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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 Corrigendum of Prosecution's Application for Leave to Appeal the "Reasons for the Order on translation of witness statements (ICC-02/0503/09-199) and additional instructions on translation"

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:

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I. INTRODUCTION

1. Defence Counsel for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus (the “**Defence**”) submit that the *Corrigendum of Prosecution’s Application for Leave to Appeal the “Reasons for the Order on translation of witness statements (ICC-02/0503/05-11) and additional instructions on translation” (“Application”)*¹ should be dismissed as it fails to satisfy the standard for seeking leave to appeal under Article 82(1)(d) of the Rome Statute (“**Statute**”).
2. In addition to this failure, the Defence observe that the Application advocates for a procedure which would handicap the search for the truth and would add to the considerable delay already caused by the Prosecutor’s failure to discharge his obligations under Rule 76(3) of the Rules of Procedure and Evidence (“Rules”) in a timely manner. If the Prosecution were successful in its proposed appeal, it would result in the need to translate into Zaghawa 715 plus pages of interview transcript rather than a condensed version set out in a signed written statement and would allow former suspects to testify as witnesses of truth at trial without ever having secured from that individual a solemn declaration.

II. CERTIFICATION OF INTERLOCUTORY APPEALS

3. Interlocutory appeals under Article 82(1)(d) of the Rome Statute (“Statute”) are *exceptional* remedies which are only available if the moving party satisfies the Trial Chamber that the article’s strict conditions are met.²

¹Corrigendum of Prosecution’s Application for Leave to Appeal the “Reasons for the Order on translation of witness statements (ICC-02/0503/05-11) [sic] and additional instructions on translation”, ICC-02/05-03/09-218-Corr, 19 September 2011.

² 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.

III. SUBMISSIONS

Failure to identify an appealable issue

4. Crucially, the issue which the Prosecution seek to appeal (“**Issue**”)³ is not an appealable issue as it was not dealt with in the impugned Decision.⁴ Therefore, the Application should be dismissed.
5. The Issue was not discussed in either of the parties’ pleadings and was clearly not the subject of the impugned Decision. Neither the *Prosecution’s Proposals on the Issue of Translation*⁵ nor the *Prosecution’s update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses*⁶ made any mention of the procedure to follow when Article 55(2) witnesses are interviewed, or any argument regarding the relationship between Rules 111 and 112.⁷ Instead, the Prosecution’s submissions focused squarely on the efficiency of its proposal to translate into Zaghawa summaries of witness statements including those statements obtained in transcript format. Having highlighted the practical difficulties involved in the translation of written material into Zaghawa, the Prosecution argued that its proposal to translate summaries was motivated by a concern to “drastically reduce the amount of time it would take to translate the witness statements and transcripts from English into the Zaghawa language.”⁸
6. Contrary to the Prosecution’s bald assertion in the Application that the Trial Chamber “mistakenly” concluded that the Prosecution had agreed to provide signed statements for witnesses 0307 and 0442,⁹ the Prosecution expressly made that indication. As the Decision correctly points out, the Prosecution

³ Application, para. 13. See also Application, para. 18 (“the issue concerns the procedure to follow when article 55(2) witnesses are interviewed in connection with an investigation”) & para. 19 (“the issue is [...] essential to clarify the interpretation of rules 11 and 112”).

⁴ “Decision” is defined at Application, para. 12.

⁵ Prosecution’s Proposals on the Issue of Translation, ICC-02/05-03/09-192, 8 August 2011.

⁶ Prosecution’s update to the Trial Chamber on language related issues and further information on re-interviews of two Prosecution witnesses, ICC-02/05-03/09-205, 1 September 2011 (“**Prosecution Update**”).

⁷ See the new arguments now raised in this regard at Application, para. 16.

⁸ Prosecution’s Proposals on the Issue of Translation, ICC-02/05-03/09-192, 8 August 2011, para. 5.

⁹ Application, para. 12.

communicated to the Defence that “[t]he Prosecution sees no difficulty in reformatting the summaries of these two witnesses as suggested, and obtaining their signatures thereto, however it will not significantly reduce the translation burden if full statements as opposed to summaries for the remaining 10 Prosecution witnesses are required.”¹⁰ The Prosecution’s previous agreement to provide signed statements contradicts their current position that such statements are not required for Article 55(2) witness interviews.

