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

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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 &

SALEH MOHAMMED JERBO JAMUS

Public

**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-
03/09-168)**

Source: Office of the Prosecutor

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Introduction

1. The Prosecution seeks leave to appeal the “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence” (“Decision”).¹ In its Decision the Chamber determined that in the instant case the appointment of a former member of the Office of the Prosecutor as a member of a defence team does not create a conflict of interest.
2. The Prosecution submitted before the Trial Chamber that “in the particular circumstances of the OTP, lawyers’ who work within the Office have a conflict of interest and should be barred for a period of time, which should be no shorter than one year, to work for the defence in any case before the International Criminal Court”.²
3. Given the serious impact of the Decision on the organization of the Office of the Prosecutor, and its potential detrimental consequences for the proceedings, the Prosecution submits that the issue should be sent to the Appeals Chamber for its immediate authoritative determination. This is not only required to solve the matter in this case, but it will contribute to establishing a standard for managing conflicts of interest or the appearance of conflicts of interest at the International Criminal Court.

Summary of Issues

4. The Prosecution seeks leave to appeal the following two Issues from the Decision:
 - 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 whether they should be barred for a period of time before joining a defence team (“First Issue”). The First Issue concerns the legal test to be applied by the

¹ ICC-02/05-03/09-168.

² ICC-02/05-03/09-160, para. 4 (the “Request”).

Chamber to determine impediments to representation and conflict of interest by counsel.

- 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 (“Second Issue”). The Second Issue concerns the weight to be given to a statement of the Prosecution concerning its structure and internal working methods and the inferences that can be drawn from it, as well as the question of the weight to be given to an assertion given by someone who has a personal interest in the outcome of a decision clearly arises from the Decision.
5. These two Issues arise from the Decision and constitute appealable issues pursuant to Article 82(1) (d). They further meet all the criteria for leave to appeal.

Background

6. Mr Ibrahim Yillah (“Mr Yillah”) started to work as an Associate Trial Lawyer (P2) in the Office of the Prosecutor (“Prosecution”) on 15 August 2005. He became a Trial Lawyer (P3) on 1 August 2008, a position which he held until he resigned on 19 April 2011. Over this period, he worked on the *Situation in Uganda*, and on the cases *Prosecutor v. Katanga and Ngudjolo* and *Prosecutor v. Bemba*.
7. By memorandum of 4 May 2011, the Counsel Support Section (“CSS”) notified the Prosecution of the proposed appointment of Mr Yillah as Associate Defence Counsel to the Defence team on the case *Prosecutor v Abdallah Banda Abakaer Nourian and Saleh Mohammed Jerbo Jamus* (“Banda and Jerbo case”).

8. On 8 June 2011, the Prosecution filed the “Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence” (“Request”).³ The Prosecution submitted that “in the particular circumstances of the OTP, lawyers’ who work within the Office have a conflict of interest and should be barred for a period of time, which should be no shorter than one year, to work for the defence in any case before the International Criminal Court”.⁴ The Prosecution also stated that Mr Yillah’s exposure to confidential information concerning the OTP’s investigative and prosecutorial strategies in specific situations and cases, analyses of charging decisions and alternatives, and strategies relating to confirmation hearings and trial preparation created a real risk that, even inadvertently, he would use this knowledge in decisions that the defence team in the Banda and Jerbo case will make while representing their client.⁵ On that basis, the Prosecution argued that Mr Yillah’s appointment gave rise to a conflict of interest and requested that Trial Chamber IV (“Chamber”) invalidate his appointment.
9. On 15 June 2011, the defence of Banda and Jerbo filed a response to the Request (“Response”),⁶ arguing that the Request should be dismissed.
10. On 30 June 2011, the Chamber issued its “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel for the Defence” (“Decision”).⁷ It ruled that “the combination of lack of any proof that Mr Yillah is effectively in possession of confidential material and his unequivocal assertions that he is unaware of any relevant confidential material settles this matter. Absent any reasons for doubting Mr Yillah’s integrity, the Chamber is entitled to rely on his clear undertakings. Therefore, the Chamber finds that there are no persuasive indications that a conflict of interests exists or that his appointment is prejudicial to the present proceedings.”⁸

³ ICC-02/05-03/09-160.

⁴ Request, para. 4.

⁵ Request, paras.2-3.

⁶ ICC-02/05-03/09-163.

⁷ ICC-02/05-03/09-168.

⁸ Decision, para. 22.

11. The Prosecution hereby seeks leave to appeal three issues arising from the Decision pursuant to Article 82(1) (d).

Submissions

12. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1) (d). The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.⁹ Reference to any errors contained in the Decision will only be made when necessary to demonstrate the appellability of the Decision.

