

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-03/09 OA 4

Date: 6 May 2013

THE APPEALS CHAMBER

Before:
Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN DARFUR, SUDAN

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

Public document

Decision on the participation of victims in the appeal

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Karim A. A. Khan
Mr Nicholas Koumjian

Legal Representatives of Victims
Ms Hélène Cissé
Mr Jens Dieckmann

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor” of 23 January 2013 (ICC-02/05-03/09-443),

Having before it the “Requête des Représentants Légaux Communs aux Fins de Participer à l’Appel Interlocutoire interjeté par la Défense contre la Décision de la Chambre de Première Instance IV du 23 Janvier 2013 Rejetant sa Demande de Divulgence des Documents en Possession du Procureur (ICC-02/05-03/09-443)” of 12 April 2013 (ICC-02/05-03/09-461),

Renders the following

DECISION

The above-mentioned application is dismissed.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

1. On 20 October 2011, Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus (hereinafter: “Mr Banda and Mr Jerbo”) filed before Trial Chamber IV (hereinafter: “Trial Chamber”) the “Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”¹ (hereinafter: “Request for Disclosure”). Mr Banda and Mr Jerbo sought, pursuant to article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence, an order by the Trial Chamber for the disclosure of all material that the Prosecutor had submitted in support of the application for a warrant of arrest against Mr Omar Hassan Ahmad Al Bashir, with the exception of statements of victims and any information identifying

¹ ICC-02/05-03/09-235.

insider witnesses (hereinafter: “Requested Material”).² Mr Banda and Mr Jerbo submitted the Requested Material was material to the preparation of their defence in relation to the three contested issues in the case,³ namely i) whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; ii) if the attack is deemed unlawful, whether the accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and iii) whether the African Union Mission in the Sudan (hereinafter: “AMIS”) was a peacekeeping mission in accordance with the Charter of the United Nations (hereinafter: “Contested Issues”).⁴

2. The Prosecutor objected to the Request for Disclosure,⁵ to which Mr Banda and Mr Jerbo filed a reply.⁶ The victims participating in the proceedings before the Trial Chamber (hereinafter: “Victims”) made no submissions in relation to the Request for Disclosure.

3. On 23 January 2013, the Trial Chamber issued the “Decision on the Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”⁷ (hereinafter: “Impugned Decision”), rejecting the Request for Disclosure.

4. On 29 January 2013, Mr Banda and Mr Jerbo applied for leave to appeal the Impugned Decision.⁸ The Prosecutor⁹ and the Victims¹⁰ opposed this application.

5. On 21 March 2013, the Trial Chamber granted leave to appeal the Impugned Decision¹¹ (hereinafter: “Decision Granting Leave to Appeal”) in relation to:

² Request for Disclosure, p. 19.

³ Request for Disclosure, para. 3.

⁴ Trial Chamber IV, “Decision on the Joint Submission regarding the contested issues and the agreed facts”, 28 September 2011, ICC-02/05-03/09-227, para. 24.

⁵ “Prosecution’s Response to Defence Request for Disclosure”, 10 November 2011, ICC-02/05-03/09-251.

⁶ “Defence Reply to the Prosecution’s Response to the Defence Request for Disclosure”, 30 November 2011, ICC-02/05-03/09-264.

⁷ ICC-02/05-03/09-443.

⁸ “Defence Application for Leave to Appeal the ‘Decision on Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’ (ICC-02/05-03/09-443)”, ICC-02/05-03/09-447.

⁹ “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’”, 4 February 2013, ICC-02/05-03/09-449.

¹⁰ “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”, 4 February 2013, ICC-02/05-03/09-450.

[W]hether 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.¹²

B. Proceedings before the Appeals Chamber

6. On 2 April 2013, Mr Banda and Mr Jerbo submitted their document in support of the appeal against the Impugned Decision (hereinafter: “Document in Support of the Appeal”).¹³

7. On 12 April 2013, the Victims submitted the “Requête des Représentants Légaux Communs aux Fins de Participer à l’Appel Interlocutoire interjeté par la Défense contre la Décision de la Chambre de Première Instance IV du 23 Janvier 2013 Rejetant sa Demande de Divulgence des Documents en Possession du Procureur (ICC-02/05-03/09-443)”¹⁴ (hereinafter: “Victims’ Application”), seeking their participation in the present appeal.

