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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 Document

Prosecution's Response to "Defence Application for leave to Appeal the 'Decision on the defence request for a temporary stay of proceedings'"

Sources: Office of the Prosecutor

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

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Introduction

1. The Defence team for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("The Defence") is seeking leave to appeal ("Defence Application") Trial Chamber IV's "Decision on the defence request for a temporary stay of proceedings" ("Impugned Decision") which rejected the Defence request for a temporary stay of proceedings. The Prosecution submits that the Defence Application should be rejected.
2. The Defence raises two main issues, though the first has multiple components and the second incorporates two separate issues. Issue One relates to whether the Defence properly substantiated their Request for a Temporary Stay with sufficient specificity, and Issue Two relates to whether the Trial Chamber erred in determining that the rights in article 67(1)(b) and (e) of the Statute have not been infringed and whether various ameliorative measures identified by the Trial Chamber are adequate.
3. Issue 1, in substantial part, and Issue 2 do not arise from the Impugned Decision. Should the Trial Chamber find that they do arise from the Impugned Decision, they still do not meet the requirements for leave to appeal.
4. Additionally, none of the complaints contained in the issues significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution by the Appeals Chamber will not materially advance the proceedings.

Procedural Background

5. On 6 January 2012, the Defence filed a Request for a Temporary Stay of Proceedings ("Request for a Temporary Stay").¹
6. On 30 January 2012 the Prosecution opposed the Defence Requests for a Temporary Stay of Proceedings and for an Oral Hearing.² On 30 January 2012, the Legal Representatives of Victims also filed submissions opposing the Defence Requests.³ After obtaining leave⁴ on 21 February 2012, the Defence filed a reply to the Prosecution's Response.⁵
7. On 6 July 2012, the Chamber issued an order scheduling a hearing and status conferences.⁶ The hearing and the status conferences took place on 11 and 12 July 2012.
8. On 26 October 2012 Trial Chamber IV issued the Impugned Decision.⁷
9. On 5 November 2012 the Defence sought leave to appeal the Decision.⁸

Submissions

The Defence Issues

10. The Defence Application identifies two issues that allegedly arise from the Decision:⁹

¹ ICC-02/05-03/09-274.

² ICC-02/05-03/09-286-Red.

³ ICC-02/05-03/09-285.

⁴ ICC-02/05-03/09-294-Red.

⁵ ICC-02/05-03/09-300-Red

⁶ ICC-02/05-03/09-366.

⁷ ICC-02/05-03/09-410.

⁸ ICC-02/05-03/09-412 p.5-6.

⁹ ICC-02/05-03/09-412 p.5-6.

i. The First Issue

“Whether the Trial Chamber erred in finding that the Defence have not properly substantiated their Request “with sufficient specificity [...] in light of the information available to it” by:

- a) applying the wrong threshold in terms of specificity;
- b) determining that evidence concerning “the alleged existence of a violence campaign perpetrated by the GoS against the civilian population in Haskanita and Darfur generally, and the effect the GoS military offensive had on the civilian population in the area” is not relevant to the contested issues and, thus, failing to consider this evidence in determining whether the Request was properly substantiated; and
- c) considering only the prejudice caused to the Defence’s ability to mount a positive Defence case and not also considering the prejudice caused to the Defence by being unable to properly test the Prosecution case, including during cross-examination.”

ii. The Second Issue

“Whether:

- a) the Trial Chamber erred in determining that the Request was premature and the rights encompassed in Article 67(1)(b) and (e) of the Statute have not been infringed to the extent that a fair trial is impossible in the circumstances of the present case until the Defence can enter and conduct investigations (including interviews) in the State where the events relevant to the case took place and in which the main putative defence witnesses reside; and
- b) the various measures identified by the Trial Chamber to resolve or relieve unfairness or prejudice either during or at the end of trial, including the Trial Chamber otherwise keeping “the defendant’s complaint [...] in mind in the

course of the trial” in order, inter alia, to “draw conclusions and strike a balance”, are adequate, practical or effective.”

