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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernandez de Gurmendi

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

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-02/05-03/09-168)

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

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I. INTRODUCTION

1. Defence Counsel for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus (the “Defence”) file this response to 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-02/05-03/09-168) (“Application”).¹
2. The Application fails to satisfy the standard for seeking leave to appeal under Article 82(1)(d) of the Rome Statute (“Statute”) and thus should be dismissed. The Application’s reasoning distils to no more than a disagreement with the impugned Decision² and suffers from the same fundamental flaw as the original Request³ - namely a reliance on speculation rather than articulating any concrete prejudice.

II. CERTIFICATION OF INTERLOCUTORY APPEALS

3. Interlocutory appeals under Article 82(1)(d) of the Statute are exceptional remedies which are only available if the moving party satisfies the Trial Chamber that strictly defined conditions are met.⁴
4. For leave to appeal an interlocutory decision to be granted under Article 82(1)(d), the moving party must establish that:
 - (a) the impugned decision involves an issue that would significantly affect either:
 - (i) the fair and expeditious conduct of the proceedings; or

¹ 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), ICC-02/05-03/09-173, 6 July 2011 (“Application”).

² “Decision” is defined at paragraph 1 of the Application.

³ Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence Team, ICC-02/05-03/09-160, 8 June 2011 (“Request”).

⁴ 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, para. 28 (“*Lubanga* Decision”) and *Prosecutor v. Katanga & Ngudjolo*, Decision on the Prosecutor’s Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009, ICC-01/04-01/07-946-tENG, 6 March 2009, para. 11.

(ii) the outcome of the trial; and

(b) an immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings.⁵

5. The definition of an “issue” under Article 82(1)(d) of the Statute is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An appealable issue must emanate from the ruling of the decision concerned and not merely represent an abstract question or a hypothetical concern.⁶

III. SUBMISSIONS

Failure to identify any appealable issues

6. Contrary to the Prosecution’s position, neither of the two issues⁷ identified in the Application constitute appealable issues.⁸ A proper consideration of both reveals that they fail to satisfy the requirement that they “emanate from the ruling of the decision concerned”.⁹ On this basis alone the Application should be dismissed.
7. The First Issue,¹⁰ as framed by the Prosecution, clearly does not arise from the Decision. Rather, its formulation raises a general question of law and, therefore, falls foul of the prohibition against seeking leave to appeal abstract questions.¹¹

⁵ Article 82(1)(d) of the Statute.

⁶ *Prosecutor v. Bemba*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 11.

⁷ The Defence notes that the Application refers at times to three Issues (see paras 11, 20 & 28). However, it assumes that this is simply a typographical error and the Application concerns only two issues.

⁸ Application, paras 5 & 13-19.

⁹ *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. 12.

¹⁰ The “First Issue” is framed and defined in the first bullet point of paragraph 4 of the Application. By characterising its First Issue as a legal standard, the Prosecution misrepresents the Chamber’s Decision. Nowhere in the impugned Decision is the issue of a one year ban proposed by the Prosecution in its original Request dealt with by the Chamber as the legal standard for determining whether there is an impediment to legal representation is to be found under Article 12(1)(b) of the Code of Professional Conduct for Counsel.

¹¹ An appealable issue must emanate from the ruling of the decision concerned and does not merely represent an abstract question or a hypothetical concern. See paragraph 5 and footnote 6 above referencing ICC-01/05-01/08-75, 25 August 2008, para. 11.

In addition and crucially, the First Issue is quite simply a rehash of the Prosecution's original argument which formed no part of the dispositive element of the Decision.¹² In this regard, an analysis of the Decision and the Prosecution's underlying Request is revealing.

8. In the Decision, the Chamber mentioned the First Issue as part of its recitation of the Prosecution's submissions.¹³ However, as is clear from both the Request and the Application, the Prosecution's argument regarding the imposition of a ban on Prosecution lawyers from working for ICC Defence teams for a particular period of time was predicated on the assumption that all Prosecution lawyers are in possession of confidential information for all OTP cases.¹⁴ In disposing of the Application the Trial Chamber found that "the Prosecution has not demonstrated that Mr. Yillah indeed has any confidential information and knowledge pertaining to this specific case" and that the Prosecution Request "only suggests the possibility".¹⁵ Thus, the Trial Chamber did not have to proceed to consider the Prosecution's arguments which are now recycled in the First Issue. Instead, the Trial Chamber's focus in the dispositive part of its Decision was properly on the governing documents and jurisprudence of this Court, specifically Article 12(1)(b) of the Code of Professional Conduct for Counsel, none of which mentions the First Issue. This analysis clearly demonstrates that the First Issue "consists of 'nothing more than a disagreement' with a finding of the Chamber"¹⁶ and a desire on the part of the Prosecution to re-litigate the Request.

¹² A review of paragraphs 13 to 15 of the Application wherein the Prosecution tries to argue that the First Issue arises from the Decision shows that no reference (whether in the main body of the text or the footnotes) is made to any dispositive aspect of the impugned Decision.

