

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-02/05-03/09  
Date: 13 December 2012

**TRIAL CHAMBER IV**

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

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
THE PROSECUTOR *v.* ABDALLAH BANDA ABAKAER NOURAIN  
AND SALEH MOHAMMED JERBO JAMUS**

**Public**

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

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

**Counsel for the Defence**

Mr Karim A.A. Khan

Mr Nicholas Koumjian

**Legal Representatives of Victims**

Ms Helene Cisse

Mr Jens Dieckmann

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others  
Appeals Chamber**

Trial Chamber IV (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, issues, pursuant to Article 82(1)(d) of the Rome Statute (“Statute”), the following Decision on the “Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”.

## I - Background and Submissions

1. On 26 October 2012, the Chamber issued its “Decision on the defence request for a temporary stay of proceedings” (“Impugned Decision”), rejecting the defence’s request to temporarily stay the proceedings (“defence Request”) and concluding that “the better approach is for the case to go to trial. If need be, the defendant's complaint will be kept in mind in the course of the trial. At trial, the Chamber, the parties and the participants will be in a position to better assess the evidence adduced to see whether the complaints about fair trial are founded”.<sup>1</sup>
2. On 5 November 2012, the defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“defence”) filed its “Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’” (“Application”),<sup>2</sup> in which it seeks leave to appeal the Impugned Decision with respect to two issues and submits that both issues meet the legal requirements of Article 82(1)(d) of the Statute. The defence submits that both issues concern “the basis on which temporary stays of proceedings may be granted in cases before this

<sup>1</sup> Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, paragraphs 159 and 160(i).

<sup>2</sup> Defence Application for Leave to Appeal the “Decision on the defence request for a temporary stay of proceedings”, 5 November 2011, ICC-02/05-03/09-412.

Court and also the adequacy of the remedies proposed to counterbalance the necessity of imposing a stay".<sup>3</sup> The two identified issues are formulated as follows:

1. First issue ("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;
- 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.

2. Second issue ("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.<sup>4</sup>

3. The defence submits that the three sub-issues under the First Issue and the two sub-issues under the Second Issue arise from the Impugned Decision and are not mere disagreements with the conclusions of the Chamber, and constitute therefore appealable issues.<sup>5</sup> Both issues, according to the defence, affect significantly the fair

<sup>3</sup> ICC-02/05-03/09-412, paragraph 4.

<sup>4</sup> ICC-02/05-03/09-412, paragraph 9.

<sup>5</sup> ICC-02/05-03/09-412, paragraphs 12 to 14.

and expeditious conduct of the proceedings because they, *inter alia*, (i) “encapsulate the fundamental matters of equality of arms, the ability of the Defence to conduct efficient and effective investigations and (...) to properly and adequately test the [p]rosecution case and construct an affirmative [d]efence case”<sup>6</sup> and (ii) relate to matters that have an impact on the defence strategy to present its case, requiring additional time for defence investigations and preparation of its case.<sup>7</sup> In particular, as regards the fairness requirement under Article 82(1)(d) of the Statute, the defence contends that the First Issue is “intimately linked to the fair conduct of the proceedings”, as it relates to the degree of specificity the Chamber required of the defence to substantiate the request for temporary stay of proceedings, a request which was based on the argument that fair trial could not take place.<sup>8</sup> The defence avers that the Second Issue, which relates to the Chamber’s conclusion of the premature nature of the request and the counter-balancing measures envisaged in the Impugned Decision to guarantee that the conduct of the trial will be fair, also “inevitably” affects the fairness of the proceedings.<sup>9</sup> In addition, the defence submits that both issues affect the outcome of the trial.<sup>10</sup> Finally, the defence argues that the immediate resolution of the issues will materially advance the proceedings,<sup>11</sup> 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’”.<sup>12</sup>

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<sup>6</sup> ICC-02/05-03/09-412, paragraph 19.

<sup>7</sup> ICC-02/05-03/09-412, paragraph 23.

<sup>8</sup> ICC-02/05-03/09-412, paragraph 20.

<sup>9</sup> ICC-02/05-03/09-412, paragraphs 21 and 22.

<sup>10</sup> ICC-02/05-03/09-412, paragraph 29.

<sup>11</sup> ICC-02/05-03/09-412, paragraphs 30 to 34.

<sup>12</sup> ICC-02/05-03/09-412, paragraph 33. Footnote omitted.