Whether the issues raised by the Defence are appealable issues within the terms of article 82(1)(d)

11. As established by the jurisprudence of the Court, in an application for leave to appeal under article 82(1)(d) the correctness of a decision is irrelevant. The sole question is whether the issue meets the criteria set out in the provision.¹⁰ Reference to the merits of the Decision will only be made when necessary to demonstrate that it does not meet the criteria of article 82(1)(d).
12. The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.”¹¹

The first issue

13. As a preliminary note, the Prosecution observes that Issue One, by its very terms, recognizes that the Chamber found that the Defence should have substantiated its request for a temporary stay with greater specificity. The Defence has a contrary view; it believes that it did sufficiently substantiate

¹⁰ ICC-02/04-01/05-20, para. 22.

¹¹ ICC-01/04-168 OA3, para.9. ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para.8; ICC-01/09-02/11-27, para.7. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

its request. The Defence thus disagrees with the Chamber's exercise of its judgment, asserting that the Chamber failed to fully appreciate the Defence evidence and thereby reached what the Defence submits is the wrong result. But such a disagreement alone is not sufficient to qualify the issue for appeal.

14. In addition, only the first sub-issue in Issue One even arguably arises from the Decision.

15. In the second sub-issue the Defence submits that the Chamber erred in "determining" that a certain category of evidence was not relevant to the contested issues. That is not correct.¹² In fact, in the Impugned Decision the Chamber stated:

*"As a general proposition, a broad view of what was happening in Darfur, the alleged existence of a violence campaign perpetrated by the GoS against the civilian population in Haskanita and Darfur generally, and the effect the GoS' military offensive had on the civilian population in the area do not readily appear to the Chamber to fall within the scope of the issues that the Chamber will review during the trial. Their relevance in the case must depend upon a clearly articulated connection to what the parties had delineated in their agreement as to the facts and the contested issues."*¹³

16. The Chamber did not conclude, as asserted by the Defence, that the topics in question – the violence campaign of the Government of Sudan and the effect of the military offensive on the civilian population – was categorically

¹² See in this context ICC-01/09-02/11-406, para.46 (In this case the appellant misinterpreted a factual finding - with which it merely disagrees - in order to make it a point of law); ICC-01/04-01/07-15, para.15 (the TC did not make a general ruling and it only addressed the concrete request by the Prosecution); ICC-01/04-01/07-1732, paras.15,17-18; ICC-01/04-01/10-487, paras.32-33; ICC-01/04-01/07-1088, paras.33-35; ICC-01/04-535, paras.26-29 (OPCD misinterpreted the terms *prima facie* vs. "factual finding" used in the decision); ICC-01/04-01/10-106, p. 6.

¹³ ICC-02/05-03/09-410, para.106. Emphasis added, footnotes omitted.

irrelevant. Rather, its decision was much more limited. It concluded only that the Defence failed to establish a clear connection between these matters and the narrowed contested issues in the case. To the extent the Defence asserts that the Chamber erroneously excluded this topic as irrelevant, that is not what the Chamber in fact ruled and therefore the alleged error does not arise out of the decision. Alternatively, if the Defence claims that the Chamber erred in failing to appreciate its efforts to connect this subject to the contested issues, that amounts to a mere disagreement with the conclusions of the Chamber and its evaluation of the arguments of the Defence. In either event, issue 1(b) is misconceived and does not arise out of the impugned Decision.

Issue 1 (c)

17. With respect to the third sub-issue, the Prosecution also notes that the Defence never urged that without access to Darfur it would be unable to properly test the Prosecution case. It is now being raised in issue 1(c) *ex improviso*. While, to be sure, the Chamber did consider only whether the Defence would be prejudiced in mounting its own case, it considered that issue only because the Defence raised it. The Prosecution submits that it is the duty of a party to raise issues if the party wants the Chamber to consider them; if the party fails in that duty, it cannot raise as an appellate issue the failure of the Chamber seized of the matter to consider something that was not raised before it. In this respect, the Prosecution notes that in a prior decision on leave to appeal, a Single Judge considered that the failure of the applicant to raise the issue in a timely fashion negatively impacted on his right to later seek leave to appeal.¹⁴ Indeed, if the rule were otherwise, a party would meet the requirements for interlocutory appeal by identifying any significant issue that “arises” from a decision’s failure to address it, even

¹⁴ ICC-01/04-01/06-338, p. 8.

when the failure is attributable exclusively to the party's own failure to raise it.

