

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 21 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 on the Defence Application for Leave to Appeal the “Decision on the
Defence’s Request for Disclosure of Documents in the Possession of the Office
of the Prosecutor”**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Adebowale Omofade

Counsel for the Defence

Mr Karim A.A. Khan

Mr Nicholas Koumjian

Legal Representatives of Victims

Ms Hélène Cissé

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*, 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’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor.”

I. Background and submissions

1. On 20 October 2011, the defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“defence”) filed the “Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor” (“Defence Request for Disclosure”).¹ The defence sought, pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (“Rules”), the disclosure of documents that were confidentially submitted by the Office of the Prosecutor (“prosecution”) in support of its application for a warrant of arrest against Omar Hassan Ahmad Al Bashir in the situation in Darfur (“Requested Material”).² The defence submitted that documents relating to the existence of a Government of Sudan’s campaign of violence directed against the civilian population in Darfur are material to the defence preparation for the trial on the three contested issues in this case (“Contested Issues”).³
2. On 23 January 2013, the Chamber issued its “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor” (“Impugned Decision”),⁴ in which it rejected the Defence Request for Disclosure.

¹ ICC-02/05-03/09-235.

² Annex A to Public Redacted Version of the Prosecutor’s Application under Article 58 filed on 14 July 2008, 12 September 2008, ICC-02/05-157-AnxA.

³ ICC-02/05-03/09-235, para 3.

⁴ ICC-02/05-03/09-443.

The Chamber noted the disagreement between the parties as to the relevance of the Request Material, and considered that, in cases of disagreement, the Chamber must determine whether the defence made a sufficient showing of materiality, within the meaning of Rule 77. The Chamber held that the defence had failed to demonstrate or had demonstrated only a very limited and indirect link between the Contested Issues and the evidence to which it sought access. The Chamber concluded that the defence had failed to make a sufficient showing of materiality within the meaning of Rule 77.⁵ Further the Chamber considered the prosecution's concerns regarding the highly sensitive nature of the Requested Material, the fact that protective measures would have to be taken if the defence were to inspect it, and the impact this may have on the expeditiousness of trial.⁶ In light of these security and expeditiousness concerns and the above mentioned insufficient showing of materiality by the defence, the Chamber rejected the request.

3. On 29 January 2013, the defence filed its "Application for Leave to Appeal the 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor'" ("Defence Application").⁷ The defence seeks leave to appeal the following issue ("Issue") which, according to it, arises from the Impugned Decision:

'Whether the Trial Chamber erred in its application of Rule 77 when evaluating the Request by restricting the scope of information which is material to the preparation of the defence to information which the Trial Chamber considers at this time would be directly relevant to the resolution of the contested issues at trial as opposed to material relevant to the preparation of the Defence for trial, and by interpreting the scope of the contested issues too narrowly.'⁸

⁵ *Ibid.*, paras 18 - 24.

⁶ *Ibid.*, para. 23.

⁷ ICC-02/05-03/09-447.

⁸ *Ibid.*, paras 3 and 20.

The defence argues that this Issue meets the legal criteria for leave to appeal an interlocutory decision pursuant to Article 82(1)(d) of the Statute.

4. The defence states, firstly, that the matter is an “appealable issue” pursuant to Article 82(1)(d) as it emanates from the ruling of the Impugned Decision. The defence submits that the first part of the Issue concerns “the proper interpretation of the term “material to the preparation of the defence” in Rule 77.⁹ The second part of the Issue concerns the “proper interpretation and scope of the contested issues” and the fact that the Chamber’s ruling regarding the Requested Material’s lack of relevance to the Contested Issues, construes the issues “extremely narrowly.”¹⁰
5. The defence then argues that the Issue significantly affects the fair and expeditious conduct of the proceedings since it “concerns the proper interpretation of Rule 77 and, therefore, the scope of the Prosecution’s disclosure obligations.”¹¹ The defence further submits that the Issue will significantly affect the outcome of the trial as it “has a bearing on the scope of the facts to be discussed and the type of evidence which will be used to substantiate them at trial”.¹² Finally, the defence also argues that an immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings in the case because “if leave to appeal is denied, the Defence will have to start investigating evidence. [...] This time consuming process [...] would obviously significantly affect the timeframes given by the Defence in relation to a trial start date and could be avoided by the Appeals Chamber ruling on the Issue now.”¹³ In addition, “disclosure of these documents is likely to assist in identifying further

⁹ *Ibid.*, para. 23.

