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No.: ICC-02/05-03/09
Date: 19 November 2010

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public

Defence Application for Leave to Appeal the “Decision on the ‘Defence Application pursuant to article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan’ ” of 17 November 2010

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:

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Legal Representatives of the Victims

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
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 10 November 2010, the defence teams of Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“the Defence”) filed their “Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan” (“the Application”).¹
2. On 12 November, Single Judge Tarfusser issued an “Order to the Prosecutor to file a response to the ‘Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan’”.² In this Order, the learned Single Judge required the Prosecutor to file a response to the Application by Tuesday, 16 November 2010.
3. The Prosecutor filed his response³ on 16 November, but it was distributed to the Defence on Wednesday, 17 November. Before the Defence could file an application for leave to reply, the learned Single Judge issued his decision.⁴
4. The Defence hereby applies for leave to appeal against the Decision in accordance with Rule 155 of the Rules of Procedure and Evidence.

II. The test for interlocutory appeal

5. An application for leave to appeal an interlocutory decision needs to satisfy the requirements of Article 82(1)(d) of the Statute:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

...

¹ ICC-02/05-03/09-95.

² ICC-02/05-03/09-98.

³ Prosecution’s response to the “Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan” filed on 10 November 2010, ICC-02/05-03/09-101.

⁴ Decision on the “Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan”, ICC-02/05-03/09-102 (“the Decision”). One of the arguments the Defence would have sought to address in the reply was the argument detailed at paragraph 8 of the Prosecution’s response, questioning the utility of the assistance sought in the Application for the purposes of confirmation.

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. Thus, a Chamber may only grant a party's application for leave to appeal under Article 82(1)(d) if the Chamber finds that:
 - a) An "issue" exists that was dealt with in the impugned decision⁵;
 - b) The issue would significantly affect either the:
 - i) Fair and expeditious conduct of the proceedings, or
 - ii) The outcome of the trial; and
 - c) An immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings.

III. An "issue" exists that was dealt with in the Decision

7. In his Decision, the learned Single Judge states that the "Defence Application fails to elaborate on the reasons which would make the requested order by the Chamber 'necessary' at this particular stage of the proceedings, in particular in light of the strategy pursued by the Defence in respect of the forthcoming confirmation hearing"⁶ and that "statements [in the Joint Submission] clarify that any investigative step which might be taken, as well as any evidentiary material which might be collected...would serve no purpose for the pre-trial phase of the case, namely in respect of the confirmation hearing..."⁷
8. The Defence never considered the requested order to be necessary for the purposes of confirmation. It is not. The Defence respectfully maintains, however, that the requested order is absolutely necessary for it to prudently continue its

⁵ See, e.g., PTC I, *Lubanga*, Decision on Leave to Appeal Confirmation Decision, ICC-01/04-01/06-915, at para. 56-59.

⁶ The Decision at para. 3, emphasis added.

⁷ *Ibid.* at para. 4.

investigations at the pre-trial phase, with a view to ensuring an effective defence in the event the case proceeds to trial.⁸

9. The Article 82(1)(d) “issue” identified by the Defence is whether or not the assistance sought under Article 57(3)(b) has to be “necessary” only for the confirmation hearing, or whether it should be granted if “necessary to assist the person in the preparation of his or her defence”, whether at confirmation *or* at trial.
10. Put conversely, the issue raised by the Decision is whether Article 57(3)(b) is available in the pre-trial phase in respect of the preparation of the person’s defence, beyond confirmation. It is clear that the powers and functions of the Pre-Trial Chamber enumerated in Article 57(3) of the Statute are not limited to questions of whether charges should be confirmed or not. Nor are they simply limited to “issues being adjudicated” at confirmation. This is evidenced, in part, by the clear language of Rule 116(1)(a) of the Rules of Procedure and Evidence. That rule has two limbs. The first deals with facilitating the collection of evidence that may be material to the proper determination of the issues *being* adjudicated. The second is wider, and deals providing assistance that may facilitate the proper preparation of the person’s defence.
11. That the authority of the Pre-Trial Chamber clearly encompasses issuing orders relevant only in the event that there is a trial is evidenced by various provisions of the Rome Statute and Rules of Procedure and Evidence. For example, Article 56(1)(a), referred to in Article 57(3)(b), is aimed at securing evidence “for the purposes of a trial.” Article 57(3)(e) enables the Pre-Trial Chamber to seek the cooperation of States “to take protective measures for the purpose of forfeiture” under Article 93(1)(k). The only provision of the Statute which authorises the forfeiture of assets is Article 77(2)(b), which allows the Court to order such forfeiture as a penalty in addition to imprisonment, at sentencing, *after trial*.

⁸ An effect of the Decision may be that a defence team that intends to challenge the charges at confirmation (with the arguable effect that confirmation may be *less* likely) will obtain the assistance requested, whereas a Defence team that does not contest the charges (with the effect that confirmation may be *more* likely) will be denied the requested assistance and so hampered in its preparation for trial.