8. The Victims submit that (a) they are authorised to participate in the case as victims;¹⁵ (b) their personal interests are affected by the issues on appeal because: (i) the arguments raised by Mr Banda and Mr Jerbo in the Document in Support of the Appeal seek to substantiate that the attack on the MGS Haskanita was lawful and seek to deny AMIS’ status as a peacekeeping mission, which are questions directly linked to their status as victims and which affect the Victims’ dignity and professional integrity,¹⁶ and (ii) any attempt to broaden the scope of rule 77 of the Rules of Procedure and Evidence will impact adversely on the expeditiousness of proceedings, and therefore on the Victims’ rights;¹⁷ (c) it is appropriate for the Appeals Chamber to allow the Victims to participate at this juncture of the proceedings for the purposes of

¹¹ “Decision on the Defence Application for Leave to Appeal the ‘Decision on Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”, ICC-02/05-03/09-457.

¹² Decision Granting Leave to Appeal, para. 21.

¹³ “Defence’s Document in Support of Appeal against Trial Chamber IV’s ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”, ICC-02/05-03/09-459 (OA 4).

¹⁴ ICC-02/05-03/09-461 (OA 4).

¹⁵ Victims’ Application, p. 7, referring to Pre-Trial Chamber I, “Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges”, 29 October 2010, ICC-02/05-03/09-89.

¹⁶ Victims’ Application, paras 21-28.

¹⁷ Victims’ Application, paras 34-47.

presenting their views and concerns on the issues raised by Mr Banda and Mr Jerbo;¹⁸ and (d) the expression of their views and concerns on the issues raised by Mr Banda and Mr Jerbo is neither prejudicial to nor inconsistent with the rights of the accused persons to a fair and impartial trial, given that Mr Banda and Mr Jerbo retain a right of response to any submissions made by them.¹⁹

9. Further to an order by the Appeals Chamber,²⁰ the Prosecutor, on 18 April 2013, responded to the Victims' Application (hereinafter: "Prosecutor's Response to Victims' Application"),²¹ supporting the Victims' Application on the basis, *inter alia*, "that the issue in this appeal, that is the scope of Rule 77, the scope of the contested issues and the amount of information that must be disclosed to the Appellant under that Rule, affects the personal interests of the victims".²²

10. On 19 April 2013, Mr Banda and Mr Jerbo responded to the Victims' Application, advising that they "take no position in relation to the [Victims' Application]".²³

II. MERITS

11. The Appeals Chamber has held that, with respect to victims' participation in appeals brought under article 82 (1) (d) of the Statute, the following four cumulative criteria enumerated in article 68 (3) of the Statute must be fulfilled: (i) the individuals seeking participation must be victims in the case; (ii) their personal interests must be affected by the issues on appeal; (iii) their participation must be at an appropriate stage of the proceedings; and (iv) the manner of participation should neither cause

¹⁸ Victims' Application, paras 48-49.

¹⁹ Victims' Application, paras 50-52.

²⁰ "Order on the filing of responses to the 'Requête des Représentants Légaux Communs aux Fins de Participer à l'Appel Interlocutoire interjeté par la Défense contre la Décision de la Chambre de Première Instance IV du 23 Janvier 2013 Rejetant sa Demande de Divulgence des Documents en Possession du Procureur (ICC-02/05-03/09-443)", 16 April 2013, ICC-02/05-03/09-463 (OA 4).

²¹ "Prosecution's Response to the « Requête des Représentants Légaux Communs aux Fins de Participer à l'Appel Interlocutoire interjeté par la Défense contre la Décision de la Chambre de Première Instance IV du 23 Janvier 2013 Rejetant sa Demande de Divulgence des Documents en Possession du Procureur »", ICC-02/05-03/09-464 (OA 4).

²² Prosecutor's Response to Victims' Application, para. 3.