4. On 9 November 2012, the common legal representatives (“CLR”) filed their response to the defence Application,<sup>13</sup> in which they request the Chamber to reject the Application as both issues do not meet the requirements of Article 82(1)(d) of the Statute and are unfounded.<sup>14</sup> The CLR submit that the First Issue constitutes a mere disagreement of the defence with the Chamber’s finding in the Impugned Decision.<sup>15</sup> In addition, the CLR argue, *inter alia*, that this issue does not significantly affect the outcome of the trial as the Chamber clearly stated that the defence’s complaints “will be kept in mind in the course of the trial” and that, consequently, rejecting the defence’s request for temporary stay of proceedings at this stage does not necessarily imply that the defence’s complaints would be irrelevant at a later stage.<sup>16</sup> The CLR further submit that the Second Issue has been formulated in such a way that it does not constitute an “appealable issue” but again a mere disagreement.<sup>17</sup> In addition, the CLR argue that the defence fails to demonstrate that the second issue significantly affects the fair and expeditious conduct of the proceedings.<sup>18</sup> Nor does it show the reasons why an immediate resolution of the Second Issue would materially advance the proceedings.<sup>19</sup>
5. On 9 November 2012, the prosecution filed its response to the Application.<sup>20</sup> The prosecution submits that both the First Issue “in substantial part” and the Second Issue do not arise from the Impugned Decision and that, in any event, none of the issues meets the requirements of Article 82(1)(d) of the Statute.<sup>21</sup> The prosecution

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<sup>13</sup> Réponse des Représentants Légaux Communs à la Requête de la défense pour Etre Autorisée à Interjeter Appel, ICC-02/05-03/09-415 and Annexe 1 to the Réponse des Représentants Légaux Communs à la Requête de la défense pour Etre Autorisée à Interjeter Appel, 9 November 2012, ICC-02/05-03/09-415-Anx1.

<sup>14</sup> ICC-02/05-03/09-415, paragraphs 7 and 8.

<sup>15</sup> ICC-02/05-03/09-415, paragraphs 15 and 16.

<sup>16</sup> ICC-02/05-03/09-415, paragraphs 17 and 18.

<sup>17</sup> ICC-02/05-03/09-415, paragraphs 21 and 25.

<sup>18</sup> ICC-02/05-03/09-415, paragraphs 26 to 30.

<sup>19</sup> ICC-02/05-03/09-415, paragraphs 32 and 33.

<sup>20</sup> Prosecution’s Response to “Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”, 9 November 2012, ICC-02/05-03/09-416.

<sup>21</sup> ICC-02/05-03/09-416, paragraphs 3 and 4.

submits that both issues as identified by the defence constitute merely a disagreement with the Chamber's considerations. As regards sub-issue 1a), the prosecution states that the defence only expresses a different opinion on the Chamber's conclusion that the defence did not sufficiently substantiate its request for temporary stay of proceedings.<sup>22</sup> However, the prosecution concedes that this issue arises from the Impugned Decision.<sup>23</sup> As to sub-issue 1b), the prosecution argues, *inter alia*, that it is misconceived and does not arise from the Impugned Decision.<sup>24</sup> As regards issue 1c), it is submitted that the defence simply disregarded the Chamber's consideration of the defence's prejudice resulting from its alleged inability to test the prosecution evidence.<sup>25</sup> As a result of the mischaracterisation of the Impugned Decision by the defence, none of the first three sub-issues constitute an appealable issue according to the prosecution.<sup>26</sup> Furthermore, the prosecution argues similarly that the Second Issue does not qualify as an appealable issue as it does not arise from the Impugned Decision. The prosecution explains, *inter alia*, that the Second Issue relates to a hypothetical question that "would require the Chamber to speculate on the impact of the issue" on the trial proceedings, which are only underway at this stage.<sup>27</sup>

6. In any event, should the Chamber consider that both issues constitute "appealable issues", the prosecution is of the view that none of them significantly affects the fair<sup>28</sup> and expeditious<sup>29</sup> conduct of the proceedings, or the outcome of the trial.<sup>30</sup>

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<sup>22</sup> ICC-02/05-03/09-416, paragraph 13.

<sup>23</sup> ICC-02/05-03/09-416, paragraph 24.

<sup>24</sup> ICC-02/05-03/09-416, paragraphs 15 and 16.

