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Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/05-03/09**  
Date: **29 January 2013**

**TRIAL CHAMBER IV**

**Before:** Judge Joyce Aluoch, Presiding Judge  
Judge Silvia Fernández de Gurmendi  
Judge Chile Eboe-Osuji

**SITUATION IN THE DARFUR, SUDAN**

**IN THE CASE OF *THE PROSECUTOR***

***v.***

***ABDALLAH BANDA ABAKAER NOURAIN***

***&***

***SALEH MOHAMMED JERBO JAMUS***

**Public**

**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”  
(ICC-02/05-03/09-443)**

**Sources:** Defence Team of Abdallah Banda Abakaer Nourain  
Defence Team of Saleh Mohammed Jerbo Jamus

**Document 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 QC  
Mr. Nicholas Koumjian

**Legal Representatives of the Victims**

Ms. Hélène Cissé  
Mr. Jens Dieckmann

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(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

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## **I. Introduction**

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (“Defence”) respectfully request the Trial Chamber to grant the Defence leave to appeal the “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor” (“Impugned Decision”).<sup>1</sup>
2. On 20 October 2011, the Defence requested the Trial Chamber to order the Prosecutor to disclose to the Defence the material (“Request”)<sup>2</sup> previously submitted by the Office of the Prosecutor in support of the Prosecutor’s Application under Article 58 of the Rome Statute (“Statute”) for the arrest of Omar Hassan Ahmad Al Bashir in the situation in the Darfur (“*Al Bashir* Application”).<sup>3</sup> The Request was rejected.<sup>4</sup> In the Impugned Decision, when assessing the requirement of “materiality” for the purposes of Rule 77 of the Rules of Procedure and Evidence (“Rules”), the Trial Chamber held that the Defence had failed to demonstrate or had demonstrated only a “very limited and indirect” link between the contested issues in the present case and the evidence to be disclosed.<sup>5</sup>
3. The Defence seek leave to appeal the following issue (“Issue”):

*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.*

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<sup>1</sup> ICC-02/05-03/09-443.

<sup>2</sup> Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, ICC-02/05-03/09-235, 20 October 2011.

<sup>3</sup> Public Redacted Version of the Prosecutor’s Application under Article 58, ICC-02/05-157-AnxA, 14 July 2008.

<sup>4</sup> Impugned Decision, para. 27.

<sup>5</sup> Impugned Decision, paras. 18, 22 and 24.

4. In summary, this Issue concerns the proper interpretation of Rule 77 in a case where the Parties have entered into an agreement under Rule 69. The crux of Rule 77 is that information which is in the possession or control of the Prosecutor which is “material to the preparation of the defence” should be disclosed to the Defence. The jurisprudence states that the Rule should be “interpreted broadly” and should “not exclude objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence”.<sup>6</sup> Nothing in the jurisprudence or in the plain terms of the rule indicates that its breadth is constrained by the existence of a Rule 69 agreement. Crucially, the Issue also addresses the proper interpretation of the contested issues and the determination of what evidence will be considered relevant to their proof at trial. Given that the Issue concerns the Defence’s right to receive disclosure and the parameters of the evidence it will be allowed to lead at trial, the Defence respectfully submit that it engages fundamental questions regarding the fairness and expeditiousness of proceedings and the outcome of the trial in the unique circumstances of this case. Further, the immediate resolution of this Issue by the Appeals Chamber will materially advance the proceedings by “[r]emoving doubts about the correctness of [the] decision” which may later “unravel the judicial process”.<sup>7</sup>

## **II. Procedural Background**

5. In order to narrow the scope of necessary defence investigations and also for the presentation of evidence at trial, on 21 June 2011, the Defence requested that the Prosecution stipulate to facts concerning the Government of Sudan’s

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<sup>6</sup> *Prosecutor v. Lubanga*, Judgement on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433, 11 July 2008, paras. 77-78.