²³ "Defence Response to 'Requête des Représentants Légaux Communs aux Fins de Participer à l'Appel Interlocutoire interjeté par la Défense contre la Décision de la Chambre de Première Instance IV du 23 Janvier 2013 Rejetant sa Demande de Divulgence des Documents en Possession du Procureur (ICC-02/05-03/09-443)", ICC-02/05-03/09-465 (OA 4), para. 2.

prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial.²⁴

12. In relation to whether the Victims' personal interests are affected in the case at hand, the Appeals Chamber notes that the issues on appeal concern the scope of the Prosecutor's obligations under rule 77 of the Rules of Procedure and Evidence to disclose the Requested Material to Mr Banda and Mr Jerbo. The Appeals Chamber considers that these issues are, as such, unrelated to the personal interests of the Victims because they relate solely to the relationship between the accused and the Prosecutor. The Appeals Chamber recalls further that the Requested Material is from another case entirely – that of *Prosecutor v. Omar Hassan Ahmad Al Bashir*²⁵ – and there is no suggestion that potentially disclosing material from that case affects the personal interests of the Victims in the present case.

13. The Appeals Chamber is not persuaded by the arguments put forward by the victims in relation to their personal interests. In particular, the Appeals Chamber notes that several of their submissions relate to how their personal interests would be affected by the determination of the Contested Issues, rather than by the disclosure of the Requested Material. They aver, for example, that Mr Banda and Mr Jerbo's arguments seeking to substantiate the lawfulness of the attack by challenging AMIS' peacekeeping status directly affect their personal interests as their very status and rights as victims of the war crime occasioned by the 29 September 2007 attack are at issue,²⁶ presumably on the basis that if the lawfulness of the attack is established, they will no longer be considered victims. The Victims also argue that their status and concomitant rights, and thus their personal interests, are affected by other arguments

²⁴ *Prosecutor v. Thomas Lubanga Dyilo*, "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", 16 May 2008, ICC-01/04-01/06-1335 (OA 9 OA 10), para. 36; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on the Second Application by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", 28 January 2010, ICC-02/05-01/09-70 (OA), para. 9; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Participation of Victims in the Appeal of Mr Katanga Against the 'Decision on the Modalities of Victim Participation at Trial'", 24 May 2010, ICC-01/04-01/07-2124 (OA 11), para. 5; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Participation of Victims in the Appeal against Trial Chamber I's Decision to Stay the Proceedings", 18 August 2010, ICC-01/04-01/06-2556 (OA 18), para. 7; *Prosecutor v. Germain Katanga*, "Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court", 17 January 2013, ICC-01/04-01/07-3346 (OA 13), para. 6.

²⁵ ICC-02/05-01/09.

²⁶ Victims' Application, paras 24-25.

in the Document in Support of the Appeal, including those relating to the motives of Mr Banda and Mr Jerbo.²⁷ In this regard, the Appeals Chamber underlines that its eventual decision on the present appeal will not lead to a determination of any of those issues, but will address whether or not the Prosecutor must disclose the Requested Material. Therefore, the outcome of the appeal will not affect the status of the Victims.

14. In light of the above, the Appeals Chamber finds that the Victims' personal interests are not affected by the issues on appeal. The Appeals Chamber therefore dismisses the Victims' Application on that basis and will not examine the remaining criteria. Apart from that, the Appeals Chamber notes that the Victims' Application, while referring to the decision granting the Victims the right to participate during the pre-trial stage of the case,²⁸ does not specify expressly on behalf of which victims it was filed, nor does it reference the relevant decisions of the Trial Chamber in relation to their participation at the trial stage of the proceedings. As previously underscored by the Appeals Chamber,²⁹ it is important that applications for participation in appeals under article 82 (1) (d) of the Statute contain such information.

The separate opinion of Judge Sang-Hyun Song will be filed in due course and will be attached as an annex to this decision.

²⁷ Victims' Application, para. 27.

²⁸ See Victims' Application, p. 7, footnote 15 referring to "Decision on Victims' Participation at the Hearing on the Confirmation of the Charges", 29 October 2010, ICC-02/05-03/09-89.

²⁹ See, in particular, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on 'Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 9 January 2012 and addendum of 10 January 2012'", 1 February 2012, ICC-01/05-01/08-2098, para. 12; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Participation of Victims in the Appeal of Mr Katanga Against the 'Decision on the Modalities of Victim Participation at Trial'", 24 May 2010, ICC-01/04-01/07-2124 (OA 11), para. 6; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Participation of Victims in the Appeal against the 'Decision on Applications for Provisional Release' of Trial Chamber III", 14 July 2007, ICC-01/05-01/08-1597 (OA 7), para. 14.

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



Judge Akua Kuenyehia
Presiding Judge

Dated this 6th day of May 2013

At The Hague, The Netherlands