<sup>25</sup> ICC-02/05-03/09-416, paragraphs 17 to 19.

<sup>26</sup> ICC-02/05-03/09-416, paragraph 20.

<sup>27</sup> ICC-02/05-03/09-416, paragraphs 21 to 23.

<sup>28</sup> ICC-02/05-03/09-416, paragraphs 25 to 32.

<sup>29</sup> ICC-02/05-03/09-416, paragraphs 33 to 38.

<sup>30</sup> ICC-02/05-03/09-416, paragraphs 39 to 41.

Finally, according to the prosecution, an immediate resolution of both issues raised by the defence will not materially advance the proceedings.<sup>31</sup>

## II. Analysis

7. In deciding on the Application the Chamber is guided by its previous decision on a request for leave to appeal<sup>32</sup> and other Chambers of the Court regarding the interpretation of Article 82(1)(d) of the Statute. The party seeking leave to appeal should identify a specific “issue” which has been dealt with in the relevant decision and which constitutes the appealable subject.<sup>33</sup>
  
8. The Appeals Chamber has held that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is a disagreement or conflicting opinion [...]. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.”<sup>34</sup>
  
9. Accordingly, the Chamber has examined the Application according to the following criteria:
  - a) Whether the matter is an “appealable issue”;
  - b) Whether the issue at hand could significantly affect:
    - i. the fair and expeditious conduct of the proceedings; or

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<sup>31</sup> ICC-02/05-03/09-416, paragraphs 42 to 46.

<sup>32</sup> 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”, 1 November 2011, ICC-02/05-03/09-243, paragraphs 5 and 6.

<sup>33</sup> Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, paragraph 9.

<sup>34</sup> *Ibid.*

- ii. the outcome of the trial; and
  - c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>35</sup>
10. The criteria mentioned in a), b) and c) above are cumulative and therefore, failure to fulfil one or more of these criteria is fatal to an application for leave to appeal.<sup>36</sup> The cumulative nature of these requirements means that, if at least one of them is not satisfied, it is unnecessary for the Chamber to continue to consider whether the remaining criteria are met.<sup>37</sup>
11. It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.<sup>38</sup> Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.<sup>39</sup>

### **Whether the defence has identified “appealable issues”**

#### ***First Issue***

##### *Sub-Issues 1(a) and 1(b)*

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<sup>35</sup> Decision on the prosecution and defence applications for leave to appeal the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 26 January 2011, ICC-01/05-01/08-1169, paragraph 23.

<sup>36</sup> ICC-01/05-01/08-1169, paragraph 24.

<sup>37</sup> *Ibid.*

<sup>38</sup> ICC-01/05-01/08-1169, at paragraph 25. See also 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, 20 February 2007, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 21; and Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, paragraph 11.

<sup>39</sup> ICC-01/05-01/08-1169, paragraph 25.

12. The defence framed the two first sub-issues as follows:

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 (“Sub-Issue 1(a)”) and
- b) by 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 (“Sub-Issue 1(b)”).

13. According to the defence, the Chamber applied a wrong threshold: (a) when it found that the defence “had not identified the unavailable evidence with sufficient specificity in light of the information available to it at this stage” and (b) when it considered some allegedly unavailable evidence to be irrelevant to the contested issues.<sup>40</sup> Sub-Issue 1(b) appears to be a mere example of the Chamber’s consideration of evidence with the application of the allegedly wrong threshold of specificity, which has been spelled out under Sub-Issue 1(a). Therefore, the Chamber will analyse the requirements of Article 82(1)(d) of the Statute for both sub-issues at the same time.

14. In the Impugned Decision, the Chamber clearly set out the threshold applicable to its determination of a request for temporary stay of proceedings.<sup>41</sup> It specified, *inter alia*, that for the defence Request to be considered as “properly substantiated”, the defence must identify the unavailable evidence with sufficient specificity in light of the information available to it at this stage.<sup>42</sup> The Chamber also required that the unavailable evidence is relevant to the contested issues as defined in the present

<sup>40</sup> ICC-02/05-03/09-412, paragraph 12.

<sup>41</sup> ICC-02/05-03/09-410, paragraphs 90 to 95.