<sup>7</sup> *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, (“Decision on Extraordinary Review Application”), paras. 15 and 16.

campaign of violence against the civilian population in Darfur.<sup>8</sup> The Prosecution declined to agree to these facts which were taken from the Prosecution's own materials, namely the *Al Bashir* Application, the second warrant of arrest for Omar Hassan Ahmad Al Bashir dated 12 July 2010,<sup>9</sup> statements by the Prosecutor to the United Nations Security Council and facts alleged by the Prosecution in the Document Containing the Charges in the present case.<sup>10</sup>

6. Given the Prosecution position, on 19 July 2011, the Defence requested that the Prosecution disclose evidence pursuant to Article 67(2) of the Statute and Rule 77 of the Rules concerning *inter alia* the situation in Darfur, namely secondary materials in the Prosecution's possession, including open source and expert reports and all evidence of statements by Government of Sudan ("GoS") military or political leaders tending to demonstrate an attempt to persecute or destroy in whole or in part the Fur, Zaghawa and Masalit people.<sup>11</sup> On 2 September 2011, the Prosecution declined to provide the requested disclosure.<sup>12</sup>
7. On 20 October 2011, the Defence submitted the Request. In the Request, the Defence sought disclosure pursuant to Article 67(2) and Rule 77 of material previously submitted by the Prosecution in support of its application for a warrant of arrest against Omar Hassan Ahmad Al Bashir. Given the importance of this disclosure to the Defence, in the Request, the Defence asked the Trial Chamber to convene an oral hearing.<sup>13</sup>

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<sup>8</sup> Email from Defence Lead Counsel, Mr. Karim A. A. Khan QC, to Mr. Omofade titled "Proposed Additional Rule 69 Agreement as to Evidence" and dated 21 June 2011.

<sup>9</sup> Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, 12 July 2010.

<sup>10</sup> Email from Mr. Omofade to Defence Lead Counsel, Mr. Karim A. A. Khan QC, titled "Re. Proposed Additional Rule 69 Agreement as to Evidence" and dated 6 July 2011.

<sup>11</sup> Letter from Defence Lead Counsel, Mr. Karim A. A. Khan QC, to Mr. Omofade dated 19 July 2011 attaching annexes A to C. Annex C related to materials concerning the case against Al Bashir.

<sup>12</sup> Email from Ms. Kikalishvili to Defence Lead Counsel, Mr. Karim A. A. Khan QC, titled "RE: Defence Request for disclosure" and dated 2 September 2011.

<sup>13</sup> Request, para. 39.

8. On 10 November 2011, the Prosecution filed the "Prosecution's Response to Defence Request for Disclosure".<sup>14</sup>
9. On 17 November 2011, the Defence filed the "Defence Application for Leave to Reply to the Prosecution's Response to the Defence Request for Disclosure."<sup>15</sup>
10. On 24 November 2011, the Trial Chamber issued its "Order on the defence's application for leave to reply"<sup>16</sup> in which the Trial Chamber rejected the Defence application for an oral hearing<sup>17</sup> but granted leave to the Defence to file a Reply by 30 November 2011.<sup>18</sup>
11. On 30 November 2011, the Defence filed the "Defence Reply to the Prosecution Response to the Defence Request for Disclosure."<sup>19</sup>
12. On 23 January 2013, the Trial Chamber issued the Impugned Decision in which it rejected the Request.

### **III. The test for certification of an interlocutory appeal**

13. An application for leave to appeal an interlocutory decision must satisfy the requirements of Article 82(1)(d) of the Statute which provides that a party may appeal

*[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.*

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<sup>14</sup> ICC-02/05-03/09-251.

<sup>15</sup> ICC-02/05-03/09-256.

<sup>16</sup> ICC-02/05-03/09-261.

<sup>17</sup> *Ibid.*, para. 5.

<sup>18</sup> *Ibid.*, paras. 5–6.

<sup>19</sup> ICC-02/05-03/09-264.

14. The following criteria are, therefore, applicable to an application for leave to appeal:<sup>20</sup>

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

15. The requirements set out in subparagraphs 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>21</sup> Each of the requirements has also been elucidated in the Court’s jurisprudence.

16. According to this Court’s settled jurisprudence, an appealable issue must emanate from the ruling of the impugned decision,<sup>22</sup> must be an “identifiable subject or topic requiring a decision for its resolution” and “not merely a question over which there is disagreement or conflicting opinion”,<sup>23</sup> and its resolution must be “essential for the determination of matters arising in the judicial cause under examination”.<sup>24</sup>

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<sup>20</sup> See, e.g., 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”, ICC-02/05-03/09-179, 13 July 2011 (“Decision on Leave to Appeal Disqualification of Counsel Decision”), para. 5; Decision on the 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”, ICC-02/05-03/09-243, 1 November 2011 (“Decision on Leave to Appeal Translation of Statements”), para. 5.

