

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 13 July 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 "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence"**

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

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

**Counsel for the Defence**

Mr Karim A.A. Khan

Mr Nicholas Koumjian

**Legal Representatives of Victims**

Mr Brahim Koné

Ms Hélène Cissé

Mr Akin Akinbote

Mr Frank Adaka

Sir Geoffrey Nice & Mr Rodney Dixon

**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**

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* ("*Banda and Jerbo case*"), issues the following Decision on the Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence".<sup>1</sup>

## **I. Background and Submissions**

1. On 30 June 2011 the Trial Chamber issued its "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence" ("Decision"),<sup>2</sup> holding that in the absence of any persuasive indications of a conflict of interest, the appointment of a former member of the Office of the Prosecutor ("prosecution") to the team of the defence for Messrs Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus ("defence") in the present case was not prejudicial to the proceedings.<sup>3</sup>

### ***The prosecution application***

2. On 6 July 2011, the prosecution filed an application for leave to appeal the Decision on the following two issues:<sup>4</sup>

#### ***First prosecution issue:***

- a) Whether, as a matter of law, prosecution lawyers may join a defence team in a case that was open at the time when the person worked for the prosecution, or

<sup>1</sup> Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence" (ICC-01/02-05-03/09-168), 6 July 2011, ICC-02/05-03/09-173.

<sup>2</sup> ICC-02/05-03/09-168, issued following the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team, 8 June 2011 (notified on 9 June 2011), ICC-01/02-05-03/09-160 ("Request").

<sup>3</sup> ICC-02/05-03/09-168, paragraph 21.

<sup>4</sup> ICC-02/05-03/09-173.

whether they should be barred for a period of time before joining the defence team.<sup>5</sup>

***Second prosecution issue:***

- b) Whether the Chamber failed to properly consider and weigh the information provided by the prosecution that Mr Yillah was privy to confidential information relating to the *Banda and Jerbo* case and whether it gave excessive weight to the assertion of Mr Yillah that he is unaware of any relevant confidential information.<sup>6</sup>

***The defence response***

3. The defence filed its response on 8 July 2011, opposing the application for leave to appeal and arguing that the application fails to satisfy the standard under Article 82(1)(d) of the Rome Statute ("Statute") as concerns both issues presented by the prosecution.<sup>7</sup>

**II. Relevant Provisions**

4. In accordance with Article 21(1) of the Statute, the Trial 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

<sup>5</sup> ICC-02/05-03/09-173, paragraph 4.

<sup>6</sup> ICC-02/05-03/09-173, paragraph 4.

<sup>7</sup> Defence Response to Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence" (ICC-01/02-05-03/09-168), 8 July 2011 ICC-01/02-05-03/09-175.

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 held<sup>8</sup> 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
  - (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.<sup>9</sup>

#### A. The first prosecution issue

##### (i) Is this an appealable issue?

##### *The prosecution submissions*

7. The prosecution submits that the first issue concerns the legal standard applicable to conflicts of interest involving former prosecution lawyers.<sup>10</sup> According to the

<sup>8</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, paragraphs 8 – 19.

<sup>9</sup> 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, a/0111/06 to a/0127/06, ICC-02/04-112, 19 December 2007, notified on 20 December 2007, paragraphs 17 – 19.

prosecution, former prosecution lawyers have what amounts to a *per se* conflict of interest arising out of their previous employment with the OTP and should be barred for a period of time (which it is suggested should be no shorter than one year) from working for the defence in any case before the ICC.<sup>11</sup> According to the prosecution, this first issue arises from the Decision<sup>12</sup> and its resolution is essential to the determination of whether Mr Yillah's appointment gives rise to a conflict of interest.<sup>13</sup>

### *The defence submissions*

8. The defence argues that the first prosecution issue does not arise from the Decision and is thus not an appealable issue.<sup>14</sup> It is submitted that since the Chamber found that the prosecution had not shown that Mr Yillah possessed confidential information pertaining to the *Banda and Jerbo* case, the first issue is therefore merely a general question of law "which formed no part of the dispositive element of the Decision"<sup>15</sup> and which "consists of nothing more than a disagreement with a finding of the Chamber".<sup>16</sup>

### *Analysis*

9. The Appeals Chamber has indicated that "an issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".<sup>17</sup> An appealable "issue" may be either legal,

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<sup>10</sup> ICC-02/05-03/09-173, paragraph 18.

<sup>11</sup> ICC-02/05-03/09-173, paragraphs 4 and 13 – 14.

<sup>12</sup> ICC-02/05-03/09-173, paragraphs 13 – 15.

<sup>13</sup> ICC-02/05-03/09-173, paragraph 17.

<sup>14</sup> ICC-02/05-03/09-175, paragraphs 6 – 7.