<sup>42</sup> ICC-02/05-03/09-410, paragraph 93.

case.<sup>43</sup> The Chamber consequently recalled the existing dispute between the parties relating to the disclosure of evidence regarding the alleged existence of a campaign of violence perpetrated by the Government of Sudan against the civilian population in Hashkanita and Darfur generally.<sup>44</sup> The Chamber concluded that, for the purpose of its determination of the defence Request, such evidence did not readily appear to fall within the scope of the contested issues and added that its relevance must depend upon a clearly articulated connection to the agreed facts and the contested issues.<sup>45</sup> Having reviewed the relevant part of the Impugned Decision, the Chamber considers that Sub-Issues 1(a) and (b) arise from the said decision and therefore constitute appealable issues.

15. As regards the requirement that both sub-issues would significantly affect the outcome of trial, the Chamber notes that the test under Article 82(1)(d) of the Statute requires the Chamber to make an analysis of the “possible implications of a given issue being wrongly decided on the outcome of the case”.<sup>46</sup> In the present circumstances, the Majority of the Chamber, Judge Eboe-Osuji dissenting, considers that what is *in fine* at stake here is whether the Chamber correctly decided not to temporarily stay the proceedings and to move to trial in spite of the objections raised by the defence. For the purpose of the present Decision, the Chamber needs to consider whether moving to trial, instead of temporarily staying the proceedings until the defence’s concerns have been resolved, would have a *significant* impact on the outcome of the trial.<sup>47</sup> The Majority is of the view that, in the event that it applied a wrong threshold of specificity when considering the defence Request, this

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<sup>43</sup> ICC-02/05-03/09-410, paragraph 92.

<sup>44</sup> ICC-02/05-03/09-410, paragraphs 105 and 106.

<sup>45</sup> ICC-02/05-03/09-410, paragraph 106.

<sup>46</sup> ICC-01/04-168, paragraph 13

<sup>47</sup> See for the importance of the adverb “significantly”, International Criminal Tribunal for Rwanda, *Prosecutor v Arsene Shalom Ntahobali and al.*, Case No ICTR-97-21-T, Trial Chamber II, Decision on Ntahobali’s and Nyiramasuhuko’s motions for certification to appeal the “Decision on Defence urgent motion to declare parts of the evidence of Witnesses RV. and QBZ inadmissible”, 18 March 2004, paragraph 14.

would have had a significant bearing on the outcome of the Impugned Decision and, in turn, the outcome of the trial.

16. Indeed, in making its decision on the defence Request, the Chamber considered, *inter alia*, that the evidence, which the defence claimed was unavailable, - evidence regarding a violence campaign in the Darfur in general - , did not appear to fall within the scope of the contested issues. The issue of the applicable specificity threshold impacts then on the nature of evidence to be taken into account to discuss the contested issues. The Chamber's determination on the specificity threshold led it to deny the defence Request for temporary stay. Therefore, the requirement by the Chamber that unavailable evidence should be specific enough and sufficiently connected to the contested issues had an impact on the outcome of the Impugned Decision and would have a *significant* impact on the outcome of the trial. If the Appeals Chamber determines that the Trial Chamber indeed applied a wrong threshold, the defence Request may have to be re-examined with a different threshold. As a result, it may be decided upon differently. Ultimately, the issue would affect the outcome of the case because it has a bearing on the facts to be discussed and substantiated by evidence at trial.

17. The Majority is therefore satisfied that both sub-issues significantly affect the outcome of trial. In view of the disjunctive nature of this limb of the certification test pursuant to Article 82(1)(d) of the Statute, the Chamber need not analyse the first limb of the test, namely that the sub-issues would significantly affect the fair and expeditious conduct of the proceedings.

18. Finally, as regards the requirement that the immediate resolution of an issue will materially advance the proceedings, according to the Appeals Chamber, what is

intended is a forward movement of the proceedings, by ensuring that they “follow the right course”.<sup>48</sup> According to the Appeals Chamber, the term “advance” means that “[R]emoving doubts about the correctness of a decision or mapping a course of action along right lines provides a safety net for the integrity of the proceedings”<sup>49</sup> The Majority considers that, if the Appeals Chamber ultimately decides that the Trial Chamber applied a wrong specificity threshold to determine that the proceedings need not be stayed,<sup>50</sup> this will inevitably have an impact on the correct course of the proceedings and subsequently its “integrity”. The Chamber notes the defence submission that, if ultimately convicted the “first ground of their appeal against conviction will likely be that the trial was unfair (...), which relates to the First Issue”.<sup>51</sup> The defence submits that the immediate resolution of the issues will materially advance the proceedings,<sup>52</sup> 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’”.<sup>53</sup> The applied specificity threshold which, among other factors, led the Chamber to decide not to stay the proceedings at this stage is interlinked with the issue of fairness and with the right of the accused to have adequate facilities for the preparation of the defence.