<sup>21</sup> Decision on Leave to Appeal Disqualification of Counsel Decision, para. 6; Decision on Leave to Appeal Translation of Statements, para. 6.

<sup>22</sup> See, e.g., *Prosecutor v. Lubanga*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, 24 May 2007, paras. 56-59; Decision on Leave to Appeal Translation of Statements, para. 10.

<sup>23</sup> *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 (“Decision on Extraordinary Review Application”), para. 9.

<sup>24</sup> Decision on Extraordinary Review Application, para. 9.

17. The requirement set out in paragraph 14 b) above is made up of two disjunctive prongs. In relation to the first, the Appeals Chamber has observed that “[t]he term ‘fair’ in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute”.<sup>25</sup> Included within the attributes of a fair trial are the “expeditious conduct of the proceedings in one form or another [...], as well as the investigation of crime”.<sup>26</sup> As regards the “expeditiousness of proceedings”, this has been held “to be closely linked to the concept of judicial proceedings ‘within a reasonable time’” and to complement “the guarantees afforded to [an accused], such as the right to fair and public proceedings.”<sup>27</sup>
18. In relation to the second prong of the requirement in paragraph 14 b), the Appeals Chamber has elucidated that a Chamber considering whether a given issue would affect the outcome of the trial requires the Chamber to “ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, a process which “involves a forecast of the consequences of such an occurrence.”<sup>28</sup>
19. In respect of the final requirement, the term “advance” in this prong of the test requires that the immediate and “authoritative determination” by the Appeals Chamber of the issue will “ensur[e] that the proceedings follow the right course” by “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines [...]”.<sup>29</sup>

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<sup>25</sup> Decision on Extraordinary Review Application, para. 11.

<sup>26</sup> Decision on Extraordinary Review Application, para. 11.

<sup>27</sup> *Prosecutor v. Bemba*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-532, 18 September 2009, para. 20.

<sup>28</sup> Decision on Extraordinary Review Application, para. 13.

<sup>29</sup> Decision on Extraordinary Review Application, para. 15.



#### **IV. The Proposed Issue for Appeal**

20. The Defence seek leave to appeal the following Issue which arises from the Impugned Decision and satisfies all the requirements of Article 82(1)(d):

*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.*

#### **V. Submissions**

a) The Issue constitutes an appealable issue pursuant to Article 82(1)(d)

21. When determining that the requested material should not be disclosed to the Defence, the Trial Chamber made the following dispositive findings:

- a) at paragraph 18 that, in relation to material concerning the GoS' failure to comply with peace agreements, "the defence [...] has not demonstrated the link between the [third] contested issue and the items of evidence sought to be disclosed by the Prosecution. [...] Nor does the defence identify any other factors which in its view are of relevance to the determination of whether AMIS was a peacekeeping mission in accordance with the UN Charter [i.e. the third contested issue]" (emphasis added);
- b) at paragraph 21 that "the Chamber must strike a balance between the parties' arguments keeping in mind the contested issues at stake" (emphasis added);
- c) at paragraph 22, that "the significance of the existence of a campaign of violence to the contested issues in the present case, if any, is very limited and indirect" (emphasis added); and

d) at paragraph 24, that “the disclosure of [the requested material] is, if at all, only remotely linked to the contested issues” (emphasis added).

22. Therefore, the approach taken in the Impugned Decision was, first, to find that the disclosure of material under Rule 77 required the Defence to articulate an evidentiary link to the ultimate resolution of the contested issues and, second, that the requested material was not sufficiently linked to those issues.

23. The Issue emanates from the Impugned Decision. The first part of the Issue concerns the proper interpretation of the term “material to the preparation of the defence” in Rule 77. As is evidenced by the above findings, notwithstanding the acknowledgement of the Appeals Chamber’s guidance in *Lubanga*,<sup>30</sup> the Impugned Decision assessed “materiality” and whether the requested evidence should be disclosed pursuant to Rule 77 narrowly and by reference to the ultimate determination on the contested issues alone. The Defence submits that this is an error.<sup>31</sup> As the Defence will submit if leave to appeal is granted, the Court’s jurisprudence requires that the term “material to the preparation of the defence” be interpreted broadly.<sup>32</sup> Indeed, the Defence will submit that the jurisprudence supports the view that evidence of

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<sup>30</sup> Impugned Decision, para. 14 citing to *Prosecutor v. Lubanga*, Judgement on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433, 11 July 2008, paras. 50, 77-78.

