

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 March 2013

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 concerning the trial commencement date, the date for final
prosecution disclosure, and summonses to appear for trial and further hearings**

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 H el ene Ciss e

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

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

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* (“Banda and Jerbo case”), acting pursuant to Articles 58(7), 63(1), 64(2), 64(3), 64(6)(f) and 67 of the Rome Statute (“Statute”), Rules 76, 77, 119(2) and 132(1) of the Rules of Procedure and Evidence (“Rules”), and Regulation 24(5) of the Regulations of the Court, issues the following “Decision on the date for the commencement of the trial and the date for final prosecution disclosure”.

I. Background and submissions

1. On 27 August 2009, Pre-Trial Chamber I issued summonses to appear against Mr Saleh Mohammed Jerbo Jamus¹ and Mr Abdallah Banda Abakaer Nourain² for the purpose of their first appearance before the Court, which was initially scheduled for 17 November 2009 and eventually took place on 17 June 2010. These summonses to appear before the Court were reclassified as public on 15 June 2010.

2. On 19 November 2012, as ordered by the Chamber,³ the Office of the Prosecutor (“prosecution”),⁴ the defence of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus (“defence”),⁵ and the common legal representatives for victims (“CLR”)⁶ filed their respective written submissions on a possible date for the commencement of the trial. In addition, on 20 December 2012, the Registry filed

¹ Summons to appear for Saleh Mohammed Jerbo Jamus, 27 August 2009, ICC-02/05-03/09-2-RSC.

² Summons to appear for Abdallah Banda Abakaer Nourain, 27 August 2009, ICC-02/05-03/09-3-RSC.

³ Decision on the defence’s request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, page 72, point (iii).

⁴ Public Redacted Version of “Prosecution’s Submissions on the Possible Date for Commencement of the Trial” filed on 19 November 2012, 19 November 2012, ICC-02/05-03/09-421-Red.

⁵ Public Redacted Version of “Defence Submissions on the Possible Date for the Commencement of the Trial” filed on 19 November 2012, 19 November 2012, ICC-02/05-03/09-422-Red2.

⁶ Soumission des représentants légaux communs proposant une date pour le début du procès, 19 November 2013, ICC-02/05-03/09-418.

its confidential *ex parte* “Submission of the Registrar pursuant to 24bis of the Regulation of the Court concerning the possible date for the commencement of the Trial” (“Registry’s Report” or “Report”).⁷ Upon the Chamber’s instruction,⁸ a public redacted version of the Registry’s Report was filed on 25 January 2013.⁹

3. On 29 January 2013, pursuant to Rule 132(1) of the Rules, the Chamber held a public status conference in order to receive additional submissions and responses on the different dates for the commencement of the trial suggested by the parties, the CLR and the Registry, respectively.¹⁰
4. On 1 February 2013, pursuant to the Chamber’s instructions given at the status conference,¹¹ the defence filed additional submissions.¹² On 25 February 2013, the CLR filed a response to those submissions (“CLR Response”).¹³ The CLR submit that they file that response within 21 days of notification of the defence’s additional submissions.¹⁴ The only issue discussed in those additional submissions to which the CLR Response refers is the defence’s declaration regarding the time when it will be in a position to “make the last referral” to the Victims and Witnesses Protection Unit (“VWU”).¹⁵ The Chamber, however, notes that in addition to briefly discussing that issue, the CLR Response also discusses a number of other issues, which the

⁷ Submission of the Registrar pursuant to 24bis of the Regulation of the Court concerning the possible date for the commencement of the Trial, 20 December 2012, ICC-02/05-03/09-434-Conf-Exp.

⁸ Email of a Legal Officer to the Trial Chamber to the Registry on 17 January 2013 at 11:10.

⁹ Public Redacted Version of the “Submission of the Registrar pursuant to 24bis of the Regulation of the Court concerning the possible date for the commencement of the Trial”(ICC-02/05-03/09-434-Conf-Exp) filed on 20 December 2012, 25 January 2013, ICC-02/05-03/09-434-Red.

¹⁰ Transcript of hearing on 29 January 2013, ICC-02/05-03/09-T-21-Red-ENG.

¹¹ ICC-02/05-03/09-T-21-Red-ENG, page 62, lines 1 to 4.

¹² Defence Submissions on Issues Relevant to a Potential Date for the Commencement of Trial Following the Public Status Conference Held on 29 January 2013, 1 February 2013, ICC-02/05-03/09-448-Red.