7. As in the *Lubanga* Decision, an appealable issue must have a real basis in the impugned decision which is evidenced by specific challenges and submissions.¹¹ An issue’s tangential connection to the impugned decision, as in this case, is not sufficient and, indeed, would undermine the exceptional nature of the remedy. Had an issue connected to Article 55(2) and Rules 112 and 112 been of such concern to the Prosecution, it should have been properly and explicitly raised in its original submissions.¹² The Prosecution cannot seek to remedy its own failings by seeking to shift the blame on the Trial Chamber via interlocutory appeal.

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

8. Even if the Issue is considered appealable, it is not one which will significantly affect the fair and expeditious conduct of proceedings. In fact, the Issue will certainly have the opposite effect and lead to unfairness and further delay in the Prosecution’s already untimely discharge of its Rule 76(3) obligations and the concomitant effect this delay will have on Messrs. Banda and Jerbo’s right to be tried without undue delay.¹³

¹⁰ This was further confirmed during a telephone call between the Prosecution and the Defence the specific purpose of which was to clarify exactly what was meant by the Prosecution’s email statement that it would provide “summarized statements” which had been signed by 0307 and 0442. The Prosecution statement can be found at ICC-02/05-03/09-195-AnxE, para. 5. The Defence’s submissions clarifying the matter for the Trial Chamber can be found at ICC-02/05-03/09-195, para. 18. The Prosecution never sought leave to reply on this point, seemingly accepting the veracity of the Defence submissions.

¹¹ *Lubanga* Decision, paras. 56-59.

¹² The Prosecution was on notice from 12 July 2011 that the Defence’s suggested approach to lengthy interview transcripts was to prepare from such transcripts fair and accurate signed statements (Transcript of Status Conference of 12 July 2011, ICC-02/05-03/09-T-ENG ET WT, p. 13).

¹³ Article 67(1)(c) of the Statute.

9. Dealing first with the issue of expediency. The obvious point which the Prosecution fail to address is that, if the Prosecution do not provide organised and signed witness statements in narrative form for witnesses 0307 and 0442, then to comply with Rule 76(3) a translation of these witnesses' interview transcripts will need to be provided, apparently totalling at present some 715 pages.¹⁴ The Defence proposal that such transcripts be condensed into statement form was specifically designed in part to deal with the issue of length and to promote the expeditious conduct of proceedings and ease the translation burden.
10. Further, the Prosecution submissions that "the process [of preparing signed witness statements in narrative form] will take weeks and require extended or repeated trips"¹⁵ is unconvincing, especially as the Prosecution stated at the July status conference that it planned to meet with and re-interview both of these witnesses and five new witnesses.¹⁶ The Prosecution has repeatedly told the Trial Chamber that its investigation is ongoing as it understandably attempts to fill the gaps in its current evidence.¹⁷ But apparently the Prosecutor is not concerned with the expenditure of resources on trips to interview witnesses unless the purpose is to fulfil his statutory obligations regarding disclosure to the Accused and believes that he alone should decide what the Defence needs to prepare their case. The entire resources argument seems to reflect a troublingly cavalier attitude by the Prosecutor towards the Trial Chamber's duty to protect the rights of the Accused.
11. In any event, the process of turning a transcript which has already been summarized into a signed statement in narrative form should certainly be more

¹⁴ Application, para. 25.

¹⁵ *Ibid*, para. 25. See also Application, footnote 21.

¹⁶ Transcript of Status Conference of 12 July 2011, ICC-02/05-03/09-T-ENG ET WT, p. 6, lines 8-10 ("the Prosecution still intends to interview a number of fresh witnesses and we did mention that in the filing and at the last status conference. Those witnesses are now five") & p. 10, lines 13-14 ("I'm able to confirm anyway that it's Witness 307 and Witness 442 that we intend to re-interview now").

