindful of the imminent trial start date, the Defence respectfully requests that the Trial Chamber issue formal requests for cooperation to the relevant governments pursuant to Articles 57(3)(b), 64(6)(a), 86, 87 and 93(1)(i) and (l) of the Rome Statute (“Statute”).

II. Classification

3. This filing and related annexes are classified as “confidential and *ex parte* available to the Registry and Defence only” because they refer to information which would reveal to the Prosecution the direction and focus of defence investigations. The Defence observes that there is nothing in the Statute or in the Rules of Procedure and Evidence which requires the Defence to disclose such information to the Prosecution. In fact, to do so would prejudice the Defence investigation and trial tactics. Further, the relief requested in no way impacts on the rights of the Prosecution or prejudices its trial preparation. A public redacted version of this filing will be filed in the record.

¹ ICC-02/05-03/09-455.

² As the Trial Chamber is aware, the Defence has previously sought the assistance of the Nigerian Government. See ICC-02/05-03/09-504-Red.

III. Background

(i) Rwanda

4. On 20 December 2012, the Registry transmitted a letter from the Defence to the Government of Rwanda dated 18 December 2012. A copy of this letter is provided in confidential and *ex parte* Annex B.³ The Defence letter sought to obtain certain of the documents specified in confidential and *ex parte* Annex A and assistance in arranging interviews with certain individuals.
5. The Defence has requested updates on the status of its request from the Registry on several occasions. In this regard, in or around March 2013, the Registry followed up the initial letter by transmitting a *Note Verbale* to the Government of Rwanda. Thereafter, on 2 May 2013, 24 May 2013 and 1 July 2013, the Registry advised the Defence that no response had been received from the Government of Rwanda. Most recently, on 7 January 2014, the Registry confirmed that, whilst the Government of Rwanda had acknowledged receipt of the Defence's request, no substantive response had been received. Given the delay, the Registry advised that it will send another *Note Verbale* to the Government of Rwanda. However, notwithstanding this further attempt by the Registry to obtain a response, the Defence submits that the imminent trial start date means that it is appropriate and necessary to take more formal steps to try to secure the Rwandan government's assistance.
6. As is evident from the foregoing, this request has now been outstanding for more than one year.

(ii) Ghana

7. On 26 April 2013, the Registry transmitted a letter from the Defence to the Government of Ghana. A copy of this letter is provided in confidential and *ex*

³ [REDACTED].

parte Annex C.⁴ The Defence letter sought to obtain certain of the documents listed in Annex A which are material to the preparation of the Defence and assistance in arranging interviews with certain individuals.

8. The Defence has requested updates on the status of its request to the Ghanaian government from the Registry on a regular basis. In this regard, on 24 May 2013 and 1 July 2013, the Registry advised the Defence that no response had been received to this request. On 7 January 2014, the Registry confirmed that, whilst the Government of Ghana had acknowledged receipt of its request, no substantive response had been received. Given the delay, the Registry advised that it will send another *Note Verbale* to the Government of Ghana. However, as stated above, notwithstanding this further attempt by the Registry to obtain a response, the Defence believes that the imminent trial start date means that it is appropriate and necessary to take more formal steps to try to secure the Ghanaian government's assistance.
9. As set out above, this request has been outstanding for eight months.

(iii) Nigeria

10. On 8 November 2012, the Registry transmitted a second request for assistance from the Defence to the Government of Nigeria dated 31 October 2012. A copy of this request is provided in confidential and *ex parte* Annex D. In this request, the Defence sought assistance in arranging an interview with an individual.
11. As with its other outstanding requests, the Defence has requested updates from the Registry on a regular basis. In this regard, on 21 March 2013, 24 May 2013 and 7 November 2013, the Registry advised the Defence that no response had been received to this request. On 7 January 2014, the Registry confirmed to the Defence that, whilst the Government of Nigeria had acknowledged receipt of its

⁴ [REDACTED].

request, no substantive response had been received. Given the delay, the Registry advised that it will send another *Note Verbale*. However, as stated above, notwithstanding this further attempt by the Registry to obtain a response, the Defence believes that the imminent trial start date means that it is appropriate and necessary to take more formal steps to try to secure the Nigerian government's assistance.

12. As set out above, this request has been outstanding for over a year.

13. Of relevance to the foregoing is the status of the Defence's first request for assistance from the Nigerian government. Following the decision by this Trial Chamber,⁵ the Registry filed with the Court the reply received from the Honourable Attorney-General of the Federation and Minister of Justice of Nigeria ("Reply").⁶ At the behest of the Defence, on 7 November 2013, the Registry sent a *Note Verbale* to the Nigerian government seeking clarification of certain information contained in the Reply. The communications between the Defence and Registry regarding this *Note Verbale* are provided in confidential and *ex parte* Annex E. To date, no response has been received to this request for clarification.