¹⁰ *Ibid.*, para. 25.

¹¹ *Ibid.*, para. 29.

¹² *Ibid.*, para. 33.

¹³ *Ibid.*, para. 36.

areas of agreement between the Parties”, which would further narrow the scope of the trial.¹⁴

6. On 4 February 2013, the prosecution filed the “Prosecution’s Response to Defence Application for Leave to Appeal the ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”.¹⁵ The prosecution submits that the Defence Application should be rejected as the Issue is not an appealable issue within the terms of Article 82(1)(d) of the Statute and, in addition, it does not meet the criteria for leave to appeal under that provision.¹⁶ The prosecution argues that the defence mischaracterised the findings of the Trial Chamber and as such, the Issue does not arise from the Impugned Decision, but is ultimately a disagreement with the Trial Chamber’s decision and not sufficient to justify appeal.¹⁷

7. In any event, should the Trial Chamber find that the Issue does arise from the Impugned Decision and is an appealable issue, the prosecution is of the view that the Issue does not meet the criteria for leave to appeal pursuant to Article 82(1)(d).¹⁸ The prosecution avers that “[t]he mere fact that an issue relates to the scope of the Prosecution’s disclosure obligations does not mean that it significantly affects the fair and expeditious conduct of the proceedings.”¹⁹ It also submits that “since the Impugned Decision has not limited the scope of the defence nor the types of evidence that will be considered relevant, probative and admissible, it will also not have an impact on Defence case strategy.”²⁰ Further, the prosecution argues that the Issue does not significantly affect the outcome of

¹⁴ *Ibid.*, para. 37.

¹⁵ ICC-02/05-03/09-449.

¹⁶ *Ibid.*, para. 2.

¹⁷ *Ibid.*, para. 26.

¹⁸ *Ibid.*, para. 27.

¹⁹ *Ibid.*, para. 36.

²⁰ *Ibid.*, para. 36.

the trial as the Impugned Decision “will not necessarily exclude relevant evidence at trial.”²¹ Finally, the prosecution argues that the defence argument that disclosing the documents would result in additional agreed facts which would materially advance the proceedings is a purely speculative argument.²² There is sufficient material already disclosed to the defence and, as such, the defence argument that it will need to conduct lengthy investigations, is not persuasive.²³

8. On 4 February 2013, the Common Legal Representatives of Victims (“CLR”) filed their response to the Defence Application.²⁴ The CLR argue that the defence agreed to limit the scope of the case to the Contested Issues and should not ignore that agreement.²⁵ The CLR submit that a mere disagreement as to the relevance of the Requested Material to the Contested Issues cannot constitute an issue subject to an interlocutory appeal within the meaning of Article 82(1)(d) of the Statute.²⁶

II. Analysis

9. 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.²⁷

²¹ *Ibid.*, para. 39.

²² *Ibid.*, paras 41-42.

²³ *Ibid.*, para. 40.

²⁴ *Réponse des Représentants Légaux Communs à la Requête de la Défense Demandant à être Autorisée à Interjeter Appel contre la Décision sur la Requête de la Défense pour Obtenir la Divulgence des Documents en Possession du Procureur*, ICC-02/05-03/09-450.

²⁵ *Ibid.*, para. 19.

²⁶ *Ibid.*, paras 20-21.

²⁷ *Situation in the Democratic Republic of the Congo*, 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, para. 9.

10. 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.”²⁸ The Appeals Chamber also held that “the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue. By the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial or Trial Chamber may certify such a decision on its own accord”.²⁹

11. When examining the Defence Application the Chamber will have regard to the following criteria:

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand would significantly affect:
 - i. the 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 by the Appeals Chamber may materially advance the proceedings.

12. 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. The cumulative nature of these requirements means that, if at least one

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 20.

of them is not satisfied, it is unnecessary for the Chamber to continue to consider whether the remaining criteria are met.³⁰

13. 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.³¹ 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.³²

14. The issue with respect to which the defence seeks leave to appeal can be divided into two distinct issues:

- (i) whether the Trial Chamber erred in its application of Rule 77 when evaluating the Request by restricting the scope of information which is material to the preparation of the defence to information which the Trial Chamber considers at this time would be directly relevant to the resolution of the contested issues at trial as opposed to material relevant to the preparation of the Defence for trial, and
- (ii) whether the Trial Chamber erred in its application of Rule 77 when evaluating the Request by interpreting the scope of the contested issues too narrowly.