¹⁷ Prosecution's Revised List of Evidence and Revised List of Witnesses, in light of the Agreement of Facts between the Parties, ICC-02/05-03/09-162, 13 June 2011, para. 9 ("[t]hose investigative activities include proposed interviews of 6 additional witnesses") & Transcript of Status Conference of 12 July 2011, ICC-02/05-03/09-T-ENG ET WT, p. 6, lines 8-10 ("the Prosecution still intends to interview a number of fresh witnesses and we did mention that in the filing and at the last status conference. Those witnesses are now five").

expeditious than the five plus months it would take for 3 translators to translate the 715 pages of interview transcripts already disclosed.¹⁸

12. As regards fairness, the Issue does not significantly affect the fair conduct of the proceedings for the following reasons.

13. First, based on the jurisprudence of this Court as set out in the *Katanga* case¹⁹ and its duty to ensure “a trial is fair and expeditious”,²⁰ it was within the inherent power of the Trial Chamber to grant the Defence application and order that the Prosecution provide comprehensive and well-organised witness statements in narrative form of all witnesses it intends to rely on at trial. Rule 76 requires the prosecution to disclose the statements of Prosecution witnesses in a language the Accused understands. The recorded transcripts of the Article 55(2) interviews that are the subject of the Application currently total 715 pages. By ordering the translation and disclosure of signed statements rather than these full transcripts, the Trial Chamber expedited the start of the trial by at least several months.

14. Second, the Prosecution’s argument that it is being made subject to a retrospective additional burden²¹ ignores the fact recognized in the Application²² that there has long existed jurisprudence at the Court requiring witness statements from persons interviewed under Article 55(2) who are now being called as witnesses by the Prosecution. The *Katanga* Decision dates from October 2009 and no leave to appeal this decision was sought by the Prosecution at the time.

¹⁸ Based on the estimates provided by the Prosecution to translate 1,020 pages and 3,700 pages (i.e. 8.5 months and 30 months respectively), it appears it takes approximately 1 month to translate between 120 and 123 pages (see Transcript of Status Conference of 12 July 2011, ICC-02/05-03/09-T-ENG ET WT, p. 11, lines 1-14). Therefore, by extrapolation, to translate 715 pages it will approximately take just over 5 months. Moreover, the Prosecution has indicated it will conduct further interviews with both of these witnesses on new topics, generating still more transcripts.

¹⁹ *Prosecution v. Katanga & Ngudjolo*, Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, 23 October 2009, ICC-01/04-01/07-1553 (“*Katanga Decision*”). See also the comments of Presiding Judge Fulford in the *Lubanga* case at ICC-01/04-01/06-T-113-Red-ENG CT WT, p. 12, lines 16-23.

²⁰ Article 64(2) of the Statute.

²¹ Application para. 20.

²² *Ibid*, para. 34.

15. Third, the Prosecution's argument that the fairness of the proceedings will be negatively affected by requiring production of a witness statement from an Article 55(2) interview transcript is unfounded.²³ The Prosecution concern is that the statement will contradict the transcript. The Trial Chamber is composed of professional judges with the experience and the ability to make a considered assessment of a witness' credibility. If an issue arises regarding differences between the interview transcript and the related signed statement, the Chamber will be able to appreciate whether it relates to something fundamental and critical to a witness' credibility or whether the explanation is procedural and lies in the statement making process.

16. Fourth, the production of a signed statement can only enhance the fairness of proceedings and assist the Trial Chamber in its truth finding function.²⁴ Witnesses will be given the opportunity to read, consider, correct and clarify aspects of their evidence and to provide a signed solemn declaration regarding the truth of their evidence. This must be preferable to relying on an unsigned transcript of a suspect interview which allows the witness to claim all manner of misunderstandings. If there are significant differences between the witness' statement and the transcript of an Article 55(2) interview, testing the ability of the witness to explain such differences can only assist the search for the truth.

17. Fifth, in the case of suspects turned witnesses, obtaining a signed written statement from such individuals is in the interests of justice. As stated by the Presiding Judge in the *Lubanga* case:

"[...] I think it is probably going to be necessary for us, in the near future, to revisit the area as to whether or not it is appropriate for former suspects, those who have been interviewed when they potentially faced criminal prosecutions themselves, to be re-categorised by the Prosecution as witnesses of truth to be relied upon before a Chamber without taking a witness statement in which what is said to be the truth is set out in narrative form with an appropriate solemn undertaking at the end that

²³ *Ibid*, paras 21-22.