18. Alternatively, assuming that the Defence did sufficiently argue that a stay was necessary because it would not be able to test the Prosecution's witnesses, issue 1(c) still does not constitute an appealable "issue" within the terms of article 82(1)(d). Rather, it is again merely a disagreement with the Chamber's decision. Nothing in the Decision suggests that the Trial Chamber only considered the prejudice caused to the Defence's ability to mount a positive Defence case but refused, *as a matter of law*, to consider any other bases for claiming prejudice.
19. As indicated by the title of Section III (C) of the Impugned Decision, the Trial Chamber undertook the broader inquiry of "*Have the rights encompassed in Articles 67(l)(b) and (e) of the Statute been infringed to such an extent that the trial can no longer be fair?*".¹⁵ Many of the factors considered by the Trial Chamber in this context relate not only to building the Defence case but also to the Defence's ability to properly test the Prosecution case. Such factors included Defence access to Prosecution witnesses;¹⁶ Prosecution evidence in the Zaghawa language;¹⁷ relevant potentially exculpatory documents from the AU, UNSC, OCHA, UNMIS, the Government of Nigeria, the ICRC and the GoS;¹⁸ and documents obtained by the Prosecution pursuant to article 54(3)(e).¹⁹ Therefore, even though the Chamber did not explicitly address the Defence's ability to test the Prosecution's evidence, it did so implicitly. Accordingly, sub-issue 1(c) was not raised by the Defence in its original motion for a stay and also does not arise out of the Chamber's decision.

¹⁵ ICC-02/05-03/09-410, p. 49.

¹⁶ ICC-02/05-03/09-410, paras. 122-129.

¹⁷ ICC-02/05-03/09-410, paras. 130-135.

¹⁸ ICC-02/05-03/09-410, paras. 136-144.

¹⁹ ICC-02/05-03/09-410, paras. 145-150.

20. Accordingly, with respect to the first issue, the Defence mischaracterizes the Impugned Decision²⁰ and seeks certification of an issue that does not arise out of it or is “merely a question over which there is disagreement or conflicting opinion”.²¹ That alone does not constitute an appealable issue.

The second issue

21. The Prosecution submits that the second issue similarly does not constitute an appealable “issue” within the terms of article 82(1)(d). In issue 2 (a) the Defence asserts that the Trial Chamber erred in determining that the Request was premature and the rights in article 67(1)(b) and (e) have not been infringed to the extent that a fair trial is impossible in the circumstances of the present case until the Defence can enter and conduct investigations in Sudan. In issue 2(b) the Defence questions whether the various measures identified by the Trial Chamber to resolve or relieve unfairness or prejudice either during or at the end of trial are adequate, practical or effective.

22. Issue Two is not a confined, appealable issue. The Defence simply disagrees with the Trial Chamber’s conclusion that a fair trial is still possible and the Defence request is therefore premature. In fact, the Defence takes issue with the Appeals Chamber’s jurisprudence stating that stay of the proceedings is

²⁰ See in this context ICC-01/09-02/11-406, para.46 (In this case the appellant misinterpreted a factual finding - with which it merely disagrees - in order to make it a point of law); ICC-01/04-01/07-15, para.15 (the TC did not make a general ruling and it only addressed the concrete request by the Prosecution); ICC-01/04-01/07-1732, paras.15,17-18; ICC-01/04-01/10-487, paras.32-33; ICC-01/04-01/07-1088, paras.33-35; ICC-01/04-535, paras.26-29 (OPCD misinterpreted the terms *prima facie* vs. “factual finding” used in the decision); ICC-01/04-01/10-106, p. 6.

²¹ ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27; ICC-02/11-01/11-99-Conf, para.21.

a measure of last resort.²² A blanket criticism of this kind is inadequate for the purposes of satisfying the strict requirements of article 82(1)(d).