(i) The two Issues arise from the Decision

13. The First Issue arises from the Decision. The Prosecution submitted that “in the particular circumstances of the OTP, lawyers’ who work within the Office have a conflict of interest and should be barred for a period of time, which should be no shorter than one year, to work for the defence in any case before the International Criminal Court”.¹⁰ The standard is based in an objective premise: any lawyer working in the Office of the Prosecutor, because of its size and the operational methods will be unavoidable exposed to information of a privileged nature in all ongoing case.
14. The objective standard proposed by the Prosecution relies on many national jurisdictions where former prosecutors are barred or limited in their representation of suspects as defence counsel in opposition to the prosecutors’ offices with which they were recently affiliated.¹¹ Also, this standard does not require proof of actual access to confidential or privilege information.
15. The Chamber rejected the Prosecution’s standard. It also considered that the numerous examples provided by the Prosecution from national jurisdictions were

⁹ ICC-02/04-01/05-20-US-Exp, para. 22.

¹⁰ Request, para. 4.

¹¹ Decision, para. 8.

not proof of a general principle of law derived from national laws pursuant to Article 21(1) (c).¹² According to the Chamber, the determinative issue before it was “whether Mr Yillah became aware of more than ‘*de minimis* confidential information’ relevant to the case which a member of the defence team should not possess”.¹³

16. The Second Issue also arises out of the Decision: in its Request, the Prosecution provided extensive information regarding the structure of the Prosecution, the established working methods of the Office, and the informal environment in which Prosecution lawyers communicate and exchange work related information. It submitted that this combination of factors will inevitably lead to each Prosecution lawyer being exposed to confidential and/or privileged information, including to information concerning the Prosecution’s investigative and prosecutorial strategies in situations and cases other than the one he or she primarily works on.¹⁴ Although taking note of the Prosecution’s submissions,¹⁵ the Chamber did not examine them. It merely found that the Prosecution’s assertions had “been advanced essentially in general terms, without any particular or any supporting material”.¹⁶ It concluded that “the Prosecution has not demonstrated that Mr Yillah indeed has confidential information and knowledge pertaining to this specific case”¹⁷ and rejected the Request, among others, based on the “lack of any proof” to that effect.¹⁸ In addition, the Chamber took note of the assertion by Mr Yillah in the Response that “he is not in possession of any confidential information [...] pertaining to any other case or situation outside the Central African Republic, the Democratic Republic of the Congo and Uganda”.¹⁹ It concluded that “absent any reasons for doubting Mr Yillah’s integrity”; the Chamber is entitled to rely on his clear and unequivocal

¹² Decision, para. 8.

¹³ Decision, paras. 13-16.

¹⁴ Request, para. 2, 11-12.

¹⁵ Decision, para. 17.

¹⁶ Decision, para. 20.

¹⁷ Decision, para. 21.

¹⁸ Decision, para. 22.

¹⁹ Decision, para. 21.

assertions.²⁰ It therefore considered this as one of the two factors that led to the finding that no conflict of interest exists and that the appointment of Mr Yillah is not prejudicial to the present proceedings.²¹

(ii) *The two Issues constitute appealable issues pursuant to Article 82(1)(d)*

17. Both Issues constitute “identifiable subject[s] or topic[s] requiring a decision for [their] resolution”.²² Their resolution is “essential for the determination of matters arising under the judicial cause under examination,”²³ namely the question of whether Mr Yillah’s appointment to the defence team in the Banda and Jerbo case gives rise to a conflict of interest in light of his previous employment with the Prosecution.

18. The First Issue concerns a question of law surrounding the applicable legal standard for a determination of a conflict of interest involving a former Prosecution lawyer. Its resolution is essential to the entire approach taken by the Chamber to the issue of conflict of interest, since the relevant information has to be assessed against that standard.

19. The Second Issue concerns the exercise of the Chamber’s discretion in assessing and weighing the relevant facts in the context of the matter before the Chamber. While the Prosecution does not dispute that the Chamber has the power to freely assess all evidence,²⁴ if and when leave to appeal is granted, it will raise errors of fact concerning the weight that the Chamber gave in this case to certain pieces of information before it. It will demonstrate that the Chamber misappreciated or disregarded relevant information.²⁵ Such errors of fact are permissible grounds of

²⁰ Decision, para. 22.

²¹ Decision, para. 22.

²² ICC-01/04-168 OA3, para. 9.

²³ ICC-01/04-168 OA3, para. 9.

²⁴ Rule 63 (2).

²⁵ ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 66.

appeal against interlocutory decisions²⁶ and do not constitute a mere disagreement on the evaluation of the evidence.

(iii) The two Issues affect the fair conduct of the proceedings

20. The determination of both Issues contributes to the outcome of the determination of a conflict of interest involving Mr Yillah. Provisions on conflict of interest and their application are by definition intended to safeguard the fairness of the proceedings. In fact, the Chamber in its Decision acknowledge its duty under Articles 64(2) and 64(3) (a) of the Statute to apply these provisions to prevent any “unfairness in the proceedings”.²⁷ In addition, the Chamber examined the Prosecution’s Request in light of the question whether the appointment of Mr Yillah would be “prejudicial to the present proceedings”.²⁸ As the three Issues all have a significant bearing on the Decision, their resolution is essentially entwined with the fairness of the present proceedings.