IV. Applicable Law

14. On 31 March 2005 the United Nations Security Council adopted Resolution 1593/2005. In this Resolution, the Security Council:-

"1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. Decides that 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

⁵ ICC-02/05-03/09-504-Red.

⁶ ICC-02/05-03/09-518 and related confidential and *ex parte* annex.

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.”

15. This Trial Chamber has previously observed that “[t]he word “urges” has been interpreted as not imposing a mandatory obligation in Security Council resolutions.”⁷

16. 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.⁸ The relevant provisions of Part 9 of the Statute are set out below.

17. In respect of States Parties, 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.

18. In this regard, 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.)

19. In respect of non-States Parties, Article 87(5)(a) of the Statute provides that:

⁷ ICC-02/05-03/09-170, para. 10 citing to Security Council Report, Special Research Report: Security Council Action under Chapter VII: Myths and Realities, 23 June 2008, No.1, p. 4, www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FP96FF9%7D/Research%20Report%20Chapter%20VII%2023%20June%2008.pdf.

⁸ ICC-02/05-03/09-169, para. 13.

The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

20. 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:

[...]

(a) The identification and whereabouts of persons or the location of items;

[...]

(i) the provision of records and documents, including official records and documents;

[...]

(l) any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

21. Article 93(1)(i) expressly provides that the provision of documents may be the subject of a request for cooperation.⁹ The Defence submits that reading Article 93(1)(a) together with Article 93(1)(l), a request for assistance in arranging an interview to be conducted by the Defence is also a proper subject for a request for cooperation.

22. Ghana and Nigeria are States Parties to the Statute.¹⁰ Accordingly, the clear effect of Articles 86, 87 and 93(1) is that the Trial Chamber has the power to request Ghana and Nigeria to cooperate with the Court by, as the case may be, providing documents and assisting in arranging witness interviews.

23. Rwanda is not a State Party to the Statute. Accordingly, whilst Rwanda is not obliged to cooperate with the Court,¹¹ Article 87(5)(a) provides that the Court

⁹ ICC-02/05-03/09-504-Red para. 3.

¹⁰ Ghana signed the Rome Statute on 18 July 1998 and deposited its instrument of ratification on 27 December 1999. Nigeria signed the Rome Statute on 1 June 2000 and deposited its instrument of ratification on 27 September 2001.

¹¹ ICC-02/05-03/09-170, paras. 9 – 11.

“may invite” Rwanda to “provide assistance under this Part”. Nevertheless, “it is not suggested that [Rwanda] can simply ignore the ICC petition and Resolution 1593 (2005)”.¹² As a member of the United Nations (“UN”), and pursuant to Article 2, paragraph 5 of the UN Charter, Rwanda is obligated to give the UN “every assistance in any action it takes in accordance with the present Charter”.¹³ “Therefore, it is to be expected that [Rwanda] will deploy [its] best efforts to comply bona fides with Security Council Resolution 1593 (2005), and cooperate fully with the Court.”¹⁴ Since the types of assistance that the Court may invite from a non-State Party are also defined by Part 9 of the Statute,¹⁵ the Trial Chamber may invite Rwanda to provide documents and assist in arranging an interview with an individual.

24. Accordingly, in considering applications for cooperation in respect of States Parties and non-States Parties, the same considerations apply and a:

*[...] Chamber may seek cooperation under Part 9 when the requirements of (i) specificity (ii) relevance and (iii) necessity are met.*¹⁶

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

25. 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”.¹⁷ Further, this 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

¹² ICC-02/05-03/09-170, para. 11.

¹³ Article 2(5), UN Charter. See also ICC-02/05-03/09-170, para. 11.

¹⁴ ICC-02/05-03/09-170, para. 11 (footnotes omitted).

¹⁵ See ICC-02/05-03/09-169, paras. 15 – 17.

¹⁶ For non-States Parties, see ICC-02/05-03/09-169, para. 17. For States Parties, see ICC-02/05-03/09-504-Red, para. 4.

¹⁷ ICC-02/05-03/09-170, para. 15.

party would be overly taxing and not strictly justified by the exigencies of the trial”.¹⁸ The Defence submits that the requests for assistance itemised in Annex A relate to either single documents or individuals or narrowly defined categories of documents or individuals. There should be little difficulty in identifying the requested documents / individuals. Further, in relation to documents A3 and B3, the Trial Chamber previously held that these documents, or very similar documents, were identified with sufficient specificity.¹⁹ It is submitted that all of the documents or categories of documents are identified with sufficient specificity.

