

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 1 November 2011

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

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

Public

Decision on the Prosecution's Application for Leave to Appeal the "Reasons for the Order on translation of witness statements (ICC-02/0503/09-199) and additional instructions on translation"

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

The Office of the Prosecutor

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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

Registrar

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

**Others
Appeals Chamber**

Trial Chamber IV (“Chamber”) of the International Criminal Court (“Court” or “ICC”) in the case of the *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, issues the following Decision on the Prosecution’s Application for Leave to Appeal the “Reasons for the Order on translation of witness statements (ICC-02/0503/09-199) and additional instructions on translation”.

I. Background

1. On 12 September 2011, the Chamber issued its “Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation”¹ (“Decision”), which ordered the Office of the Prosecutor (“prosecution”), pursuant to Articles 64(3)(c) and 67(1) of the Rome Statute (“Statute”) and Rules 76, 84 and 111 of the Rules of Procedure and Evidence (“Rules”), to disclose organised and signed witness statements in narrative form of all the witnesses it intends to rely on for the purposes of the trial, including those already interviewed and those who will be interviewed, in their original language and in Zaghawa audio format, on a rolling basis as soon as is practicable.²
2. On 19 September 2011, the prosecution filed an application for leave to appeal the Decision³ on the issue of “[w]hether rule 111 requires the Prosecution to take formal and ‘well-organized’ signed statements from witnesses to whom article 55(2) applies.”⁴

¹ Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, 12 September 2011, ICC-02/05-03/09-214.

² ICC-02/05-03/09-214, paragraph 37.

³ Corrigendum of 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”, 19 September 2011 (notified on 20 September 2011), ICC-02/05-03/09-218-Corr.

⁴ *Ibid.*, paragraph 13.

3. On 23 September 2011, the defence for Messrs Banda and Jerbo (“defence”) filed its response, opposing the application for leave to appeal and arguing that the application fails to satisfy the standard for seeking leave to appeal under Article 82(1)(d) of the Statute.⁵

II. Relevant Provisions

4. In accordance with Article 21(1) of the Statute, the Chamber has considered Article 82(1)(d) of the Statute:

Appeal against other decisions

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

[...]

- (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.

[...]

III. Submissions and Analysis

5. The Appeals Chamber has held⁶ that the following criteria are applicable to an application for leave to appeal:
 - 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

⁵ Defence Response to Corrigendum of 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”, 23 September 2011, ICC-02/05-03/09-223.

⁶ 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, paragraphs 8-19.

- (ii) The outcome of the trial; and
 - c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.
6. The Chamber notes that 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.⁷

a) Is this an appealable issue?

7. The prosecution submits that the issue constitutes an identifiable subject or topic requiring a decision for its resolution, namely, whether the prosecution is required to produce written witness statements pursuant to Rule 111 of the Rules in addition to transcripts of recorded witness interviews submitted under Rule 112 of the Rules.⁸ The prosecution further submits that the issue concerns the procedure to be followed when, pursuant to Article 55(2) of the Statute, witnesses are interviewed in connection with an investigation. The prosecution argues that the drafters intended Rule 112 of the Rules to be *lex specialis* vis-à-vis Rule 111 of the Rules as regards Article 55(2) witnesses.⁹ According to the prosecution, the last sentence of Rule 112(1)(a) of the Rules as well as the scenario foreseen in Rule 112(2) of the Rules would be redundant or meaningless if the prosecution was obliged to provide a written statement.¹⁰

⁷ See for example, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06, and a/0111/06 to a/0127/06, ICC-02/04-112, 19 December 2007, notified on 20 December 2007, paragraph 17.

⁸ ICC-02/05-03/09-218-Corr, paragraph 17.

⁹ ICC-02/05-03/09-218-Corr, paragraph 18.

¹⁰ ICC-02/05-03/09-218-Corr, paragraph 18.