<sup>31</sup> The Defence provide this indication as to why the Defence respectfully submit the Trial Chamber erred in the Impugned Decision on a similar basis to the defence in the *Katanga* case. In the decision granting the *Katanga* defence leave to appeal the decision to activate Regulation 55 of the Regulations of the Court, Trial Chamber II read the appeal issue proposed by the defence “in light of the several reasons that [were] invoked by the Defence to claim that the Impugned Decision [was] unlawful and/or inappropriate” (*see Prosecutor v. Katanga*, Decision on the “Defence Request for Leave to Appeal the Decision 3319”, ICC-01/04-01/07-3327, 28 December 2012 (“*Katanga* Leave to Appeal Decision”), para. 12).

<sup>32</sup> *See* ICC-01/04-01/06-1433, para. 78.

relevance to any *prima facie* reasonable defence theory should be disclosed pursuant to this Rule.<sup>33</sup>

24. The second part of the Issue concerns the proper interpretation and scope of the contested issues.<sup>34</sup> This emanates from the Impugned Decision, because it held that the requested material was not sufficiently linked, and thus irrelevant, to the contested issues as set out below.

25. In relation to the first contested issue, the Chamber ruled that a consideration of this contested issue may not include the “alleged existence of a violence campaign perpetrated by the GoS against the civilian population in Haskanita and Darfur generally”<sup>35</sup> because this is of “very limited and indirect” significance.<sup>36</sup> This contested issue concerns the question of whether the MGS Haskanita was a legitimate military objective. Its determination will involve an assessment of factors such as whether the intelligence being supplied from the base was making an effective contribution to a violence campaign perpetrated by the GoS against the civilian population and whether the attack was proportionate.<sup>37</sup> The Prosecution has specifically argued that the intelligence at the base did not “justify an armed attack of this scale”.<sup>38</sup> However, the Chamber’s ruling in the Impugned Decision regarding the requested evidence’s lack of relevance to this contested issue, indicates that this issue is being construed extremely narrowly.

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<sup>33</sup> *Ibid.* On this basis, the Defence submit that the Trial Chamber’s finding that the requested material is of “very limited and indirect” significance (Impugned Decision, para. 22) would be sufficient to satisfy the terms of Rule 77.

<sup>34</sup> See Request, para. 3 for a list of the three contested issues in this case.

<sup>35</sup> Impugned Decision, para. 20 quoting from the “Decision on the defence request for a temporary stay of proceedings”, ICC-02/05-03/09-410, 26 October 2012, para. 106.

<sup>36</sup> Impugned Decision, para. 22.

<sup>37</sup> See, e.g., Corrigendum of the “Decision on the Confirmation of Charges”, ICC-02/05-03/09-121-Conf-Corr, 7 March 2011 (“Confirmation Decision”), para. 66: “Likewise, AMIS installations, material, units or vehicles shall be entitled to the protection given to civilian objects, unless and for such time as their nature, location, purpose or use make an effective contribution to the military action of a party to a conflict and insofar as their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

<sup>38</sup> ICC-02/05-03/09-112-Conf-AnxA, para. 91.

26. Further, the scope of the third contested issue, whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations, is also discussed in the Impugned Decision. At paragraphs 17 and 18, the Trial Chamber approached this contested issue, not on the basis that all elements of the contested issue are the subject of challenge (as indicated by paragraph 25 of the Request), but on the basis that the definition of a peacekeeping mission pursuant to Article 8(e)(iii) of the Statute is limited to the Pre-Trial Chamber's definition in the Confirmation Decision.<sup>39</sup> The Trial Chamber, therefore, evaluated whether the request was material on the basis of a definition of the elements of the offence which is disputed between the Parties. Accordingly, the Trial Chamber determined that the Defence had failed to show how the requested evidence "could be of significance to any of the three factors identified by the Pre-Trial Chamber".<sup>40</sup> The scope and interpretation of the contested issues and whether the requested material is relevant to their proof is, therefore, an issue emanating from the Impugned Decision.

