



Original: **English**

No.: **ICC-02/05-03/09**
Date: **5 November 2012**

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

Defence Application for Leave to Appeal the “Decision on the defence request for a temporary stay of proceedings”

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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I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully request the Trial Chamber to grant the Defence leave to appeal the "Decision on the defence request for a temporary stay of proceedings" ("Impugned Decision").¹
2. This case raises a unique situation: it is the first case pending trial before any international court or tribunal in which the Defence, the Prosecution, and the Victims and Witnesses Unit ("VWU") are all unable to enter the country in which the alleged crimes occurred and almost all potential defence witnesses reside. Therefore, it is impossible for any of these three entities to interview witnesses, or provide any protection to willing witnesses in Sudan. The "Defence Request for a Temporary Stay of Proceedings" ("Request")² raised, for the first time, the question of whether a fair trial can occur in these unique circumstances.
3. The Request was denied.³ In the Impugned Decision, the Trial Chamber held that the Defence had not established that a fair trial could not occur, finding that "the better approach is for the case to go to trial", that "the defendant's complaint will be kept in mind" and that "[a]t trial, the Trial Chamber, the parties and the participants will be in a better position to assess the evidence adduced to see whether the complaints about fair trial are founded."⁴
4. In summary, the two issues identified for appeal below concern the basis on which temporary stays of proceedings may be granted in cases before this

¹ Decision on the defence request for a temporary stay of proceedings, ICC-02/05-03/09-410, 26 October 2012 and related annex, filed confidentially and *ex parte* only available to the Defence, ICC-02/05-03/09-410-Conf-Exp-Anx.

² Defence Request for a Temporary Stay of Proceedings, ICC-02/05-03/09-274, 6 January 2012 and related annexes.

³ Impugned Decision, p. 72.

⁴ *Ibid.*, para. 159.

Court and also the adequacy of the remedies proposed to counterbalance the necessity of imposing a stay. Such issues directly engage fundamental questions regarding the fairness and expeditiousness of proceedings and the outcome of the trial. This is because they concern whether the Defence is required to proceed to trial in circumstances where their ability to test the Prosecution case effectively from day one of trial and to investigate and present a positive Defence case, which includes the ability to obtain the attendance of their own witnesses, is fatally constrained, and for which no procedural remedy or remedies could sufficiently mitigate. Given that the issues directly concern the right of Mr. Banda and Mr. Jerbo to receive a fair trial and an effective defence, the immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings by "[r]emoving doubts about the correctness of [the] decision" which may later "unravel the judicial process".⁵

II. Procedural Background

5. The extensive procedural history of the Request is set out in detail in the Impugned Decision.⁶

III. The test for certification of an interlocutory appeal

6. An application for leave to appeal an interlocutory decision must satisfy the requirements of Article 82(1)(d) of the Rome Statute ("Statute") which provides that a party may appeal

[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.

⁵ *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, ("Decision on Extraordinary Review Application"), paras. 15 and 16.

⁶ Impugned Decision, paras. 2-69.

7. The following criteria are, therefore, applicable to an application for leave to appeal:⁷

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand could significantly affect either the:
 - i. Fair and expeditious conduct of the proceedings, or
 - ii. The outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution of the issue by the Appeals Chamber could materially advance the proceedings.

8. The requirements of sub-parts a), b) and c) above are cumulative. Thus, failure to fulfil one or more of them is fatal to an application for leave to appeal.⁸

IV. The Proposed Issues for Appeal

9. The Defence seek leave to appeal the following two issues which, it is submitted, arise from the Impugned Decision and satisfy all the requirements of Article 82(1)(d):

i. First Issue

Whether the Trial Chamber erred in finding that the Defence have not properly substantiated their Request “with sufficient specificity [...] in light of the information available to it” by:

- a) applying the wrong threshold in terms of specificity;

⁷ See, e.g., Decision on the Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”, ICC-02/05-03/09-179, 13 July 2011 (“Decision on Leave to Appeal Disqualification of Counsel Decision”), para. 5; Decision on the Prosecution’s Application for Leave to Appeal the “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”, ICC-02/05-03/09-243, 1 November 2011 (“Decision on Leave to Appeal Translation of Statements”), para. 5.