21. If confidential information concerning the investigation and prosecution in the Banda and Jerbo case, including information on the prosecutorial strategy in the case, is possessed by a member of the Defence team, this will necessarily affect the fairness of the proceedings. At a minimum, it will give the Defence insight into the Prosecutor’s strategy and its perception of the strengths and weaknesses of the case. That will provide the Defence with an undue and unfair advantage over the Prosecution.

(iv) The two Issues affect the expeditious conduct of the proceedings

22. Chambers of this Court have taken different approaches to whether a party is also required to show that an issue affects the expeditious conduct of proceedings once it has been demonstrated that the issue affects the fairness of those proceedings. The Prosecution concurs with Trial Chamber II, which has granted

²⁶ ICC-01/04-01/06-568 OA3, para. 19; ICC-02/04-01/05-408 OA3, para. 80.

²⁷ Decision, para. 12

²⁸ Decision, para. 22.

leave to appeal after finding that an issue “may significantly affect” or “clearly has a bearing on” the fairness of the proceedings and therefore, without requiring additional affect on expeditiousness, concluding that “the first requirement of Article 82(1)(d) of the Statute is met”.²⁹ Hence, once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).³⁰ Nonetheless, the Prosecution submits that the Issue in this Decision also affects the expeditious conduct of the proceedings.

23. The Prosecution may be forced to adjust its strategy in the case as well as its selection of evidence for the purposes of the trial in order to neutralize or mitigate the legitimate and serious concerns that it has as to Mr Yillah’s access to sensitive information.³¹ Moreover, if it becomes clear at trial that the Defence strategy is indeed informed by its access to confidential Prosecutorial information that could derail the trial and require disqualification of the Defence team in its entirety and recommencement of the proceedings with new counsel. Alternatively, it would present a compelling issue on appeal and could lead to vacating the result of the trial and, again, recommencement of the proceedings. In any of these scenarios, the result will be an avoidable delay to the overall determination of the

²⁹ ICC-01/04-01/07-2032, para. 28; ICC-01/04-01/07-1859, para. 18. Trial Chamber III has also granted leave to appeal finding that the issue affects the fairness of the proceedings – without making any independent finding on expeditiousness. See ICC-01/05-01/08-1169, para.35.

³⁰ This reflects the consistent position of the Prosecution: see in particular ICC-01/04-141, paras. 49-52; ICC-01/04-103, footnote 5; ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair or no longer expeditious, they are no longer “fair and expeditious”; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the “fair and expeditious conduct of the proceedings”. The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition (see authorities set out in ICC-01/04-141, paras. 49-52).

³¹ ICC-01/04-01/07-116, p. 6.

responsibility of Banda and Jerbo³² and compromise of the efficient conduct of the proceedings.³³

(v) The immediate resolution of the two issues will materially advance the proceedings

24. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”³⁴ Otherwise, a wrong decision on an issue in the context of Article 82(1)(d), unless remedied on appeal, will entail a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.³⁵

25. The appointment of a member of the Defence team is a sensitive matter. If tainted by a conflict of interest, Mr Yillah’s appointment might invalidate the entire proceedings. In the absence of an immediate authoritative decision by the Appeal Chamber, this matter can, and is likely to be, raised as a ground of appeal against the final decision pursuant to Article 81. A conflict of interest is such a systemic flaw in the process that, if there is a possibility of conflict, the judgment will be vulnerable. Timely intervention by the Appeals Chamber now will materially advance the proceedings in the sense that it will prevent taint to the entirety of the trial proceedings from Mr Yillah’s appointment.

26. Moreover, the very point of this Court is to protect the rule of law and end both the perception and the reality of impunity due to power or special status. If a

³² Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

³³ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. Norman Decision on Application for Stay, para. 8; and Terrier, Powers of the Trial Chamber in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

³⁴ ICC-01/04-168, paras. 14-15, 18.

³⁵ ICC-01/04-168 OA3, para. 16.

perception of insider advantage taints the case it can damage the public perception of the legitimacy of these proceedings and the public acceptance of the validity of the outcome. In that regard the appellate determination of the rules of conflict, in this case and applicable to all future cases before this Court, will materially advance the proceedings by avoiding reversible error and also increasing the acceptability of the institution through greater confidence in the transparency of its proceedings and the fairness of its process.

27. Finally, if Mr Yillah or any other member of the Defence team were to intentionally or inadvertently use any confidential information that he obtained for the purposes of the defence of his client, this would influence the strategy and investigation of the Defence as well as its litigation. By necessary implication, this would also affect the proceedings. An immediate resolution by the Appeals Chamber of the three Issues is therefore required to prevent such an outcome.

Relief sought

28. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the three Issues pursuant to Article 82(1) (d).



Luis Moreno-Ocampo
Prosecutor

Dated this 6th day of July 2011

At The Hague, The Netherlands