¹³ Réponse des Représentants Légaux Communs à la Version Publique Expurgée des « Soumissions de la Défense Relatives à la Date Potentielle Pour le Commencement du Procès Suite à l’Audience Publique de Mise en Etat tenue le 29 Janvier 2013 » notifiée le 1er Février 2013, 25 February 2013, ICC-02/05-03/09-453 and 4 annexes thereto.

¹⁴ ICC-02/05-03/09-453, paragraph 8.

¹⁵ ICC-02/05-03/09-453, paragraphs 1 to 5, referring to ICC-02/05-03/09-448-Red, paragraph 11.

parties and participants would have been expected to raise in their written submissions referred to above and at the above-mentioned status conference. The Chamber will therefore not consider the CLR Response in so far as it discusses those other matters going beyond the scope of the defence's additional submissions.

5. On 4 March 2013, the defence filed an application for leave to reply to the CLR Response ("Application for Leave to Reply").¹⁶ However, in view of the Chamber's decision not to consider the CLR submissions on the issues which go beyond the issue discussed in the defence's additional submissions, the Chamber will not grant leave to reply to that response.
6. Written and oral submissions are summarised below.
7. The prosecution initially submitted in writing that the trial could start at the earliest at the end of March 2013 or "shortly thereafter".¹⁷ This date corresponds to the anticipated completion of the audio-translation into Zaghawa of all incriminatory evidence as set out in the latest prosecution report on translation issues.¹⁸ At the status conference, the prosecution submitted that the date of October 2014 proposed by the defence is not reasonable.¹⁹ Whilst the prosecution initially maintained its suggested date of end of March 2013, it specified that this is subject to (1) pending disclosure issues such as the issuance of the Chamber's decision on the Protocol on handling confidential information and regulating contacts between a witness of the calling party with the opposing party and the need for further disclosure of material

¹⁶ Defence Application for Leave to Reply to "Réponse des Représentants Légaux Communs à la Version Publique Expurgée des 'Soumissions de la Défense Relatives à la Date Potentielle Pour le Commencement du Procès Suite à l'Audience Publique de Mise en Etat tenue le 29 Janvier 2013' notifiée le 1er Février 2013", 4 March 2013, ICC-02/05-03/09-454.

¹⁷ ICC-02/05-03/09-421-Red, paragraph 2.

¹⁸ Eighth Prosecution Report on Translation Issues, 20 February 2013, ICC-02/05-03/09-452, paragraph 7.

¹⁹ ICC-02/05-03/09-T-21-Red-ENG, page 30, line 12 and page 59, line 19.

in the case *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, and (2) logistics issues as raised in the Registry's Report. Consequently, the prosecution submitted that "it may well be that more time is required" before starting the trial by the end of March 2013 as initially proposed in writing.²⁰ Indeed, considering, *inter alia*, the Registry's submissions proposing a number of "nuanced dates by which certain activities can be carried out", the prosecution finally "hesitate[s] to suggest a particular date".²¹

8. The defence submitted in writing that the trial could start on 6 October 2014, which is, according to it, a "realistic and reasonable" date.²² The defence also submitted that the earliest time when the trial could start is in October 2013, taking into account the constraint of the rainy season in Darfur, which is, as stated by the defence, from June to the end of October.²³ At the status conference, the defence further explained the constraints it faces before starting the trial, including pending prosecution disclosure issues, difficulties in carrying out field investigations and ongoing cooperation issues.²⁴ As a result, the defence maintained its initial proposal of October 2014.²⁵
9. The CLR submitted in writing that the trial could start in April 2013.²⁶ At the status conference, the CLR reiterated the interests of the victims for a commencement of the trial as soon as possible and concurred with the prosecution that the date of October 2014 proposed by the defence is unreasonable.²⁷ However, after having considered the arguments developed in the Registry's Report, the CLR modified its

²⁰ ICC-02/05-03/09-T-21-Red-ENG, page 15, lines 10 to 13.

²¹ ICC-02/05-03/09-T-21-Red-ENG, page 30, lines 6 to 9.

²² ICC-02/05-03/09-422-Red2, paragraph 55.

²³ ICC-02/05-03/09-422-Conf-Exp, paragraph 43.

²⁴ See for example, ICC-02/05-03/09-T-21-Red-ENG, page 43, line 3 to page 44, line 9.

²⁵ ICC-02/05-03/09-T-21-Red-ENG, page 44, lines 10 and 13.

²⁶ ICC-02/05-03/09-418, paragraph 10.