12. Accordingly it is patently clear that the Pre-Trial Chamber has the power to grant orders that can only possibly be relevant in the event that a case proceeds to trial.

IV. The issue will significantly affect the fair and expeditious conduct of the proceedings

13. Without the relief and assistance sought in the Application, the Defence is prevented from carrying out vital strands of its investigation until receipt of the confirmation decision. This prejudices Messrs Banda and Jerbo in the preparation of their defence for trial in that their ability to conduct an investigation in a timely manner is compromised. As noted by the Appeals Chamber, “[t]he term ‘proceedings’ as encountered in the first part of article 82 (1)(d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto.”⁹ It is, perhaps, also appropriate to note that Article 82(1)(d) specifically allows a party to show that an impugned decision involves an issue that would affect proceedings post-confirmation, namely “the outcome of the trial”.

14. The Prosecution has the right to continue its investigations beyond the confirmation hearing.¹⁰ This right must also attach to the Defence in accordance with the principle of equality of arms¹¹ and the right to an expeditious trial.¹² A competent defence team is required to safeguard the rights of the client and to conduct itself in a manner that avoids delay at a later stage. Article 57(3)(b) exists to correct an imbalance between the investigatory powers of the Prosecution and Defence (see paragraphs 16 and 17 of the Application). By denying the assistance

⁹ *Situation in the DRC*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (hereinafter Decision on Extraordinary Review Application), 13 July 2006, ICC-01/04-168, at para. 12; see also *Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915, at para. 36 (“Fairness of proceedings has to be assessed on the basis of the proceedings in their entirety in a particular case.”)

¹⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence’”, Appeals Chamber, 13 October 2006, ICC-01/04-01/06-568, at paras. 49 & 52. This decision refers only to the Prosecution, but presumably applies equally to the Defence pursuant to the principle of the equality of arms.

¹¹ Recognised by Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on Defence’s request to obtain simultaneous French transcripts”, 14 December 2007, ICC-01/04-01/06, at para. 18.

¹² Statute, Article 67(1)(c).

of Article 57(3)(b) to the Defence at this stage, the Decision affects the fair conduct of the proceedings by disturbing the balance the provision seeks to provide.

15. The Decision fails to acknowledge the potential delay between the confirmation hearing itself and the issuance of the confirmation decision. Regulation 53 of the Regulations of the Court requires that the Pre-Trial Chamber issue its decision on the confirmation of charges within 60 days from the date the confirmation hearing ends. A consequence of the Decision is that the very earliest the Defence will be able to seek the assistance of the Court in order to facilitate investigations will be February 2011. The Defence must have the ability to seek the assistance of the Pre-Trial Chamber pursuant to Article 57(3)(b) if the right to investigate at the pre-trial stage, including after the hearing itself and before a decision on confirmation, is to be possible.
16. The Decision, accordingly, will have the effect of delaying Defence investigations for a *minimum* of two months. By forcing the Defence to do in the trial phase that which it is trying to do in the pre-trial phase, delay is unnecessarily being inserted into the criminal process. This will significantly affect the fair and expeditious conduct of the proceedings. The Defence will simply not be in a position to move forward as quickly to trial as it would have been had the relief requested been granted at this stage.
17. Finally, it is always desirable that evidence, especially in a criminal process, should be secured as early as possible. The effect of the Decision is to delay investigations that the Defence may otherwise be able to carry out, with the assistance of the Pre-Trial Chamber. This delay may well have adverse impact on the quantity and quality of evidence that the Defence may be able to collect, and will accordingly significantly impact on the fairness and expeditiousness of the trial.

V. Immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings

18. The Appeals Chamber has provided guidance on the meaning and application of this third prong of the leave to appeal test. The Appeals Chamber explains that the term “advance” in this prong of the test requires that the immediate and “authoritative determination”¹³ by the Appeals Chamber of this issue will “ensur[e] that the proceedings follow the right course” by “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines...”¹⁴

19. The loss of the time between confirmation and the confirmation decision is irrecoverable. By deciding the issue incorrectly, the Decision has placed proceedings on the ‘wrong course’ by denying the Defence assistance that they were entitled to. The immediate intervention of the Appeals Chamber is necessary to put proceedings back on the ‘right course’ by avoiding delay. Waste of time is always prejudicial to the Defence and should be avoided in judicial proceedings.

Relief Requested

20. Based on the above submissions, the Defence respectfully request that the Pre-Trial Chamber grant leave to appeal the impugned Decision pursuant to Article 82(1)(d) of the Statute.

¹³ *Decision on Extraordinary Review Application*, ICC-01/04-168, at para. 14.

¹⁴ *Ibid.*, para. 15

Respectfully Submitted,



Mr. Karim A. A. Khan

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Saleh Mohammed Jerbo Jamus

Dated this 19th Day of November 2010

At The Hague, The Netherlands