8. The defence argues that the prosecution issue was not dealt with in the Decision and is thus not an appealable issue.¹¹ Neither the “Prosecution’s Proposal on the Issue of Translation”¹² nor the “Prosecution’s update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses”¹³ made any mention of the procedure to follow when Article 55(2) witnesses are interviewed, or any argument regarding the relationship between Rules 111 and 112 of the Rules.¹⁴ Referring to a decision in the case of the *Prosecutor v. Thomas Lubanga*, the defence contends that an appealable issue must have a real basis in the impugned decision which is evidenced by specific challenges and submissions.¹⁵
9. The Chamber notes that the issue defined by the prosecution is “[w]hether rule 111 requires the Prosecution to take formal and ‘well-organized’ signed statements from witnesses to whom article 55(2) applies”.¹⁶ In the Decision, the Chamber required the prosecution to “disclose organised and signed witness statements in narrative form of all witnesses it intends to rely on for the purposes of the trial, including those already interviewed and those who will be interviewed, in their original language and in Zaghawa audio format on a rolling basis as soon as is practicable”.¹⁷ The Decision concerns, among others, two Article 55(2) witnesses.¹⁸
10. Therefore, the Chamber is satisfied that the issue as defined in the request arises from the Decision.

¹¹ ICC-02/05-03/09-223, paragraph 4.

¹² Prosecution’s Proposals on the Issue of Translation, 8 August 2011, ICC-02/05-03/09-192.

¹³ Prosecution’s update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses, 1 September 2011, ICC-02/05-03/09-205.

¹⁴ ICC-02/05-03/09-223, paragraph 5.

¹⁵ ICC-02/05-03/09-223, paragraph 7, making reference to, 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.

¹⁶ ICC-02/05-03/09-218-Corr, paragraph 13.

¹⁷ ICC-02/05-03/09-214, paragraph 37.

¹⁸ ICC-02/05-03/09-214, paragraph 21.

(b) Does the issue significantly affect the “fair and expeditious conduct of the proceedings or the outcome of the trial”?

11. The prosecution submits that the issue affects the fair conduct of the proceedings as the Decision requires it to comply with an extra-statutory requirement that is not provided for in the Statute or the Rules. According to the prosecution, this imposition can be unfairly burdensome and diminishes its ability to allocate and use its time and resources as it deems appropriate for investigation and prosecution purposes.¹⁹
12. In addition, the prosecution claims that the issue may also affect the presentation of its evidence, bearing in mind that when a person is asked to recall the same events he or she previously recounted, there will often be differences in emphasis or expression, or remembered or forgotten details.²⁰ Thus, an imposed requirement of an additional statement for Article 55(2) witnesses can have an unfair impact on the assessment of the credibility of that witness and of his or her evidence by the Trial Chamber.²¹ It is further submitted that contradictions would equally arise if the prosecution were to interview a new Article 55(2) witness. If the Chamber’s approach is applied, there will necessarily be inconsistencies, contradictions and differences between the two records. Ultimately, this could interfere with the Chamber’s ability to assess credibility.²² Also, according to the prosecution, the defence might claim that the issue affects fairness because it implicates its right to have a copy of a written statement by the witness, in addition to the actual recorded interview before the witness testifies. In this respect, it is argued that the requirement that there be both

¹⁹ ICC-02/05-03/09-218-Corr, paragraph 20.

²⁰ ICC-02/05-03/09-218-Corr, paragraph 21.

²¹ ICC-02/05-03/09-218-Corr, paragraph 21.

²² ICC-02/05-03/09-218-Corr, paragraph 22.

recordings and written statements to protect the rights of the defence meets the criteria under Article 82(1)(d) of the Statute.²³

13. With regard to whether the issue also affects the expeditious conduct of the proceedings, the prosecution argues that the process of taking written statements as defined in the Decision will take weeks and will require extended or repeated trips.²⁴ Moreover, the anticipated statements will take time to prepare, thus showing that the Decision has clear consequences for the expeditiousness of the proceedings.²⁵
14. The defence rejects the prosecution's suggestion that the issue has the potential to significantly affect the fair or expeditious conduct of the proceedings.²⁶ The defence submits that the prosecution's submissions are unconvincing, especially as the prosecution stated that it planned to meet with and re-interview two Article 55(2) witnesses and five new witnesses.²⁷ Regarding fairness, the defence argues that it is the duty of the Chamber to ensure a fair and expeditious trial and within its inherent power to order the prosecution to provide comprehensive and well-organised witness statements in narrative form for all witnesses it intends to rely on at trial.²⁸
15. It goes without saying that the taking of statements requires the time and resources of the prosecution. More importantly, however, the Chamber notes that Article 67(1) of the Statute provides for a "fair hearing" and requires, *inter alia*, that the accused be informed promptly and in detail of the nature, cause and content of the charges and to have adequate time and facilities for the preparation of his or her defence".²⁹ A consequence of this principle is the prosecution's disclosure obligations to the defence. Pursuant to Rule 76 of the Rules, the prosecution shall provide the defence

²³ ICC-02/05-03/09-218-Corr, paragraph 23.