²⁷ ICC-02/05-03/09-T-21-Red-ENG, page 31, lines 11 to 15 and page 33, lines 11 to 13.

initial proposed date and submitted that “September 2013 seems to be a fairer date” for the commencement of the trial.²⁸

10. Finally, the Registry submitted in its Report that the trial cannot start before the Autumn of 2013 and may reasonably start in mid-2014.²⁹ The Registry explained that this is due to, *inter alia*, the persistent lack of a fourth Zaghawa interpreter required to ensure simultaneous interpretation during the trial and the required time for negotiations with the Host State on the conditions of stay of the accused persons during trial.³⁰ At the status conference, the Registry submitted that October 2013 may be considered as the earliest possible date.³¹ However, the Registry further explained that, *inter alia*, operational and logistical issues, co-operation issues and protection related issues need to be addressed before the start of the trial.³² As a result, the Registry reiterated that Spring 2014 would be a more appropriate date.³³

II. Analysis and Conclusion

Elements to be taken into consideration to fix a reasonable and realistic date for the commencement of the trial in the present case

²⁸ ICC-02/05-03/09-T-21-Red-ENG, page 34, lines 23 to 25

²⁹ ICC-02/05-03/09-424-Red, paragraphs 27 and 31.

³⁰ ICC-02/05-03/09-T-21-Red-ENG, page 4 line 25 to page 5, line 3.

³¹ ICC-02/05-03/09-T-21-Red-ENG, page 54, lines 20 to 22.

³² ICC-02/05-03/09-T-21-CONF-ENG ET, page 50, lines 16 to 19. The Chamber notes that the present decision refers to information considered as confidential at the status conference and therefore redacted in the public version of the transcript. While some of the matters referred to in this redacted part of the transcript should remain confidential at this stage, the Chamber is of the view that in light of the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, this Decision makes reference to information that the Chamber considers not to warrant confidential treatment at this time.

³³

11. Having considered the written and oral submissions, the Chamber is of the view that its determination of a trial date depends on a number of issues that need to be resolved before the opening statements and the presentation of evidence may commence. Indeed, the Chamber considers that further steps still need to be taken by both parties and the Registry in order to minimise, to the extent possible, the risk of avoidable interruptions of the trial proceedings once the presentation of evidence starts.

a) Disclosure issues

12. The Chamber notes the existence of outstanding issues as regards disclosure by the prosecution. In the particular circumstances of this case, every possible effort must be made to resolve those issues ahead of the commencement of the trial. In this respect, the Chamber notes the reiterated prosecution submission that the main disclosure issues will be resolved by the end of March 2013 subject to, *inter alia*, the issuance of the Chamber's Decision on the Protocol handling confidential information.³⁴ This decision has now been issued³⁵ and the prosecution is thus able to promptly disclose information important to the defence preparation.

13. In this respect, the Chamber notes the defence's request that, taking into account the ongoing difficulties which the defence encounters in carrying out its investigatory work, the defence be given "at least a year" to continue its investigations and "identify with sufficient certainty the witnesses it intends to call at trial".³⁶ Indeed, the defence submits that it "will only be in a position to make a decision on the

³⁴ ICC-02/05-03/09-T-21-Red-ENG, page 11, lines 15 to 19, page 12, line 24 to page 13, line 1 and page 29, lines 2 to 10.

³⁵ Decision on the Protocol on the handling of confidential information and contact between a party and the witnesses of the opposing party, 18 February 2013 (notified on 19 February 2013), ICC-02/05-03/09-451.

³⁶ ICC-02/05-03/09-424-Red, paragraph 3.

witnesses they intend to call with sufficient certainty, and, therefore, make the last referral to VWU, once the necessary investigations have progressed – this is one year after final disclosure of evidence and completion of Zaghawa translations”.³⁷ The defence argues that, in order to question incriminatory witnesses, it must be able to do so on the basis of evidence collected by the defence for the preparation and presentation of its case. Thus, it must be in a position to reasonably know which witness will be available to it before the presentation of prosecution evidence.³⁸

14. The Chamber notes that the defence states that it has already started to refer witnesses to the VWU for protection;³⁹ a statement confirmed in writing after the status conference.⁴⁰ In this respect, the Chamber can only encourage the defence to continue referring individuals on a rolling basis, as soon as it has decided to call such individuals as witnesses. Indeed, the Chamber is of the view that defence preparation is an ongoing process that has commenced, at least, since the two accused persons were committed to trial almost two years ago. In addition, the Chamber considers that, as submitted by the prosecution,⁴¹ a fair portion of the evidence has already been disclosed, which has allowed the defence, at least in part, to commence its preparation. Some significant preparatory work can only be completed once there has been full disclosure on the part of the prosecution. However, the Chamber does not accept that the setting of the date for trial may not be done until the defence has “identif[ied] with sufficient certainty the witnesses it intends to call at trial.” Nor is the Chamber persuaded that it would be reasonable

³⁷ ICC-02/05-03/09-422-Red2, paragraph 37.