⁸ Decision on Leave to Appeal Disqualification of Counsel Decision, para. 6; Decision on Leave to Appeal Translation of Statements, para. 6.

- b) determining that evidence concerning “the alleged existence of a violence campaign perpetrated by the GoS against the civilian population in Haskanita and Darfur generally, and the effect the GoS military offensive had on the civilian population in the area” is not relevant to the contested issues and, thus, failing to consider this evidence in determining whether the Request was properly substantiated; and
- c) considering only the prejudice caused to the Defence’s ability to mount a positive Defence case and not also considering the prejudice caused to the Defence by being unable to properly test the Prosecution case, including during cross-examination.

ii. Second Issue

Whether:

- a) the Trial Chamber erred in determining that the Request was premature and the rights encompassed in Article 67(1)(b) and (e) of the Statute have not been infringed to the extent that a fair trial is impossible in the circumstances of the present case until the Defence can enter and conduct investigations (including interviews) in the State where the events relevant to the case took place and in which the main putative defence witnesses reside; and
- b) the various measures identified by the Trial Chamber to resolve or relieve unfairness or prejudice either during or at the end of trial, including the Trial Chamber otherwise keeping “the defendant’s complaint [...] in mind in the course of the trial” in order, *inter alia*, to “draw conclusions and strike a balance”, are adequate, practical or effective.

V. Submissions

- a) Each issue constitutes an appealable issue pursuant to Article 82(1)(d)

10. According to this Court’s settled jurisprudence, an appealable issue must emanate from the ruling of the impugned decision,⁹ must be an “identifiable subject or topic requiring a decision for its resolution” and “not merely a

⁹ See, e.g., *Prosecutor v. Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007 (“*Lubanga Decision*”), paras. 56-59; Decision on Leave to Appeal Translation of Statements, para. 10.

question over which there is disagreement or conflicting opinion”,¹⁰ and its resolution must be "essential for the determination of matters arising in the judicial cause under examination".¹¹ As set out below, both issues satisfy these requirements and are, thus, appealable issues.

11. The crux of the Impugned Decision is the Trial Chamber’s determination that “the Defence has not shown any prejudice that, in the Chamber’s view, cannot be remedied in the course of trial.”¹²
12. The First Issue emanates from the initial part of this determination because, in reaching this conclusion, the Trial Chamber found that the Defence had not identified the unavailable evidence with sufficient specificity in light of the information available to it at this stage.¹³ Further, in assessing the substantiation of the Defence’s claim of prejudice, the Chamber considered parts of the Defence submissions identifying unavailable evidence as irrelevant and did not take proper account of the prejudicial impact of the present circumstances on the Defence’s ability to test the Prosecution evidence from day one of trial.¹⁴ The First Issue, therefore, arises from the Impugned Decision.
13. The First Issue is also not a mere disagreement on the evaluation of evidence. This issue concerns whether the level of specificity required, or threshold set, by the Trial Chamber to satisfy the standard of proof was “too onerous”¹⁵ and/or set too high and whether the Trial Chamber erred in its approach in two crucial respects. The standard of proof in requests for temporary stays of

¹⁰ Decision on Extraordinary Review Application, para. 9.

¹¹ *Ibid.*, para. 9.

¹² Impugned Decision, paras. 89 and 155.

¹³ *Ibid.*, paras. 93, 102, 108.

¹⁴ *Ibid.*, para. 106.

¹⁵ *Ibid.*, para. 92.

proceedings and its application, which raise mixed questions of fact and law, is an appealable issue.¹⁶

14. In reaching the determination referred to in paragraph 11 above, the Trial Chamber also considered that, given the present circumstances of the case, the Request was premature and that it had not been established that a fair trial was prospectively impossible.¹⁷ In reaching this determination, the Trial Chamber relied on various measures which might alleviate the unfairness to the Defence.¹⁸ The Second Issue arises from the Impugned Decision because it relates to: (1) whether the Request was indeed premature and; (2) whether the various measures relied upon by the Trial Chamber in reaching the Impugned Decision provide a practical, effective and adequate protection of the right to a fair trial. The Second Issue is, therefore, also an appealable issue.

b) *The issues significantly affect both the fair and expeditious conduct of the proceedings and the outcome of the trial*

15. The criteria to be satisfied under the second prong of the certification test are disjunctive. However, as discussed more fully below, the Defence submit that both are satisfied in this case.