15. The first sub-issue appears to be based on a distinction between relevance to the Contested Issues and relevance to the preparation of the defence. In this respect, the defence asserts that, at trial, it intends to present evidence to support its theory set out in the Defence Request for Disclosure.³³ The alleged error of the Chamber consists in assessing the relevance of the Requested Material to the Contested Issues only, rather than assessing it in the light of the theory the

³⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, para. 23.

³¹ *Ibid.*, para. 25. See also *Prosecutor v. Joseph Kony et al.*, 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), para. 21; *Prosecutor v. Thomas Lubanga Dyilo*, 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, para. 11.

³² ICC-01/05-01/08-1169, para. 25.

³³ ICC-02/05-03/09-447, para. 23.

defence seeks to develop at trial. The Chamber, however, notes that it did consider the defence's theory summarised in the Defence Request for Disclosure. In particular, the Chamber discussed the relevance of the Requested Material in the light of, *inter alia*, the defence's allegations that it was not the intention of the Government of Sudan to abide by the peace agreements and that the presence of AMIS was a tactic to hinder international intervention, as well as in the light of the allegation of a recurring and consistent pattern of crimes.³⁴ The Chamber assessed the relevance of the Requested Material through the elements of that theory.

16. The Chamber reiterates that in its "Decision on the Joint Submission regarding the contested issues and the agreed facts" it ruled that "the trial will proceed only on the basis of the contested issues" and that "the parties shall not present evidence or make submissions other than on the issues that are contested".³⁵ The defence itself, jointly with the prosecution, had requested these limitations to the scope of the case and the evidence to be presented at trial, as follows:

6. Finally, the Parties agree that, apart from the [Contested Issues], the Parties shall not submit additional evidence or make additional submissions regarding the guilt or innocence of the Accused persons unless the Chamber, within its discretion, deems it necessary to have such additional evidence and/or submissions on the issues before it. [...]
8. The agreement reached by the Parties will significantly shorten the trial proceedings by focusing the trial only on those issues that are contested between the Parties. This will promote an efficient and cost effective trial whilst preserving the rights of victims to participate in the proceedings and protecting the rights of the Accused persons to a fair and expeditious trial.³⁶

Furthermore, the defence acknowledged such limitation of the scope of the case

³⁴ ICC-02/05-03/09-443, paras 16, 19 and 22.

³⁵ Decision on the Joint Submission regarding the contested issues and the agreed facts, 28 September 2011, ICC-02/05-03/09-227, para. 46.

³⁶ Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons, 16 May 2011, ICC-02/05-03/09-148.

in its Request for Disclosure, where, relying on Rule 77 of the Rules, it sought access to documents which are “material to the defence preparation for the trial in this case on the *three contested issues*”.³⁷ The Chamber proceeded accordingly and consequently did not treat the theory summarised by the defence in its Request for Disclosure separately from the Contested Issues. The rule of relevance in litigation requires that any theory that the defence may wish to develop at trial must be confined to the four corners of the case. As the present case is confined to the Contested Issues, the Chamber assessed the relevance of the Requested Material to the preparation of the defence in the light of those issues. The limitation of the Chamber’s assessment of relevance to the Contested Issues only is thus a result of the parties’ agreement and the Chamber’s prior acceptance thereof. The Chamber is therefore not satisfied that sub-issue (i) arises from the Impugned Decision. Sub issue (i) does not constitute an appealable issue and the requirements of Article 82(1)(d) of the Statute are thus not met.

17. As regards the second sub-issue, the error alleged by the defence relates to the Chamber’s interpretation of the scope of the Contested Issues. The defence contends that the Chamber construed the Contested Issues “extremely narrowly”³⁸ and that the related question of what evidence the defence will be permitted to present in relation to the Contested Issues at trial is “essential for the determination of matters arising in the judicial cause under examination”.³⁹ The Chamber agrees that the Impugned Decision involves the issue of whether the Chamber interpreted the Contested Issues too narrowly. The Chamber’s interpretation of the Contested Issues and its application of the materiality threshold to the Defence Request for Disclosure led the Chamber to deny the

³⁷ ICC-02/05-03/09-235, para. 3 (emphasis added).