<sup>15</sup> ICC-02/05-03/09-175, paragraph 7.

<sup>16</sup> ICC-02/05-03/09-175, paragraph 8, quoting Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges, ICC-01/04-01/07-727, 24 October 2008, page 16 (internal quotation marks omitted).

<sup>17</sup> ICC-01/04-168, paragraph 9.

factual, or mixed in nature, but its resolution must be “essential for the determination of matters arising in the judicial cause under examination”.<sup>18</sup>

10. The prosecution contends that former prosecution lawyers should be barred for a period of time no shorter than one year from joining an ICC defence team and further submits that this standard should be applied objectively, without a requirement of proof of actual access to confidential or privileged information.<sup>19</sup> Although the Chamber in its Decision declined to adopt the prosecution’s proposed objective standard and instead focussed on whether Mr Yillah was *effectively* in possession of any confidential information pursuant to Article 12 of the Code of Conduct, the question of the applicable legal standard concerning conflicts of interest in representation when former prosecution counsel are assigned to the defence is an issue arising from the Chamber’s decision. The resolution of this question is essential to determining the question in the current case; namely, whether Mr Yillah’s appointment gives rise to a conflict of interest.

**(ii) Does the issue significantly affect the “fair and expeditious conduct of the proceedings”?**

***The prosecution submissions***

11. The prosecution submits that both the first and second issues affect the fair conduct of the proceedings since provisions applicable to conflicts of interest “are by definition intended to safeguard the fairness of the proceedings”.<sup>20</sup> It is suggested

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<sup>18</sup> ICC-01/04-168, paragraph 9.

<sup>19</sup> ICC-02/05-03/09-173, paragraphs 13 – 14.

<sup>20</sup> ICC-02/05-03/09-173, paragraph 20.

that if a member of the defence team is in possession of confidential prosecution strategy, this will inevitably affect the fairness of the proceedings.<sup>21</sup>

12. In regards to whether the first issue also affects the expeditious conduct of the proceedings, the prosecution submits that according to the jurisprudence of Trial Chamber II, once a party has demonstrated that an issue affects the fair conduct of the proceedings, it is unnecessary to show that the issue will also affect the expeditiousness of proceedings.<sup>22</sup> However, the prosecution submits that in any event both issues also affect the expeditious conduct of the proceedings, as it may have to adjust its case strategy “in order to neutralize or mitigate the legitimate and serious concerns that it has as to Mr Yillah’s access to sensitive information”.<sup>23</sup>

13. It is further suggested that if it were to become apparent at trial that the defence strategy was informed by its access to confidential prosecution information, this could result in the disqualification of the defence team or require the recommencement of proceedings.<sup>24</sup>

### *The defence submissions*

14. The defence rejects the prosecution’s suggestion that the first issue has the potential to affect the fair or expeditious conduct of the proceedings.<sup>25</sup> The defence submits as a preliminary matter that both prosecution issues appear to be predicated on Mr Yillah (or prosecution lawyers generally) possessing confidential information.<sup>26</sup> The defence suggests that as no such specific confidential information has been

<sup>21</sup> ICC-02/05-03/09-173, paragraph 21.

<sup>22</sup> ICC-02/05-03/09-173, paragraph 22.

<sup>23</sup> ICC-02/05-03/09-173, paragraph 23.

<sup>24</sup> ICC-02/05-03/09-173, paragraph 23.

<sup>25</sup> ICC-02/05-03/09-175, paragraph 13.

<sup>26</sup> ICC-02/05-03/09-175, paragraph 14.

identified by the prosecution, no further analysis remains to be undertaken by the Chamber in this regard.<sup>27</sup>

15. Concerning whether the issue significantly affects the fairness of proceedings, the defence submits that the prosecution has failed to identify any confidential information allegedly in the possession of Mr Yillah and that the prosecution's submissions in this regard are thus "founded on conjecture".<sup>28</sup> In the submission of the defence, mere speculation by the prosecution as to how unidentified confidential information might affect the fairness of the proceedings is insufficiently linked to the first issue and does not constitute a basis for granting leave to appeal.<sup>29</sup>
16. The defence also challenges the prosecution's contention that resolution of the first issue will affect the expeditious conduct of the proceedings, arguing that the prosecution has not provided any evidence to support the scenarios it identifies.<sup>30</sup>

### *Analysis*

17. The issue of whether the assignment to defence teams of lawyers who have recently left employment with the prosecution creates a conflict of interest is one that may significantly affect the fairness of the proceedings. If the assignment of Mr Yillah to the defence team has created a conflict of interest, the fairness of the proceedings would be significantly affected. Thus, on this basis the first issue satisfies the "fairness" criterion in Article 82(1)(d) of the Statute.
18. Regarding the prosecution's suggestion that the first part of the test in Article 82(1)(d) should be read disjunctively, so that it would be unnecessary to show that

<sup>27</sup> ICC-02/05-03/09-175, paragraph 14.