i) *The issues significantly affect the fair and expeditious conduct of the proceedings*

16. As observed by the Appeals Chamber, “[t]he term ‘fair’ in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the

¹⁶ See *Prosecutor v. Muthaura et al.*, Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’”, ICC-01/09-02/11-253, 18 August 2011, (“*Muthaura* Decision on Leave to Appeal”), para. 24: “The Prosecutor’s core argument goes to the standard applied by the Single Judge and on the basis of which she reached her conclusion on the facts. Had the Single Judge applied a different standard than the awareness of more than the *de minimis* confidential information, the outcome of the decision might have been different. [...] It follows that what the Prosecutor presents are “appealable issues” within the meaning of article 82(1)(d) of the Statute.”

¹⁷ Impugned Decision, paras. 79, 89, 97, 102, 114, 121, 129, 142, 144, 149, 155, and 159.

¹⁸ *Ibid.*, paras. 113, 114, 121, 128, 129, 135, 136-144, and 150.

attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute”.¹⁹ Included within the attributes of a fair trial is “the investigation of crime”.²⁰

17. It has also been determined that the notion of “[f]airness is closely linked to the concept of ‘equality of arms’, or of balance, between the parties [...] [and] concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.”²¹ In addition, “fairness is preserved when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision.”²²

18. As regards the “expeditiousness of proceedings”, this has been held “to be closely linked to the concept of judicial proceedings ‘within a reasonable time’”.²³ Pre-Trial Chamber II has also endorsed the approach taken at the *ad hoc* tribunals which is that the expeditious conduct of proceedings will be impacted “whenever failure to provide for an immediate resolution of the issue at stake by the Appeals Chamber would entail the risk that lengthy and costly trial activities are nullified at a later stage”.²⁴

19. Both issues significantly affect the “fair and expeditious conduct of proceedings”. In fact, the issues identified go to the heart of the fair and

¹⁹ Decision on Extraordinary Review Application, para. 11.

²⁰ *Ibid.*, para. 11.

²¹ *Situation in Uganda*, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, 19 August 2005 (unsealed pursuant to ICC-02/02-01/05-52), (“Arrest Warrant Decision”), para. 30.

²² *Prosecutor v. Bemba*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-532, 18 September 2009, para. 18.

²³ *Ibid.*, para. 20.

²⁴ Arrest Warrant Decision, para. 36.

expeditious conduct of proceedings, since they encapsulate the fundamental matters of equality of arms, the ability of the Defence to conduct efficient and effective investigations and also the ability of the Defence to properly and adequately test the Prosecution case and construct an affirmative Defence case. The latter limb – the essential right of the Defence to effectively comment and confront evidence presented by the Prosecution - is a core right at the heart of a fair trial and is brought into particular focus in the present application. It is submitted that the “fairness” prong of Article 82(1)(d) is satisfied in the present application.

20. As noted above, the First Issue relates to the degree of specificity which the Defence must provide in order to substantiate a complaint that the right to a fair trial pursuant to Article 67 of the Statute has been infringed. It effectively relates to the amount and / or detail of evidence which is required to be shown that the fair conduct of proceedings has been violated. As such, it is intimately linked to the fair conduct of proceedings.
21. The Second Issue relates to whether the Request was premature and whether the various remedies suggested by the Trial Chamber will adequately and effectively protect the right to a fair trial. This issue significantly affects the fair conduct of proceedings because it calls into question whether remedies, designed to protect the fair and expeditious conduct of proceedings, will actually achieve that goal in the specific circumstances of this case.
22. Moreover, were both these issues wrongly decided against the Defence, the Defence would be placed at a substantial disadvantage in that they would have proceeded to trial without the genuine opportunity to present their case or to comment on or otherwise test the evidence presented by the Prosecution, a situation which no procedural remedy could have sufficiently mitigated, given the severe limitations that are placed on the ability to

conduct defence investigations. This inevitably affects the fairness of proceedings.²⁵