³⁸ ICC-02/05-03/09-447, para. 25.

³⁹ ICC-02/05-03/09-447, para. 27.

request.

18. The Chamber, however, notes that its conclusion that “the defence has failed to make a sufficient showing of materiality, within the meaning of Rule 77” *only related to part of the Requested Material*, namely the material relating to the alleged violations of peace agreements by the Government of Sudan.⁴⁰ With respect to the other part of the Requested Material the Chamber concluded that the significance of the issue identified by the defence to the Contested Issues, if any, is very limited and indirect.⁴¹ The Chamber identified a number of factors, which, in its view, militated against the grant of the Defence Request for Disclosure with respect to material of such limited relevance.⁴² These factors included, *inter alia*, considerations of security and protection measures to be applied to the Requested Material if provided for inspection and the related impact of these measures on the expeditiousness of trial. The defence contends that even such limited and indirect significance would be sufficient to satisfy the terms of Rule 77 of the Rules.⁴³ The Chamber is, however, of the view that sub-issue (ii) as formulated by the defence omits to address a critical aspect of the Impugned Decision, namely the above-mentioned factors. An analysis of the threshold of materiality required by the Chamber with respect to that second part of the Requested Material needs to take into account the factors which led the Chamber to conclude that, despite that material being of limited and indirect relevance to the defence preparation, the prosecution was not required to provide it for inspection. The Chamber is thus of the view that the second sub-issue needs to be reformulated as follows:

⁴⁰ ICC-02/05-03/09-443, para. 18.

⁴¹ ICC-02/05-03/09-443, para. 22.

⁴² ICC-02/05-03/09-443, paras 23-25.

⁴³ ICC-02/05-03/09-447, footnote 33.

whether the Trial Chamber erred in its application of Rule 77 by (a) interpreting the scope of the Contested Issues too narrowly for the purposes of the Defence Request for Disclosure and/or (b) considering the Defence Request for Disclosure disproportionate in the light of the expeditiousness and security concerns.

19. The Chamber is of the view that the issue as reformulated above would significantly affect the fair and expeditious conduct of the proceedings. The reformulated issue concerns the scope of material which the defence can inspect pursuant to Rule 77 of the Rules. The fairness of the proceedings would be significantly affected if the defence were denied access to relevant material which is in the possession of the prosecution. The resulting need to investigate and gather evidence to replace the material to which the defence would be denied access would cause delays in the proceedings and would thus affect the expeditious conduct of the proceedings. Should the defence fail to collect evidence to replace such missing material, the outcome of the trial could also be affected. The Chamber, however, notes that it is satisfied that the issue as reformulated above would significantly affect the fair and expeditious conduct of the proceedings and that it needs not determine whether this issue *would* also affect the outcome of the trial.

20. As the date of commencement of trial has been set,⁴⁴ it is of crucial importance to resolve the question of the scope of the defence's right to inspection of relevant material before the trial starts. The Chamber therefore considers that an immediate resolution by the Appeals Chamber may materially advance the proceedings.

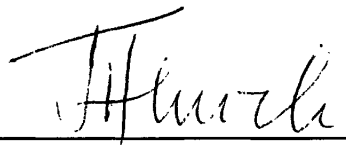
⁴⁴ Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013, ICC-02/05-03/09-455.

III. Conclusion

21. For the foregoing reasons, the Chamber hereby **partially grants** the Defence Application in that it **grants** leave to appeal the Impugned Decision in relation to the following issue:

whether the Trial Chamber erred in its application of Rule 77 by (a) interpreting the scope of the Contested Issues too narrowly for the purposes of the Defence Request for Disclosure and/or (b) considering the Defence Request for Disclosure disproportionate in the light of the expeditiousness and security concerns.

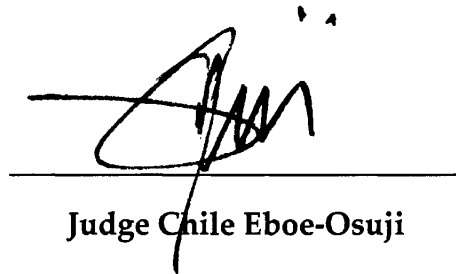
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch
Presiding Judge



Judge Silvia Fernández de Gurmendi



Judge Chile Eboe-Osuji

Dated this 21 March 2013

At The Hague, The Netherlands