23. The Prosecution notes additionally that issue 2 (a) does not arise from the Impugned Decision since the various measures identified by the Trial Chamber to resolve or relieve unfairness or prejudice are still underway and will continue to evolve. Therefore there is no final decision as of yet. An assessment of adequacy, practicality or effectiveness at this stage, where a trial date is yet to be set, would be tantamount to litigating “an abstract question or a hypothetical concern.”²³ It is irrelevant for granting leave to appeal that the issue for which leave is sought might be of general interest or that it may arise in future pre-trial or trial proceedings,²⁴ or that it may have a potential impact on the jurisprudence of this Court.²⁵ That would require the Chamber to speculate on the impact of the issue since it is unknown at this stage.²⁶

24. The Prosecution therefore submits that only sub-issue 1(a) arises from the Decision. In any event, if the Chamber decides to entertain the Defence arguments with respect to the other sub-issues, the Prosecution submits in the alternative that the Defence has failed to prove that they satisfy the other requirements of article 82(1)(d).

²² Defence Application fn. 17 refers to Decision, paras.79 and 97, inter alia, where the Trial Chamber merely referred to the relevant appeals jurisprudence.

²³ Article 82(1) (d) cannot be used to litigate hypothetical issues. See ICC-01/05-01/08-532, para.17. ICC-01/05-01/08-75 para.11, ICC-02/04-01/05-367, para.22; ICC-01/09-01/11-301 para.34, ICC-01/09-02/11-406, paras.50, 61.

²⁴ ICC-01/04-01/06-1557, para.25; ICC-02/04-01/05-20, para. 21, ICC-01/04-135-tEN, para.21; ICC-01/04-01/06-1191, para.11; ICC-01/05-01/08-1169, para.25; ICC-01/05-01/08-980, para.16 (procedural matter that may have a potential impact in other cases).

²⁵ ICC-01/05-01/08-980, para.16 (procedural matter that may have a potential impact in other cases).

²⁶ ICC-01/04-01/07-2035, para.26.

The Issues raised by Defence Request do not affect the fair conduct of the proceedings

25. With respect to the first issue, the Defence does not explain how fairness is affected beyond stating, in a vague and conclusory manner, that the specificity threshold “*effectively relates to the amount and/or detail of evidence which is required to be shown that the fair conduct of proceedings has been violated*”.²⁷ The Prosecution agrees that, in theory, the standards for sufficiency of a party’s showing to establish unfairness might itself raise an issue affecting the fairness of the proceeding. But in this instance, the Chamber did not set a standard or summarily reject the possibility of unfairness as a matter of law. Rather, it evaluated the arguments by the defence and found them wanting. In this respect, the Defence merely disagrees with the Chamber’s conclusions and its evaluations of the Defence claims. It seeks to package this disagreement in terms of a legal claim, but in fact the Chamber concluded only that the Defence failed to substantiate its assertions. Nor, in any event, does the Decision foreclose a future remedy by the Trial Chamber if in fact fairness is implicated.

26. With respect to the second issue, the Defence claims that fairness is affected because the remedies proposed by the Chamber are necessarily insufficient to ensure a fair trial.²⁸ This argument is again purely speculative as only once the remedies are applied will the Chamber be in a position to assess whether fair trial is still possible or not and fairness has been affected.

27. The Defence further claims that both issues affect the fairness of the proceedings because it will have to proceed to trial without a genuine

²⁷ ICC-02/05-03/09-412 para.20

²⁸ Defence Application, para.21.

opportunity to present its case or to test the evidence presented by the Prosecution.²⁹

28. Again, it is clearly premature and speculative to assert that these two asserted issues affect the fairness of the proceedings. This is particularly so given that the Defence agreed to substantially narrow the issues to be litigated at trial to only the following issues:

- (i) whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;
- (ii) if the attack was unlawful, whether the accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and
- (iii) whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.³⁰

29. Beyond that, the Defence fails to explain their negative impact on the fairness of the proceedings at *this* stage. The Defence merely speculates in the abstract that the impugned Decision causes prejudice.³¹ However, as Chambers of this Court have stated when rejecting applications for leave to appeal, a purely general complaint does not suffice.³²

30. As already advanced, there are no specific arguments as to why and how sub-issues 1 (b) and (c) arise from the Decision. If the Chamber nonetheless considers that these sub-issues are properly before it, the Prosecution submits that neither of them can impact on the fair conduct of the proceedings.