³⁸ ICC-02/05-03/09-422-Red2, paragraph 39.

³⁹ ICC-02/05-03/09-T-21-Red-ENG, page 39, lines 15 to 17.

⁴⁰ ICC-02/05-03/09-448-Red, paragraph 11

⁴¹ ICC-02/05-03/09-T-21-Red-ENG, page 56, lines 11 to 17. See also the last notification of prosecution disclosure to the defence, disclosing the 11th batch of evidence in the present case, Prosecution’s Notification of Disclosure to the Defence of Rule 77 Material on 24 and 29 October 2012, 19 November 2012, ICC-02/05-03/09-420 together with two confidential Annexes A and B.

to postpone the commencement of the trial until the defence has had an opportunity to request the relocation of *all* the defence witnesses. The application of such hypotheses may unduly delay the start of the trial.

15. In addition to disclosure issues, the Chamber considers it necessary to take into account other relevant factors as explained below.

b) Other considerations

16. First, with regard to operational and logistical issues, the Chamber notes the Registry's submissions that six months are required in order to secure the appearance of both accused persons at the seat of the Court.⁴² In addition, travel arrangements for the accused persons need to be made bearing in mind the rainy season in Darfur from June to September, which it is submitted, poses a major practical obstacle in the organisation of their travel to the Court.

17. The Chamber recalls that, despite significant efforts made by the Registry in recruiting and training the four needed interpreters to ensure simultaneous interpretation into Zaghawa at trial, a third interpreter requires additional training and a fourth interpreter still needs to be identified and trained. As to the fourth interpreter, the Registry submits that it will take three to six months for the recruitment process only.⁴³ The Registry submits that the third interpreter would not be available to be trained before the spring of 2014.⁴⁴ With regard to the training period, the Chamber recalls the Registry's submission that, to ensure a proper interpretation of complex legal procedures and concepts, "an additional pair of

⁴² ICC-02/05-03/09-T-21-Red-ENG, page 52, lines 12 and 13.

⁴³ ICC-02/05-03/09-T-21-Red-ENG, page 52, lines 19 and 20.

⁴⁴ ICC-02/05-03/09-434-Red, paragraph 27.

paraprofessional interpreters [...] would require at least six to eight months of training".⁴⁵ Although the Chamber can sit for shorter court sessions if only three interpreters are available,⁴⁶ for reasons of expeditiousness, the Chamber would favour, to the extent possible, starting the trial with the required resources to ensure a smooth and expeditious presentation of evidence. Consequently, the Chamber acknowledges that additional time is required to solve the language issue.

18. With regard to protection and cooperation issues, the Registry, *inter alia*, explained that these issues concern not only the accused persons who are expected to remain on the territory of the Netherlands for the duration of their trial but also the witnesses called to testify at trial. Indeed, the Registry submits that, on the basis of fifteen defence witnesses, it will need a minimum of 10 months to interview and, depending on the assessment made, relocate the witnesses as identified by the defence, should they be referred to the VWU for inclusion in the ICC Protection Program. The security assessment of witnesses residing in the Republic of the Sudan ("Sudan") which will need to be carried out by the VWU implies that the witnesses travel outside Sudan, which requires cooperation of third States. Such cooperation requires time.
19. Considering the factors discussed above and whilst the Chamber concurs with the prosecution and the CLR that October 2014 is a too far off date for the commencement of the trial, the Chamber finds that any date in the spring or autumn 2013, as proposed by the prosecution or CLR, would be unrealistic and premature in light of the unavoidable and compelling factors mentioned above, including the timing involved in securing the appearance of the accused at the seat of the Court, the difficulties to organise the Zaghawa simultaneous interpretation

⁴⁵ ICC-02/05-03/09-434-Red, paragraph 28.

⁴⁶ ICC-02/05-03/09-T-21-Red-ENG, page 55, lines 5 to 22.

and the protection issues. Furthermore, as stated above, the Chamber notes that the pending disclosure issues are expected to be resolved, as suggested by the prosecution, in the near future. The Chamber thus considers that a reasonable deadline for final disclosure is **2 May 2013**. This date should also apply to the filing by the prosecution of its updated list of witnesses to be called at the trial and its updated list of evidence.