23. In relation to the First and Second Issues, the arguments on whether the “expeditiousness” of the proceedings is affected are the same. The effect of the Impugned Decision is that the Defence are now required to proceed to trial. In order to be ready for trial and, as the Defence will submit in detail by 19 November,²⁶ the Defence will have to make further attempts to investigate, as well as try to resolve complicated witness protection issues when the Court cannot provide any protection to defence witnesses or their families in Sudan²⁷ and other matters including the conduct of missions on receipt of full disclosure from the Prosecution. All these matters clearly have an impact on Defence case strategy as a revised strategy will have to be designed following the Impugned Decision so as to enhance the Defence’s ability to make use of the limited resources and evidence available.²⁸ For example, the Defence will have to take instructions from the clients regarding the desirability of disclosing lines of defence to the Prosecution.²⁹ This is not a straightforward matter engaging issues of professional responsibility, ethics, tactics and, indeed, logistics. Further, given the constraints which the Defence face, these matters will consume a considerable amount of time, therefore, seriously

²⁵ See *Muthaura* Decision on Leave to Appeal, para. 29 (“given the fact that the logic underlying the First and Second Issues if, as argued above, was followed by the Single Judge in her ruling in the 20 July 2011 Decision, the conclusion could have been that the Mr. Faal was privy to confidential information. Accordingly, the said finding would have revealed that a conflict of interest existed, which, in turn, would have barred him from continuing to join the Defence team of Mr. Muthaura. This conclusion is sufficient in itself to demonstrate that the First and Second Issues outlined in the Prosecutor’s Application have a significant impact on the fairness of the proceedings”).

²⁶ Impugned Decision, p. 72.

²⁷ Indeed, the Defence will have to anxiously scrutinise when deciding which witnesses to call given that witnesses who currently reside in Sudan will have to travel clandestinely and at considerable risk, in many cases through conflict zones without the assistance of VWU.

²⁸ See Decision on Leave to Appeal Disqualification of Counsel Decision, para. 19, where the Prosecution’s need to adjust its case strategy and selection of evidence was found to affect the expeditious conduct of proceedings. See also *Muthaura* Decision on Leave to Appeal, para. 33.

²⁹ Impugned Decision, para. 113.

delaying the start of the trial. Accordingly, trial “within a reasonable time” is at issue.

24. The Defence acknowledge that, had the Impugned Decision been decided in their favour, the proceedings would have been temporarily stayed. However, that does not detract from the fact that both issues also engage the expeditious conduct of proceedings, given the inevitable delays caused by the aforementioned matters which will occur as the Defence now try to prepare for trial and, indeed, during the trial itself. The Impugned Decision effectively invites future applications for stays of proceedings during the trial process, either if further specific evidence comes to light (the First Issue) or as soon as the various measures suggested by the Impugned Decision are exhausted or prove inadequate (the Second Issue).³⁰ From the very first Prosecution witness there is likely to be a standing application from the Defence for a stay of proceedings on the basis that, without investigations in Sudan, the Defence cannot effectively cross-examine the witness. These delays and impediments will become even more acute as soon as the Defence attempts to call their own witnesses during the Defence case.³¹ Effectively, the expeditious conduct is engaged in all circumstances in this case, whether the issues are decided in favour of the Defence or not. The Defence submit this militates in favour of granting this application.

25. Notwithstanding the arguments made in paragraphs 23 and 24 above, and in line with the observations in the Arrest Warrant Decision, it is evident that the expeditious conduct of proceedings will be significantly affected in this case because the failure to provide for an immediate resolution of the issues at stake by the Appeals Chamber entails the risk that these trial proceedings,

³⁰ The Request was filed on 6 January 2012. The Impugned Decision was issued on 26 October 2012. This alone suggests that the resolution of any subsequent applications for a temporary stay of proceedings during the trial process is likely to result in significant delays and affect the expeditiousness of the trial process.

³¹ See submissions on witness protection issues discussed in paragraph 23 and footnote 27 above.

which are likely to be lengthy and costly, will be nullified at a later stage.³² If Mr. Banda and Mr. Jerbo are ultimately convicted, the first ground of their appeal against conviction would likely be that the trial was unfair by reason of the matters set out in the Request. If such an appeal succeeds, the effect would be to nullify the trial process. Both issues should, therefore, be addressed by the Appeals Chamber at this stage of proceedings.