27. The Issue is "not merely a question over which there is a disagreement or conflicting opinion".<sup>41</sup> The distinction between mere disagreements and appealable issues is characterised by the significance of the issue. An appealable issue must be essential for the determination of matters arising in the judicial cause under examination. If evidence concerning the GoS' failure to comply with peace agreements and the existence of a campaign of violence in Darfur is not relevant to the three contested issues and other matters which may properly be addressed during the course of trial such as character

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<sup>39</sup> As set out in the Request, the Defence vehemently contest the Pre-Trial Chamber's findings. In order to expedite the proceedings, Mr. Banda and Mr. Jerbo agreed not to contest the confirmation hearing. However, they never agreed to be bound at trial by findings made in the Confirmation Decision as to the content of the elements of the contested issues and particularly without consideration of the very evidence sought by the Request. This information regarding the Defence's position if leave to appeal is granted is provided again to assist the Trial Chamber and on a similar basis to *Katanga* Leave to Appeal Decision, para. 12.

<sup>40</sup> Impugned Decision, para. 18.

<sup>41</sup> *Supra*, footnote 23.

evidence and evidence in mitigation, then the question arises as to what evidence the Defence will be permitted to lead in order to address these matters.<sup>42</sup> The Issue deals with this broader question which is essential for the determination of matters arising in the judicial cause under examination.<sup>43</sup>

b) *The Issue significantly affects the fair and expeditious conduct of the proceedings and the outcome of the trial*

28. The criteria to be satisfied under the second prong of the leave to appeal test are disjunctive. As discussed more fully below, the Defence submit that the Issue satisfies both in this case.

i) *The Issue significantly affects the fair and expeditious conduct of the proceedings*

29. The Issue significantly affects the “fair and expeditious conduct of proceedings”. Generally, issues relating to disclosure significantly affect the fair conduct of proceedings. The Request was partially founded on Article 67(2) of the Statute, which falls within the scope of the Article of the Statute headed “rights of the accused”. Issues about the proper scope of Prosecution disclosure, whether under Article 67(2) or Rule 77, are also closely related to the right to “adequate time and facilities for the preparation for the defence” which is protected by Article 67(1)(b). For these reasons, Pre-Trial Chamber I has previously held that issues relating to disclosure, and attempts by the Prosecution to restrict disclosure in particular, directly relate to the fairness of proceedings.<sup>44</sup> Since the proposed issue concerns the proper interpretation of Rule 77 and, therefore, the scope of the Prosecution’s disclosure obligations it significantly affects the fairness of proceedings.

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<sup>42</sup> The Defence notes that Article 69.3 of the Statute provides that “[t]he parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”

<sup>43</sup> *Supra*, footnote 24.

<sup>44</sup> ICC-01/04-01/06-166, Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal, para. 32.

30. Moreover, this issue is directly analogous to an issue which was certified for appeal in *Lubanga*.<sup>45</sup> In *Lubanga*, Trial Chamber I found that the impugned decision had a direct impact on a substantial body of material.<sup>46</sup> Consequently, Trial Chamber I held that the impugned decision in that case “could significantly affect the fair and expeditious conduct of the proceedings, because if this broad area of evidence is relevant and merits research and thereafter introduction into the trial, this could affect the length of the trial and its fairness”.<sup>47</sup> Similarly, in this case, if incorrect, the Impugned Decision would prevent the Defence from using a substantial amount of relevant material for the purposes of investigations and also from admitting such material into evidence which would significantly affect the fairness of proceedings.

31. As presaged by the Trial Chamber’s comments in *Lubanga* referred to above, the “expeditious conduct of proceedings” is also clearly engaged by the issue identified for appeal for two reasons. First, in the Request the Defence sought the disclosure of evidence which the Prosecutor has already collated. If the Impugned Decision is wrong and the requested material is relevant to the contested issues, then the effect of the Impugned Decision is that rather than simply receiving documents which have already been gathered by the Prosecution, the Defence will have to investigate these issues itself from the beginning. Given the severe constraints on Defence investigations and the mismatch in resources between the Defence and the Prosecution, this research is likely to be time consuming and to delay the start of trial.

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<sup>45</sup> In *Lubanga*, Trial Chamber I certified the following issue: “Whether the Chamber interpreted Rule 77 of the Rules of Procedure and Evidence (“Rules”) in an excessively restrictive manner in concluding that the prosecution is not under an obligation to provide the defence with the material in its possession relating to the general use of child soldiers in the Democratic Republic of the Congo.” See Decision on the defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, ICC-01/04-01/06-1210, 6 March 2008, paras. 2(c), 25.