31. More specifically, as to the claim in issue 1(b), the Trial Chamber did not rule on relevance but said only that the Defence had, at this stage, failed to

²⁹ Defence Application, para.22.

³⁰ ICC-02/05-03/09-227, para.24.

³¹ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 paras. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para.30.

³² ICC-01/04-01/07-2463, para.31.

demonstrate the connection between this topic and the contested issues in the case (and without such a showing the connection is not necessarily evident). Going forward, the Defence can still argue that a particular piece of evidence concerning “the alleged existence of a violence campaign perpetrated by the GoS against the civilian population in Haskanita and Darfur generally, and the effect the GoS military offensive had on the civilian population in the area” falls within the contested issues and can attempt to demonstrate the connection between the evidence and the contested issue. The Decision has not foreclosed that line of argument, and thus does not currently affect the fairness of the proceedings.

32. It is also premature to claim that issue 1(c) will have an impact on fairness. During the trial, if the Defence finds itself to be unable to properly test the Prosecution case, including during cross-examination, nothing prevents the Defence from raising this issue. This is especially the case since the Trial Chamber has stated it will monitor the Defence’s ability to exercise its article 67(1) (b) and (e) rights over time.³³

The Issues raised by Defence Request do not affect the expeditious conduct of the proceedings

33. The Defence Application fails to demonstrate that the issues significantly affect the expeditious conduct of the proceedings within the meaning of article 82(1)(d).
34. The Defence submits that the effect of the Impugned Decision is that the Defence is now required to proceed to trial. In order to be ready for trial, the Defence will have to make further attempts to investigate, as well as try to

³³ ICC-02/05-03/09-410 para.159.

resolve complicated witness protection issues and other matters including the conduct of missions following full disclosure from the Prosecution.³⁴

35. However, the Prosecution submits that the expeditious conduct of the proceedings will only be affected by the remedy sought by the Defence (i.e. a stay of proceedings) and not by the Impugned Decision. The Defence itself acknowledges the contradiction between their claim that the ruling affects expeditiousness and the remedy they are seeking.³⁵ On this basis alone the Defence's application for leave could be denied.

36. The Defence contends additionally that from the very first Prosecution witness there is likely to be a standing application from the Defence for a stay of proceedings because further specific evidence will come to light or the measures suggested by the Chamber are exhausted or proved inadequate.³⁶ The supposition that circumstances may change or that the Chamber may yet conclude that it is impossible to provide a fair trial under the current conditions is not itself justification for an interlocutory appeal or proof that immediate review is the most expeditious way of dealing with the issue. Nor can a party's prediction that, if appeal is not now authorized, it will repeatedly renew its applications, or even attempt to lodge a standing application for leave to appeal – assuming such a thing would be allowed – be deemed sufficient to show that an immediate appeal would serve expeditiousness.

37. The Defence further argues that if the accused are ultimately convicted, the first ground of their appeal against conviction would likely be that the trial was unfair by reason of the matters set out in the Request for a Temporary Stay. This argument is again entirely speculative. And indeed, the same argument can be made for many issues for which interlocutory appeal has

³⁴ Defence Application, para.23.

³⁵ Defence Application, para.24.

³⁶ Ibid.

been unsuccessfully sought. That the issue may be raised in a final appeal is not, alone, sufficient to justify immediate appeal.

38. Moreover, if raised on appeal from a final judgment, this particular issue – the fairness of the proceeding, given the limitation on both parties’ access to Darfur -- will turn largely on the facts that will emerge at trial. Not only has a trial date yet to be set, but - as conceded by the Defence³⁷ - the parties have yet to exhaust the measures proposed by the Chamber.