19. In the Impugned Decision, the Chamber stated that the defence’s complaint will “if need be (...), be kept in mind in the course of the trial”.<sup>54</sup> Therefore, having certainty, as soon as possible, as to the correctness of the applied threshold will assist the Chamber when possibly considering the defence Request in the future. It is therefore crucial to have the matter immediately resolved in order for the

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<sup>48</sup> ICC-01/04-168, paragraph 15.

<sup>49</sup> *Ibid.*

<sup>50</sup> ICC-02/05-03/09-410, paragraph 159.

<sup>51</sup> ICC-02/05-03/09-412, paragraph 33.

<sup>52</sup> ICC-02/05-03/09-412, paragraphs 30 to 34.

<sup>53</sup> ICC-02/05-03/09-412, paragraph 33. Footnote omitted.

<sup>54</sup> ICC-02/05-03/09-410, paragraph 159.

Chamber, if applicable, to analyse the request using a different threshold and thereby ensuring that the proceedings will follow the right course.<sup>55</sup> This holds true even if, in the specific circumstances of this case, the proceedings should be temporarily stayed since proceedings that continue on the wrong course cannot “advance”. In the Majority’s view, an immediate resolution of both sub-issues by the Appeals Chamber will materially advance the proceedings because it may give guidance to the Trial Chamber as to whether fairness of the proceedings has been preserved to date.

20. The Majority, judge Eboe-Osuji dissenting, therefore considers that both Sub-Issues 1(a) and (b) fulfil the requirements of Article 82(1)(d) of the Statute.

*Sub-Issues 1c)*

21. The defence framed the third first sub-issue as follows:

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 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 (Sub-Issue 1c).

22. According to the defence, the Chamber “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.”<sup>56</sup>

23. First, the Chamber fails to see any link between the threshold of specificity applied by the Chamber to determine whether the defence Request was properly substantiated and the Chamber’s analysis of the alleged prejudice to the defence.

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<sup>55</sup> ICC-01/04-168, paragraph 15.

<sup>56</sup> ICC-02/05-03/09-412, paragraph 12.

For this reason, Sub-Issue 1(c) is dealt with as a separate issue. Second, the Chamber notes that, under sections III-C(6) and (7) of the Impugned Decision, it examined the issue of the defence's ability to, *inter alia*, question prosecution trial witnesses and access prosecution evidence disclosed under Rule 76 of the Rules and translated into Zaghawa. This evidence is to be relied on at trial by the prosecution. The Chamber clearly considered the progress made in enabling the defence to fully access this evidence for the purpose of preparation of its case.<sup>57</sup> Nothing in the Impugned Decision indicates that the Chamber viewed the "defence preparation" as referring only to the defence's ability to present exculpatory evidence, excluding the defence's ability to test the prosecution evidence.

24. With regard to the questioning or interviews of prosecution witnesses, the Impugned Decision stated that given the efforts made by the prosecution to secure contacts, the "Chamber rejects the argument that there is no possibility that the situation can be resolved in due course". Such a general finding cannot be interpreted as limiting the Chamber's consideration of the "[d]efence's ability to mount a positive [d]efence case".

25. Furthermore, as regards the Zaghawa translation of Rule 76 evidence, the Chamber referred to it as "an important factor to allow for meaningful defence investigations, including taking informed instructions from the accused persons".<sup>58</sup> This was only an example and the Chamber's analysis cannot reasonably be considered to be limited to the issue of the defence's ability to present its case, with no regard to its ability to challenge the prosecution evidence, in particular during questioning in court.

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<sup>57</sup> ICC-02/05-03/09-410, paragraphs 127, 129, 132 and 135.

<sup>58</sup> ICC-02/05-03/09-410, paragraph 135.

26. Therefore, the Chamber is of the view that the defence's argument that the Chamber considered "only the prejudice caused to the [d]efence's ability to mount a positive [d]efence case" and failed to also consider "the prejudice caused to the [d]efence by being unable to properly test the Prosecution case, including during cross-examination" does not arise from the Impugned Decision and, consequently, does not amount to an appealable issue.