¹³ Decision, para. 3.

¹⁴ Request, paras 3 & 4; Application, para. 13.

¹⁵ Decision, para. 21 (footnotes omitted).

¹⁶ *Prosecutor v. Katanga & Ngudjolo*, 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 ("Katanga Decision on Leave to Appeal Confirmation Decision"), p. 16, quoting the *Lubanga* Decision, para. 71.

9. The Second Issue¹⁷ as framed by the Prosecution suffers from the same flaw and does not constitute an appealable issue. The Prosecution states that the Second Issue “concerns the exercise of the Chamber’s discretion in assessing and weighing the relevant facts”,¹⁸ but, in conflict with this acknowledgement, later tries to argue that the Second Issue does “not constitute a mere disagreement on the evaluation of the evidence.”¹⁹
10. As is clearly evidenced in paragraph 16 of the Application, the Second Issue does amount to a disagreement about the way in which the information provided by the Prosecution was evaluated. In this regard, the jurisprudence of this Court is consistent and unequivocal. Claims that a Chamber improperly evaluated the evidence put before it do not constitute “issues” for the purposes of Article 82(1)(d).
11. Specifically, in the *Katanga and Ngudjolo* case, Pre-Trial Chamber I found that Mr. Katanga’s application seeking leave to appeal the Pre-Trial Chamber’s confirmation of sexual violence charges “despite the lack of sufficient evidence concerning the requisite subjective elements”²⁰ was not an “issue” for the purposes of Article 82(1)(d), but merely a disagreement with the Chamber over “the assessment made by the majority of the Chamber of the evidence submitted by the Prosecution.”²¹ Similarly, in the *Al Bashir* case, Pre-Trial Chamber I ruled that two of the three claims put forward by the Prosecutor in his application seeking leave to appeal the decision not to include genocide charges in the arrest warrant “consist[ed] of a mere disagreement with the Majority’s assessment of the evidence submitted by the Prosecutor to support his genocide-related

¹⁷ The “Second Issue” is framed and defined in the second bullet point of paragraph 4 of the Application.

¹⁸ Application, para. 19.

¹⁹ *Ibid.*

²⁰ *Katanga* Decision on Leave to Appeal Confirmation Decision, p. 7.

²¹ *Ibid.*, p. 16.

allegations and, therefore, neither constitutes an 'issue' as defined by the Appeals Chamber."²²

12. A further fundamental problem with the Second Issue is that it is framed in terms of the consideration and weighting which ought to have been given to the Prosecution's "information". However, these are terms which are generally applied to evidence. The Request's fatal flaw, which was identified in the Decision, was the singular failure of the Prosecution to provide any evidence in support of its allegations.²³ The Prosecution tries to side-step this failure by referring throughout the Application to the "information" it provided and to the statements it made in the Request.²⁴ But information and statements on Prosecution working methods, etc., without anything more substantial, is not evidence which can be evaluated. Indeed, nowhere in the Decision does the Chamber engage in any process of assigning weight. What the Chamber does, rather, is look at the materials before it and properly conclude that the facts were advanced in general, unsubstantiated and speculative terms. Thus, the failure by the Prosecution, the party bearing the burden of proof, to put forward any evidence to assess or weigh means that the Second Issue as framed does not arise from the Decision.

Failure to demonstrate that the fair & expeditious conduct of proceedings will be affected

13. *Esto* either or both Issues are considered appealable, neither are ones which will significantly affect the fair and expeditious conduct of proceedings as required for leave to appeal to be granted.
14. When considering the Prosecution's arguments as to how the First and Second Issues affect the fair and expeditious conduct of proceedings, some general

²² *Prosecutor v. Al Bashir*, Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-21, 24 June 2009, p. 8.

²³ Decision, paras 21 & 22.

²⁴ E.g. Application, para. 4 ("failed to properly consider and weigh the information"); para. 16 ("the Prosecution provided extensive information").

preliminary observations on the context of the Application and the framing of the Issues are relevant. Both Issues as framed by the Prosecution are predicated on Mr. Yillah or Prosecution lawyers generally being in possession of confidential information. Therefore, in order to move to a consideration of the Issues a necessary and logical prior exercise must have been successfully undertaken – the specific identification of the confidential information in the possession of the former Prosecution lawyers. As noted above, the Prosecution failed to do this in the Request. No further progress is made in this regard in the Application, nor can it for proper procedural and legal reasons. Nevertheless, this failure to identify the confidential information allegedly in Mr. Yillah's possession is the fault line which continues to fatally undermine the Prosecution's arguments, specifically in the Application in relation to the framing of the issues. If no confidential information has been identified, then the Issues are redundant. The Chamber cannot be asked to engage in a purely speculative and, in the absence of evidence that the concerns are applicable to this case, academic exercise. Accordingly, the Application must be dismissed.