<sup>28</sup> ICC-02/05-03/09-175, paragraphs 15 – 16.

<sup>29</sup> ICC-02/05-03/09-175, paragraph 17.

<sup>30</sup> ICC-02/05-03/09-175, paragraphs 19 – 20.

the issue affects the expeditious conduct of the proceedings once it has been demonstrated that fairness is affected, the Chamber considers that the use of the word “and” in this provision (“an issue that would significantly affect the fair **and** expeditious conducts of the proceedings”) rather than “or” strongly suggests that the Statute’s drafters intended this part of Article 82(1)(d) to be applied conjunctively.<sup>31</sup> Accordingly, to constitute the proper subject of an appeal, the first issue must also affect the expeditious conduct of the proceedings.

19. In its Decision, the Chamber found that while Mr Yillah’s prior employment with the prosecution “might have provided him insight into the functioning of the Office of the Prosecutor” and “knowledge pertaining to ongoing investigations”, the prosecution had not provided any proof that Mr Yillah is in possession of confidential information relating to the present case.<sup>32</sup> Notwithstanding the findings of the Chamber, the prosecution submits that due to “serious concerns” over Mr Yillah’s alleged access to sensitive information, it may need to adjust its case strategy and selection of evidence for the purposes of trial or even request disqualification of the defence team in its entirety.<sup>33</sup> The Chamber is of the view that it is for the prosecution to design its strategy and thus a real potential for delay to the trial may emerge as a result of the prosecution’s concerns. On this basis the first issue could significantly affect the expeditiousness of the proceedings.

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<sup>31</sup> See e.g. Trial Chamber I, Decision on the prosecution request for leave to appeal the “Decision on Intermediaries”, 2 June 2010 (reclassified as public on 4 June 2010), ICC-01/04-01/06-2463, paragraphs 27 – 28 and Trial Chamber III, Decision on the defence application to obtain a ruling to correct the revised Second Amended Document containing the Charges, 28 October 2010, ICC-01/05-01/08-980, paragraph 13 (referring to “*both* the fair and expeditious conduct of the proceedings”) (emphasis added).

<sup>32</sup> ICC-02/05-03/09-168, paragraphs 21 and 22.

<sup>33</sup> ICC-02/05-03/09-173, paragraph 23.

(iv) Will the immediate resolution of the issue materially advance the proceedings?

*The prosecution submissions*

20. The prosecution submits that in the absence of an immediate authoritative decision by the Appeals Chamber, if a conflict of interest exists with regard to Mr Yillah's appointment, it could invalidate the entire proceedings.<sup>34</sup> On this basis, it is said that timely intervention by the Appeals Chamber will materially advance the proceedings by preventing such an outcome and by increasing public confidence in the Court.<sup>35</sup>

*The defence submissions*

21. The defence submits that the prosecution has not demonstrated that an immediate resolution of the issues would materially advance the proceedings, as it is suggested that the prosecution has not explained why the presence of Mr Yillah would taint the proceedings, nor substantiated its concerns regarding his alleged access to confidential information.<sup>36</sup> The defence submits that any future concerns about conflicts of interest affecting defence counsel can be addressed by the relevant Trial Chambers, and refers to a decision by Trial Chamber III in support.<sup>37</sup>

*Analysis*

22. Article 82(1)(d) of the Statute, which states that "an immediate resolution by the Appeals Chamber may materially advance the proceedings" has been held to require that the Trial Chamber find that an "authoritative determination" by the Appeals Chamber will "move [the proceedings] forward" whilst ensuring their

<sup>34</sup> ICC-02/05-03/09-173, paragraph 25.

<sup>35</sup> ICC-02/05-03/09-173, paragraphs 24 – 27.

<sup>36</sup> ICC-02/05-03/09-175, paragraphs 21 – 22.

<sup>37</sup> ICC-02/05-03/09-175, paragraph 23.

integrity by “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines”.<sup>38</sup> The Chamber is of the view that in the current circumstances, an immediate determination by the Appeals Chamber concerning whether Mr Yillah should have been barred for one year following his employment with the prosecution from joining a defence team would resolve any potential error in the Decision and ensure that the proceedings continue on the right course. Therefore the Chamber finds that the first prosecution issue satisfies the final requirement of Article 82(1)(d) of the Statute.