## *Second Issue*

### *Sub-Issue 2(a)*

27. The defence framed this sub-issue as follows:

a) Whether 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; ("Sub-Issue 2(a)")

28. At the outset, the Chamber agrees with the CLR that Sub-Issue 2(a) is framed in general terms and does not identify a specific question.<sup>59</sup> The defence rather clusters several elements under this sub-issue, referring to the Chamber's different considerations such as, on the one hand, the prematurity of the defence Request, and on the other hand, the finding that no accused persons' rights have been infringed at this stage. The defence adds that this question relates to a period until when "the [d]efence can enter and conduct investigations in the [Sudan] (...)". Having considered Sub-Issue 2(a) as formulated by the defence, the Chamber first fails to identify in Sub-Issue 2(a) a specific issue which may be resolved on appeal. Second, the Chamber sees merits in the prosecution's argument that this issue is a mere expression of the defence's disagreement with the Chamber's finding that, at

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<sup>59</sup> ICC-02/05-03/09-415, paragraphs 21 and 22.

this stage, a fair trial is still possible.<sup>60</sup> In line with the jurisprudence of this Court, Sub-Issue 2(a) therefore does not constitute an “appealable issue”.

*Sub-Issues 2(b)*

29. The defence framed this sub-issue as follows:

b) Whether 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. (“Sub-Issue 2(b)”)

30. The Chamber notes that the defence takes issue with the Chamber’s main conclusion that the defence has not shown any prejudice that cannot be remedied in the course of trial.<sup>61</sup> In particular, the defence seems to criticise the Chamber’s proposition to “keep in mind” the defence’s complaints expressed in the initial request for temporary stay of proceedings<sup>62</sup> and possibly “draw conclusions and strike balance between the fairness of the proceedings and the fact that additional material supporting the same lines of argument could not have been obtained by the defence as a result of the lack of on-site investigations”.<sup>63</sup> The defence further argues that these counter-balancing measures as suggested by the Chamber are “inadequate, unpractical and ineffective”.

31. Such appreciation of the counter-balancing measures appears to be the personal opinion of the defence, conflicting with the Chamber’s approach. At no point in the Impugned Decision did the Chamber conclude that the proposed measures are indeed adequate, practicable or effective. In other words, as counter-balancing measures may only materialise as necessary and in the future, the Chamber could

<sup>60</sup> ICC-02/05-03/09-416, paragraph 22.

<sup>61</sup> ICC-02/05-03/09-412, paragraph 11.

<sup>62</sup> ICC-02/05-03/09-410, paragraph 159.

<sup>63</sup> ICC-02/05-03/09-410, paragraph 114.

not reasonably foresee in the Impugned Decision whether these measures will indeed be sufficient as no date of trial has been set yet. Therefore, Sub-Issue 2(b) is highly hypothetical and does not arise from the said decision. As Article 82(1)(d) of the Statute cannot be used to litigate abstract or hypothetical issues,<sup>64</sup> the Chamber agrees with the prosecution<sup>65</sup> and the CLR, and finds that Sub-Issue 2(b) does not constitute an “appealable issue”.

32. For the foregoing reasons, the Majority of the Chamber hereby:

**(i) Grants** the defence Application in so far as it concerns the issues identified in paragraph 12 above.

Judge Eboe-Osuji will file a dissenting opinion.

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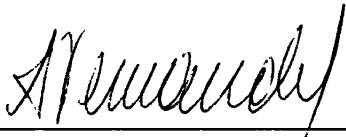
<sup>64</sup> Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 18 September 2009, ICC-01/05-01/08-532, paragraph 17; Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/09-75, paragraph 11; Decision on the Defence Request for leave to appeal the 21 November 2008 Decision, 10 February 2009, ICC-02/04-01/05-367, paragraph 22; Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)”, 29 August 2011, ICC-01/09-01/11-301, paragraph 34; Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, 9 March 2012, ICC-01/09-02/11-406, paragraphs 50 and 61.

<sup>65</sup> ICC-02/05-03/09-416, Footnote 23.

Done in both English and French, the English version being authoritative.



**Judge Joyce Aluoch**



**Judge Fernández de Gurmendi**



**Judge Chile Eboe-Osuji**

Dated this 13 December 2012

At The Hague, the Netherlands