26. 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”. In relation to documents A3 and B3, the Trial Chamber previously held that these documents, or very similar documents, were relevant.²⁰ Further submissions on specificity and relevance in respect of the documents and individuals who are the subject of the outstanding requests for assistance are developed in Annex A.

27. 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.²¹ It is necessary to make this application because the Defence has no other means of gaining access to the documents / individuals. First, the Government of Rwanda, the Government of Ghana and the Government of Nigeria have not responded in substance to the Defence requests for assistance. Further, no substantive response has been received to the Registry’s request for clarification of the response provided by the Government of Nigeria to the

¹⁸ *Ibid.*, para. 16

¹⁹ ICC-02/05-03/09-170, para. 18.

²⁰ ICC-02/05-03/09-170, para. 23.

²¹ ICC-02/05-03/09-169, para. 27.

Defence's first request for assistance. The Registry has followed up on a number of occasions without success. Since all requests have been outstanding for a considerable period of time, and either little or no progress has been made to advance the requests, the Defence submits that it is now necessary to seek the Trial Chamber's assistance.

28. Additionally, the Defence requested assistance from these States in order to assist with its trial preparations and collection of evidence, in circumstances where the Defence investigation is already severely hampered by the Defence's inability to carry out investigations in Sudan.²² If the requested assistance is provided, this may open up further lines of inquiry to the Defence. Trial is due to start on 5 May 2014. Given the circumstances, the Defence submits that this application cannot be considered premature.

29. Second, the Defence has no reasonable alternative means of obtaining the documents or interviewing the persons of interest. 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.²³ The documents sought have not been disclosed to the Defence by the Prosecution. [REDACTED]. The deadline for final disclosure by the Prosecution has passed.²⁴ Therefore, it is reasonable to presume that this material that would clearly fall within Rule 77 of the Rules is not in the Prosecution's possession or control and the Defence cannot therefore obtain the documents from the Prosecution. [REDACTED].^{25 26 27}

²² See, e.g., the Defence arguments made in ICC-02/05-03/09-274.

²³ ICC-02/05-03/09-268-Red, para. 22.

²⁴ ICC-02/05-03/09-455, para. 25 (iii) and (iv).

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

VI. This Application is Necessary to Guarantee a Fair Trial

30. The Defence submits 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.

31. 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 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".²⁸ The European Court of Human Rights ("ECtHR") also considers that "adequate facilities" includes the disclosure of documents, including the disclosure of potentially exonerating material.²⁹ The Defence submits that Article 67(1)(b) protects the accused persons' right to access these documents.

32. Mr. Banda also has, as a "minimum guarantee", the right to "present other evidence" at trial. In reliance on this right, the Defence may present the documents provided by Ghana, Nigeria and Rwanda (depending on their contents) as evidence at trial. Mr. Banda cannot exercise this right unless the documents are first provided to the Defence.

33. Requesting Ghana, Nigeria and Rwanda to provide these documents is necessary so that the Defence has 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 submits that it is necessary to grant this application.³⁰

²⁸ Nowak, CCPR Commentary 2nd revised edition, p. 332, para. 50.

²⁹ *Natunen v. Finland*, ECtHR, Judgement, 30 June 2009, paras. 42 and 43; and *Rowe and Davis v. United Kingdom*, ECtHR, Judgement, 16 February 2000.

³⁰ The Trial Chamber, of course, is obliged to ensure that "a trial is fair" pursuant to Article 64(2) of the Statute.

34. In addition, pursuant to Article 67(1)(e) of the Statute, Mr. Banda has, as a “minimum guarantee”, the right to “obtain the attendance and examination of witnesses on his or her behalf on the same conditions as witnesses against him”. In reliance on this right, the Defence may call the individuals who are the subject of the interview requests sent to Ghana, Nigeria and Rwanda (depending on the content of the relevant interviews) as witnesses at trial. However, Mr. Banda cannot properly exercise this right unless the individuals are first interviewed by the Defence.

VII. Relief Requested

35. Pursuant to the above submissions, the Defence respectfully requests the Trial Chamber to request:

- a. cooperation from the Governments of Ghana and Rwanda in providing the documents identified in confidential and *ex parte* Annex A;
- b. cooperation from the Governments of Ghana, Nigeria and Rwanda in assisting with the interviews of the individuals identified in confidential and *ex parte* Annex A; and
- c. cooperation from the Government of Nigeria in responding to the Registry’s request for clarification, which stems from this Trial Chamber’s previous decision requesting the Government of Nigeria’s assistance, through the appropriate diplomatic channels pursuant to Article 87(1)(a) of the Statute.

Respectfully Submitted,



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Dated this 14th day of January 2014

At The Hague, Netherlands