## **B. The second prosecution issue**

### **(i) Is this an appealable issue?**

#### *The prosecution submissions*

23. The second issue as framed by the prosecution concerns whether the Chamber failed to properly consider and weigh the information presented to it on the issue of whether Mr Yillah was in possession of confidential information.<sup>39</sup> In particular, the prosecution emphasises the issue of the weight to be given to Mr Yillah’s assertion that he is unaware of any relevant confidential information.<sup>40</sup> It is submitted that the second issue arises out of the Decision because the prosecution in its Request provided information concerning the structure and working methods of the OTP in support of its submissions that lawyers in that office are “inevitably” exposed to confidential information, including investigative and prosecutorial strategies in cases other than the ones they primarily work on.<sup>41</sup>

<sup>38</sup> ICC-01/04-168, paragraphs 14 – 15.

<sup>39</sup> ICC-02/05-03/09-173, paragraphs 4 and 19.

<sup>40</sup> ICC-02/05-03/09-173, paragraph 4.

<sup>41</sup> ICC-02/05-03/09-173, paragraph 16.

24. The prosecution contends that the second issue constitutes an appealable issue involving the Chamber's exercise of its discretion in assessing and weighing the relevant facts.<sup>42</sup> It is suggested that if leave to appeal is granted, the prosecution will raise errors of fact concerning the weight that the Chamber assigned to the information before it.<sup>43</sup> The prosecution submits that the second issue does not constitute a mere disagreement on the evaluation of the evidence.<sup>44</sup>

### *The defence submissions*

25. The defence contends that the second prosecution issue is not the proper subject of an appeal because it amounts to a disagreement concerning the Court's evaluation of the information provided by the prosecution and is thus not an "issue" for the purposes of Article 82(1)(d).<sup>45</sup> The defence refers to the jurisprudence of Pre-Trial Chamber I in support of this contention.<sup>46</sup> The defence further submits that the Chamber's Decision does not in any event involve any assignment of weight to the information provided since no evidence has been provided by the prosecution concerning Mr Yillah's possession of any confidential information in the present case. Accordingly, it is submitted that the second issue as framed does not arise from the Decision.<sup>47</sup>

### *Analysis*

26. In determining whether the second issue constitutes an "appealable issue", the Chamber recalls the jurisprudence of the Appeals Chamber that an appealable issue is not merely a question over which there is disagreement or conflicting opinion.<sup>48</sup>

<sup>42</sup> ICC-02/05-03/09-173, paragraph 19.

<sup>43</sup> ICC-02/05-03/09-173, paragraph 19.

<sup>44</sup> ICC-02/05-03/09-173, paragraph 19.

<sup>45</sup> ICC-02/05-03/09-175, paragraphs 9 – 10.

<sup>46</sup> ICC-02/05-03/09-175, paragraph 11.

<sup>47</sup> ICC-02/05-03/09-175, paragraph 12.

<sup>48</sup> ICC-01/04-168, paragraph 9.

In the present case, the prosecution submits that the Chamber failed to properly evaluate the information provided to it concerning the OTP's structure and working methods. However, the Chamber in its Decision considered the prosecution's assertions, along with the undertakings of Mr Yillah, in arriving at its determination that no proof had been provided to substantiate the allegations of the prosecution that Mr Yillah is in possession of confidential material.<sup>49</sup>

27. The Chamber finds that the prosecution's disagreement with the Chamber's conclusion as regards whether or not Mr Yillah is in possession of confidential prosecution information does not give rise to an appealable issue under Article 82(1)(d) of the Statute. Similarly, the Chamber considers that the fact that the prosecution may have a different view as to the reliability of the undertakings given by Mr Yillah is insufficient to create an "issue" warranting consideration by the Appeals Chamber. On this basis, and given the cumulative nature of the test under Article 82(1)(d), it is thus unnecessary to consider whether the second issue would significantly affect the fair and expeditious conduct of the proceedings or whether an immediate resolution of this issue by the Appeals Chamber could materially advance the proceedings. Accordingly, leave to appeal is refused on the prosecution's second issue.

#### **IV. Conclusion**

28. For the above reasons, the Chamber grants leave to appeal as regards the first prosecution issue and denies leave to appeal on the second prosecution issue.

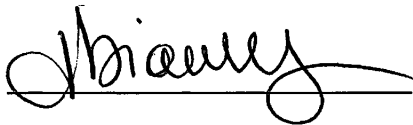
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<sup>49</sup> ICC-01/04-168, paragraphs 14 and 17 – 22.

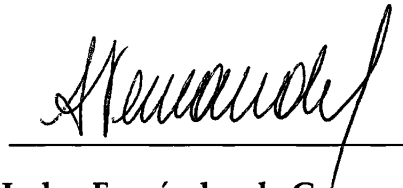
Done in both English and French, the English version being authoritative.



**Judge Joyce Aluoch**



**Judge Fatoumata Dembele Diarra**



**Judge Fernández de Gurmendi**

Dated this 13 July 2011

At The Hague, The Netherlands