²⁴ Rule 69(3) of the Rules.

the witness declares that everything that they have set out in the statement is true and they understand that there could be penalties if they have wilfully stated in it something which is untrue.²⁵

18. Sixth, in the Application the Prosecution deal at length with the supposed prejudice it would suffer from having to prepare and have the witness sign a written statement covering the material contained in the Article 55(2) interviews. The Application states that the production of an accurate statement would require the expenditure of much time and resources and is likely to negatively affect the fairness of the proceedings as “there will necessarily be inconsistencies” which “could lead to unfair confusion at trial.”²⁶ The Prosecution’s suggested remedy to this confusion is to prepare summaries which have not been reviewed or signed by the relevant witnesses. Thus, it appears that the Prosecution would prefer to give the Accused persons summaries which the Prosecution itself have no confidence accurately reflect the witnesses’ evidence. Clearly, as the impugned Decision rejects such an unfair approach, the fair conduct of these proceedings is not significantly affected.

Failure to establish that the issue will affect the outcome of the trial

19. The Prosecution’s submissions that the issue will affect the outcome of the trial are based on pure speculation.²⁷ If the Prosecution cannot concretely and properly articulate the “lost opportunities” and “uncollected evidence” which it would otherwise have been able to secure but for the impugned Decision, then the Trial Chamber should not be required to deploy the exceptional remedy of interlocutory appeal.²⁸

20. The Prosecution’s submissions at paragraph 29 of the Application regarding the “potential yet immeasurable effect” statements might have on the impeachment of witnesses are equally unsubstantiated. The effect is “immeasurable” because it

²⁵ ICC-01/04-01/06-T-113-Red-ENG CT WT, p. 14, lines 13-23.

²⁶ Application, para. 22.

²⁷ *Ibid*, paras 26-29.

²⁸ *Ibid*, para. 28.

is purely speculative and as stated previously, impeachment of a witness making substantially inconsistent statements is in the interests of justice.

21. In sum, speculation is not a basis for granting leave to appeal. In order for leave to appeal to be granted the Prosecution's submissions must properly focus on the issue it has identified as appealable and demonstrate how it satisfies the strict Article 82(1)(d) criteria.

Failure to establish that proceedings will be materially advanced

22. Finally, the Application fails to articulate how these proceedings will be materially advanced by granting an interlocutory appeal on the issue. As noted above, the insertion of an interlocutory stage in relation to this matter can only add delay on top of existing delay. As the Prosecution acknowledged in their update, translation only commenced at the start of this month, almost 15 months after the initial appearance of the Accused.²⁹ The Prosecution's submissions on this point are merely speculative and unsubstantiated.³⁰ Further, "the mere fact that an issue is of general interest, or that it could be raised in future pre-trial or trial proceedings, is not sufficient to warrant the granting of leave to appeal."³¹

23. In the absence of concrete argument to satisfy this vital stage of the Article 82(1)(d) test, the Application should be dismissed.

IV. NO GOOD DEED GOES UNPUNISHED

24. The Application states that the Prosecution "proposed that the Chamber follow the same procedure that was done prior to the confirmation."³² However, the Application fails to mention that this procedure was done based upon the Accused's waiver to their right to translations of the full witness statements

²⁹ Prosecution Update, para. 2. The initial appearance of Messrs. Banda and Jerbo took place on 17 June 2010.

³⁰ Application, paras 31-33.

³¹ *Prosecutor v. Katanga & Ngudjolo*, Decision on the Prosecutor's Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009, 6 March 2009, ICC-01/04-01/07-946-tENG, para. 18 citing to *Prosecutor v. Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, para. 11.

³² Application, para. 7.

which was specifically limited to the confirmation stage. The Prosecution now wish to use this limited waiver to compromise the Accused's statutory right to translations of the full witness statements, in effect punishing the Accused for their cooperation. Not only did the Accused's waiver expedite the confirmation stage but it ultimately significantly reduced the Prosecution's translation burden in this case as 10 of the 22 witnesses the Prosecution used at confirmation have since been dropped from the list of witnesses for trial.³³

V. CONCLUSION

25. 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 23rd Day of September 2011 Dated this 23rd Day of September 2011

At The Hague, The Netherlands

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³³ Prosecution's Updated List of Witnesses, ICC-02/05-03/09-189-AnxA, 5 August 2011.