26. In any event, in so far as the purpose of the certification of interlocutory appeals is to avoid delay in proceedings, especially the start date of trial,³³ it is clear that, if the issues are certified for appeal, they will be determined before the start of any trial.

ii) The issues significantly affect the outcome of the trial

27. Bearing in mind the disjunctive nature of this limb of the certification test, the Defence submit that, even if the Trial Chamber determines that neither issue significantly affects the “fair and expeditious conduct of proceedings”, both significantly affect the outcome of the trial.

28. The Appeals Chamber has elucidated that this test requires the Chamber to “ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, a process which “involves a forecast of the consequences of such an occurrence.”³⁴

29. In this case, if the First and Second Issues were wrongly decided, the consequences will directly affect the Trial Chamber’s ultimate determination on the guilt or innocence of Mr. Banda and Mr. Jerbo. The outcome of the trial will be based on an assessment of the totality of the evidence led at trial by both parties and also by the participants. If the First Issue was wrongly

³² Arrest Warrant Decision, para. 36.

³³ Lubanga Decision, para. 29.

³⁴ Decision on Extraordinary Review Application, para. 13.

decided, the Defence will have been required to go to trial when the Defence's ability to properly present and challenge evidence at trial, is affected by various handicaps which will inevitably affect the strength of the Defence case, and, as a result, the Trial Chamber's ultimate determination on the contested issues. If the Second Issue were wrongly decided, the same impact on the Trial Chamber's ultimate determination will arise as the Defence will have been required to rely on inadequate or ineffective remedies and safeguards. Set against this background, and given the interrelated nature of the two issues, both clearly "constitute the subject of an appeal" because the "possibility of error in [the Impugned Decision] may have a bearing [upon the outcome of trial]".³⁵

c) The immediate resolution of the issues will materially advance the proceedings

30. The term "advance" in this prong of the test requires that the immediate and "authoritative determination" by the Appeals Chamber of the issues 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 [...]".³⁶

31. An immediate resolution of both issues by the Appeals Chamber will materially advance the proceedings in the case against Mr. Banda and Mr. Jerbo for the following reasons.

32. First, if leave to appeal is denied, the Trial Chamber's determination of the Impugned Decision will impact on every aspect of the trial. It affects the ability to test the Prosecution evidence, as well as the ability of the Defence to advance a positive case. Simply put, if the Impugned Decision is wrong, it will taint every aspect of the case going forwards. Determination of both

³⁵ *Ibid.*, para. 13.

³⁶ *Ibid.*, para. 15.

issues by the Appeals Chamber at this stage would, therefore, ensure that proceedings "follow the right course", and "provides a safety net for the integrity of the proceedings".³⁷

33. Second, the importance of these issues to the proceedings is evidenced by the fact that if leave to appeal is denied, and Mr. Banda and Mr. Jerbo are ultimately convicted, the first ground of their appeal against conviction would likely be that the trial was unfair by reason of the matters set out in the Request, which relates to the First Issue, and the inadequacy of the remedies and safeguards proposed by the Trial Chamber in the Impugned Decision, which relates to the Second Issue. Immediate resolution of the Issues by the Appeals Chamber will materially advance proceedings, because it will determine important issues at this stage in proceedings rather than reserving them for a subsequent appeal which would "unravel the judicial process."³⁸

34. Finally, and specifically in relation to the Second Issue, the extent of the Trial Chamber's obligation to ensure Mr. Banda and Mr. Jerbo receive a fair trial and the extent to which, and the circumstances in which, the Trial Chamber should seek to resolve or relieve unfairness or prejudice either during or at the end of trial needs to be resolved by the Appeals Chamber in the context of cases where Defence investigations are compromised by lack of cooperation of States.³⁹

³⁷ *Ibid.*, para. 15.

³⁸ *Ibid.*, para. 16. *See also Muthaura* Decision on Leave to Appeal, para. 37.

³⁹ *See Prosecutor v. Lubanga*, Decision on the Prosecution's Application for Leave to Appeal the "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused", ICC-01/04-01/06-1417, 2 July 2008, para. 31, where Trial Chamber I certified leave on a similar basis.

Relief Requested

For the reasons set out above, the Defence respectfully request that the Trial Chamber grant leave to appeal the issues discussed above pursuant to Article 82(1)(d).

Respectfully Submitted,



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Mr. Nicholas Koumjian

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Dated this 5th Day of November 2012

At Nairobi, Kenya

Dated this 5th Day of November 2012

At The Hague, The Netherlands