²⁴ ICC-02/05-03/09-218-Corr, paragraph 25.

²⁵ ICC-02/05-03/09-218-Corr, paragraph 25.

²⁶ ICC-02/05-03/09-223, paragraphs 8-18.

²⁷ ICC-02/05-03/09-223, paragraph 10.

²⁸ ICC-02/05-03/09-223, paragraph 13.

²⁹ Article 67(1)(a) and (b) of the Statute.

with copies of any prior statements made by the witnesses whom the prosecution intends to call to testify. The underlying issue in the Decision is whether the prosecution is under an obligation to take and disclose to the defence formal and “well-organized” signed statements from all witnesses, including those falling under Article 55(2). This issue clearly affects the fair and expeditious conduct of the proceedings.

16. The Chamber notes the issue is required to either significantly affect “the fair and expeditious conduct of the proceedings” or the “outcome of the trial”. Having concluded that the issue affects the fair and expeditious conduct of the proceedings, the Chamber need not to address the question of whether the issue also affects the outcome of the trial.

(iii) Will the immediate resolution of the issue, in the opinion of the Trial Chamber, materially advance the proceedings?

17. The prosecution submits that an “authoritative determination” will advance the proceedings, ensure that they follow the right course and remove doubts about the correctness of a decision “mapping a course of action along the right lines”.³⁰ The prosecution further submits that a ruling of the Appeals Chamber on this matter is needed to provide the necessary guidance and settle the issue, in order to avoid the consolidation of a jurisprudence that, if the prosecution is correct, is based on a flawed understanding of the applicable provisions.³¹ Moreover, its resolution will assist to advance other proceedings before the Court.³²

³⁰ ICC-02/05-03/09-218-Corr, paragraph 30.

³¹ ICC-02/05-03/09-218-Corr, paragraph 34

³² ICC-02/05-03/09-218-Corr, paragraph 35.

18. The defence submits that the prosecution has not demonstrated that an immediate resolution of the issue would materially advance the proceedings, as it is suggested that the prosecution's submissions are merely speculative and unsubstantiated. Further, it is submitted that the prosecution's argument that this issue is of general interest is not sufficient to grant leave to appeal.³³

19. The Chamber is of the opinion that the immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings as the prompt reference of the issue to the Appeals Chamber and its authoritative determination will help the proceedings move forward by ensuring that the proceedings follow the right course.³⁴ In addition, the Chamber is of the opinion that an Appeals Chamber ruling would provide the necessary guidance on the prosecution's taking of witness statements and its disclosure obligations under Rule 76 of the Rules.

³³ ICC-02/05-03/09-223, paragraph 22.

³⁴ See for example, ICC-01/04-168, paragraphs 14-19.

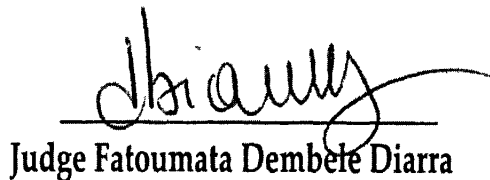
IV. Conclusion

20. For the above reasons, the Chamber grants the prosecution's request for leave to appeal.

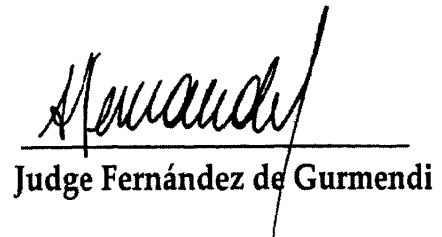
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fatoumata Dembélé Diarra



Judge Fernández de Gurmendi

Dated this 1 November 2011

At The Hague, the Netherlands