<sup>46</sup> Decision on the Defence request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, ICC-02/05-03/09-1210, 6 March 2008, para. 23.

<sup>47</sup> *Ibid.*

32. Secondly, if, as outlined in paragraph 27, evidence of the type identified in the Request is not relevant in the view of the Trial Chamber to the contested issues, then this clearly impacts on the scope of the trial and on what types of evidence are likely to be considered relevant, probative and admissible. This in turn impacts defence case strategy. A revised strategy will now have to be designed.

*ii) The Issue Significantly affects the outcome of trial*

33. As explained above, the Issue addresses the proper scope and interpretation of the contested issues and, therefore, concomitantly concerns the nature of the evidence to be taken into account to discuss the contested issues. If the Appeals Chamber determines that the Trial Chamber interpreted the contested issues too narrowly when assessing materiality under Rule 77, the Request may have to be re-examined with the scope of the contested issues being more widely delineated. As a result, a different decision may be reached. Ultimately, the Issue would affect the outcome of the case because 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.<sup>48</sup>

34. Equally, the Issue significantly affects the outcome of trial on a similar basis to the concern outlined in paragraph 30 above. If incorrect, the Impugned Decision means that certain evidence will not be put before the Court, and hence not available for the Court to consider as part of its truth seeking functions.

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<sup>48</sup> This reasoning is similar to that followed by this Trial Chamber in Decision on the “Defence Application for Leave to Appeal the “Decision on the defence request for a temporary stay of proceedings”, ICC-02/05-03-09-428, para. 16.

c) *The immediate resolution of the Issue will materially advance the proceedings*

35. An immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings in the case against Mr. Banda and Mr. Jerbo for the following reasons.

36. First, if leave to appeal is denied, the Defence will have to start investigating evidence, which would otherwise have been covered by the Prosecution's disclosure. This will involve researching publically available documentary material, interviewing witnesses and, perhaps, seeking expert evidence. The Prosecutor has had over six years to investigate the crimes with vastly greater resources and access to material from governments, international organizations, and experts in the field.<sup>49</sup> This time consuming process upon which the Defence will need to embark 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.

37. Secondly, the disclosure of these documents is likely to assist in identifying further areas of agreement between the Parties.<sup>50</sup> If these documents are disclosed and the Defence relies upon them, the Prosecution can hardly allege that they are unreliable since the Prosecution themselves have previously relied on them. As a result, the parties may be able to enter into additional agreed facts, which would materially advance the proceedings by further narrowing the scope of the trial. On the other hand, if the Defence is forced to lead its own evidence on the subject, this will generate a further area of dispute between the parties the resolution of which will take court time and prolong the trial.

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<sup>49</sup> The United Nations Security Council referred the situation in Darfur to the Prosecutor on 31 March 2005. See S/RES/1593 (2005).

<sup>50</sup> The Defence note that the Trial Chamber recommends that the parties explore the possibility of agreeing more facts related to the alleged campaign of violence in Darfur. *See Impugned Decision*, para. 26. The Defence further observe that the reality is that there is no incentive on the Prosecution to enter into additional agreed facts in light of the Impugned Decision.



38. Thirdly, and discussed at paragraph 27 above, the Impugned Decision's determination on the absence of a link between the requested documents and the contested issues has inevitable implications for the scope of the forthcoming trial. The Impugned Decision indicates that certain evidence may be considered irrelevant for proof of the contested issues and other matters which should normally be led at trial. The Issue concerns, therefore, the relevance and admissibility of a substantial body of material. The Defence submit that immediate resolution of this issue will define the proper scope of this trial, hence it will materially advance proceedings.

#### **VI. Relief Requested**

39. For the reasons set out above, the Defence respectfully request that the Trial Chamber grant leave to appeal the Issue discussed above pursuant to Article 82(1)(d).

Respectfully Submitted,





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Mr. Karim A. A. Khan QC

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Mr. Nicholas Koumjian

Lead Counsel

Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 29<sup>th</sup> Day of January 2013

Dated this 29<sup>th</sup> Day of January 2013

At The Hague, The Netherlands

At The Hague, The Netherlands