20. The Chamber underlines that the final deadline for disclosure and inspection as indicated above applies to incriminatory evidence disclosed under Rule 76 of the Rules, to potentially exculpatory evidence disclosed under Article 67(2) of the Statute (“Article 67(2) evidence”) and to the inspection of Rule 77 material. The disclosure of Article 67(2) material, as well as the provision of Rule 77 material for inspection, is a continuing obligation and the prosecution must ensure that as the evidence and issues in the preparation of and during the trial unfold it has continued to discharge its obligations in full.

Summonses to appear and related conditions of stay

21. The Chamber recalls that both accused persons were summoned to appear before this Court by Pre-Trial Chamber I on 27 August 2009, for their first appearance before the Court.⁴⁷ For purposes of their attendance in person at trial pursuant to Article 63(1) of the Statute and further appearances before the Court, when required to do so, the Chamber considers and hereby orders that the accused persons shall continue to be bound by summonses to appear, on the same conditions as those indicated in the summonses to appear issued by Pre-Trial Chamber I.

⁴⁷ ICC-02/05-03/09-2-RSC and ICC-02/05-03/09-3-RSC.

22. In addition, after consultation with the parties, the CLR and the Registry at the status conference,⁴⁸ the Chamber considers that the conditions of stay, as set out in the summonses to appear issued against both accused persons during the pre-trial proceedings, have not changed and should remain as follows:

“(i) to refrain from discussing issues related to either the charges which form the basis of the present summons or the evidence and information presented by the Prosecutor and considered by the Chamber;

(ii) to refrain from making any political statements while within the premises of the Court, including the location assigned to them;

(iii) not to leave, without specific permission of the Chamber and for the whole period of his stay in the Netherlands, the premises of the Court, including the location assigned to them;

(iv) to comply, in any case, with all the instructions of the Registrar for the purposes of their appearance before the Court.”

23. The Chamber reiterates that summonses to appear are sufficient to ensure the appearance of both accused persons before the Court.⁴⁹

24. The Chamber finally notes the Registry’s oral submission that the fourth condition may be subject to discussion with the Kingdom of the Netherlands (“Host State” or “The Netherlands”).⁵⁰ Therefore, in addition to the various difficulties described in the present Decision, the Chamber is aware that additional time is required for the Registry to discuss with the Host State the arrangements to be put in place to respect the Chamber’s decision on the conditions of stay of both accused persons on the territory of The Netherlands during the entire period of their trial, bearing in

⁴⁸ ICC-02/05-03/05-T-21-Red-ENG, page 5, line 5 to page 9, line 11.

⁴⁹ ICC-02/05-03/09-2-RSC, paragraph 20 and ICC-02/05-03/09-3-RSC, paragraph 20.

⁵⁰ ICC-02/05-03/05-T-21-Red-ENG, page 8, lines 10 to 19.

mind that both accused persons are appearing before the Court on the basis of summonses to appear rather than detention pursuant to arrest warrants. The date of the commencement of the trial as set in the present Decision allows ample time for such discussions to take place.

III. Disposition

25. For the foregoing reasons, the Chamber hereby decides that:

- (i) the Application for Leave to Reply is denied;
- (ii) the trial in the *Banda and Jerbo case* shall commence on **5 May 2014**;
- (iii) the prosecution shall disclose its trial evidence pursuant to Rule 76 of the Rules, together with its final list of witnesses and evidence, no later than 16.00 on **2 May 2013**;
- (iv) the disclosure of all Article 67(2) evidence and the provision of all Rule 77 material for inspection to the defence currently in its possession shall be completed no later than 16.00 on **2 May 2013**;
- (v) the accused persons' appearance at trial and further hearings, as required, shall continue to be on the basis of summonses to appear on the same conditions as indicated in the summonses to appear issued by Pre-Trial Chamber I on 27 August 2009, as supplemented in this Decision;
- (vi) the Registry shall start as soon as possible the necessary negotiations with the Host State to agree on any arrangements for the conditions of stay of both accused persons on the territory of the Netherlands, bearing in mind their appearance before the

Court for the purposes of their trial and further hearings, as required, is on the basis of summonses to appear and not custodial restraint.

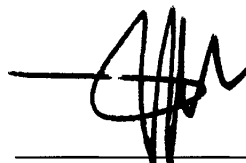
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fernández de Gurmendi



Judge Chile Eboe-Osuji

Dated this 6 March 2013

At The Hague, The Netherlands