15. Dealing specifically with the issue of fairness, the Defence notes that the Prosecution's submissions fail to concretely address how the First or Second Issue will affect the fair conduct of the proceedings. Instead, the submissions are founded on conjecture as to how unidentified confidential information allegedly in the possession of Mr. Yillah might theoretically impact on the case in ways which are not concretely identified.²⁵ Examples of this speculation include:

- (a) "If confidential information [...] is possessed by a member of the Defence team, this will necessarily affect the fairness of the proceedings" (para 21);
- (b) "if it becomes clear that the Defence strategy is indeed informed by its access to confidential Prosecutorial information that could derail the

²⁵ Application, para. 21.

trial and require disqualification of the Defence team in its entirety “
(para 23);

(c) “if tainted by a conflict of interest, Mr Yillah’s appointment might
invalidate the entire proceedings” (para 25).

16. As discussed above, the fundamental flaw in this submission is that the Prosecution has never identified a single piece of confidential information allegedly in the possession of Mr. Yillah.

17. How such unidentified confidential information might affect the fairness of proceedings has nothing to do with: (i) the First Issue and its focus on presumptive bans predicated on the possession of, it must be assumed, sufficiently identified confidential information; or (ii) the weighing and assessment of evidence process which is the basis of the Second Issue. The Defence notes that the Prosecution speculates on the effect (however misguided) that the Decision may potentially have on the case. Speculation is not a basis for granting leave to appeal. In order for leave to appeal to be granted the Prosecution’s submissions must focus on the Issues it has identified as appealable and demonstrate how they satisfy the strict Article 82(1)(d) criteria.

18. Considering the Second Issue in particular, the Defence notes that this Issue is focused solely on the evaluation of information in relation to the alleged conflict of interest matter. As nothing was presented by the Prosecution to the Chamber which could be evaluated whether by a weighing process or otherwise, it is clear that nothing manifestly unfair arises. By extension, there is nothing to indicate that any flawed process the same as or similar to the one referred to in the Second Issue will be continued during the course of the proceedings, thus affecting fairness.

19. Equally, it is difficult to understand how either Issue will affect the expeditious conduct of proceedings. As noted above, the Request failed to put forward any evidence in support of its contention that Mr. Yillah is in possession of confidential information which will inform and provide unfair advantage to the Defence case. Therefore, the submissions contained in the Application rather than concretely stating how the Issues will impact the proceedings asks the Trial Chamber to speculate as to how the Prosecution might have to change its strategy, seek the disqualification of the entire Defence team or raise the matter on final appeal without ever explaining how these scenario's could come about in this particular case.²⁶
20. In short, the Prosecution fails to discharge its burden by demonstrating how the expeditious conduct of proceedings will be affected by the Issues. The Application completely fails to even attempt to meet this burden as the Prosecution has never identified the confidential information Mr. Yillah allegedly possesses which would give raise to any of the scenarios canvassed in paragraph 23 of the Application. In the absence of submissions based on evidence (even if disputed evidence) which clearly articulate how the expeditiousness of proceedings might be affected, it is submitted that this part of the Article 82(1)(d) test has not been satisfied.

Failure to establish that proceedings will be materially advanced

21. Finally, the Application fails to articulate how these proceedings will be materially advanced by granting an interlocutory appeal on either of the Issues. The Prosecution simply alleges that the appeal will prevent "taint" of the proceedings,²⁷ prevent any damage to the public perception of the legitimacy of the proceedings²⁸ and increase the acceptability of the institution,²⁹ without ever concretely articulating how these scenarios could arise in this case.

²⁶ *Ibid*, para. 23.

²⁷ *Ibid*, para. 25.

²⁸ *Ibid*, para. 26.

22. Here, again unable to identify the alleged prejudicial confidential information, the Prosecution leaves to the reader's imagination how the presence of Mr. Yillah will taint the proceedings. The Prosecution do not substantiate its concerns regarding Mr. Yillah's alleged access to confidential information and, therefore, have not shown that there will be any material impact on the proceedings. Thus, the Prosecution do not provide any evidence that would lead to conclude that the immediate resolution of the issues would materially advance the proceedings. Rather, it is the Defence's submission that the appeal will simply distract the parties from their trial preparation.
23. Indeed, the impugned Decision is the second time Prosecution efforts to prevent accused persons from choosing former OTP employees as their counsel have been denied by a Trial Chamber. Notably, the first decision, the Kaufman Decision,³⁰ did not prevent the Prosecution from objecting in the present case. Therefore, it is clear that any future concerns about any conflicts of interest affecting defence counsel can be addressed by the relevant Trial Chambers on the facts of those particular cases.

²⁹ *Ibid.*

³⁰ *Prosecutor v. Bemba*, Decision on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team, ICC-01/05-01/08-769, 7 May 2010 ("Kaufman Decision"). Curiously, the Defence notes, the Prosecution did not seek leave to appeal the first and second Kaufman Decisions, even though Mr. Kaufman was in a higher position in the OTP than Mr. Yillah.

IV. CONCLUSION

24. For all the reasons detailed in the paragraphs above, the Defence requests that the Application be dismissed.

Respectfully Submitted,



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Dated this 8th Day of July 2011

At Nairobi, Kenya

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