The Issues raised by the Defence Application do not significantly affect the Outcome of the trial³⁸

39. The Defence Application also fails to demonstrate that the issues significantly affect the outcome of the trial.

40. The Defence claims that if the first issue was wrongly decided, the Defence will have been required to go to trial with its ability to present and challenge evidence severely undermined.³⁹ Similarly, if the second issue was wrongly decided, the Defence will have been forced to rely on inadequate remedies as safeguards. In both cases, the Trial Chamber’s ultimate determination will be affected.⁴⁰

41. The Prosecution submits that the Defence’s submissions are based on the speculative assumption that all measures devised by the Trial Chamber will be inadequate to solve the existing problems and protect the rights of the Defence at trial. However, no trial date has been set yet and the

³⁷ Defence Application, para.24 (“The Impugned Decision effectively invites future applications for stays of proceedings during the trial process [...] as soon as the various measures suggested by the Impugned Decision are exhausted or prove inadequate [...]).

³⁸ This requirement is an alternative basis for granting under Article 82(1)(d) to the issue impacting on the fair and expeditious conduct of the proceedings. ICC-02/04-112, para.17; ICC-01/04-01/06-1417, paras.17-18; ICC-01/04-01/06-1473, paras.21-22.

³⁹ Defence Application, para.29.

⁴⁰ Defence Application, para.29.

implementation of the remedies advanced by the Chamber is underway. Consequently, it is too early to conclude that the remedies are inadequate and that the Defence rights under article 67(1) (e) are affected.

An immediate resolution of The Issues raised by the Defence Application will not materially advance the proceedings⁴¹

42. Even if the Trial Chamber considers that the first cluster of requirements under article 82 (1) (d) are met, the Application should nonetheless be dismissed since it fails to demonstrate that an immediate resolution of the issues will materially advance the proceedings. What it is required under this limb of article 82 (1) (d) is a showing that intervention by the Appeals Chamber is required at this stage of the proceedings. This will ordinarily happen where there are no prospects of other remedies being available, or those available would be manifestly inadequate. Similarly, the fact that in the course of the proceedings the parties may have to resort to the Appeals Chamber on the same basis is not a relevant consideration: “[I]t is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order materially to advance the proceedings.”⁴²

43. The Defence claims that if the Impugned Decision is incorrect, it will taint every aspect of the case going forward, and determination of both issues at this stage will ensure that proceedings follow the right course.⁴³

⁴¹ 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.” See ICC-01/04-168, paras.14-15,18.

⁴² ICC-01/04-01/06-1557, para.25; ICC-01/04-01/06-1191, para.12; ICC-01/05-01/08-1169, para.25.

⁴³ Defence Application, para.32.

44. Again, the Prosecution reminds the Court that the original Defence filing sought an indefinite stay of the trial, claiming that the case cannot go forward at all. In that context, the current argument that an appeal from a denial of the indefinite stay will materially advance the proceedings – presumably by resulting in a decision that will ultimately stop the progress of the proceedings altogether -- is conceptually inconsistent. Rather, resolution of this issue by the Appeals Chamber at this stage is not likely to provide significant guidance or assist the proceedings to “move forward”.⁴⁴ To the contrary, it will only cause an unnecessary delay in the proceedings.⁴⁵

45. Beyond that, as submitted above, the Defence Application is premature. The Defence will have opportunities to raise the issues of prejudice at trial and to renew its complaints on the basis of a concrete factual showing. The Trial Chamber stated that the Defence complaints “will be kept in mind in the course of the trial”.⁴⁶ Thus, during the course of the trial, the Defence may still seek relief from the Trial Chamber if it considers that the rights of the accused are being compromised. If the Chamber again disagrees, the Defence can again request that specific issues be certified for appeal, and if certification is granted seek remedial action from the Appeals Chamber. Since there are adequate remedies available to the Defence, immediate resolution of the Issues by the Appeals Chamber is not required.

46. The Defence further argues once again that if leave to appeal is denied, and the accused are ultimately convicted, the first ground of their appeal against conviction would likely be that the trial was unfair by reason of the matters

⁴⁴ ICC-01/04-168, paras.14-15,18.

⁴⁵ As the Prosecution has regularly submitted, the extent of any likely delay is one factor to consider in whether immediate resolution of the issue would materially advance the proceedings, although it is certainly not decisive in its own right - see e.g. ICC-01/04-103, para.37, and authorities cited therein (in particular at footnote 22).

⁴⁶ Impugned Decision, para.159.

set out in the Request, which relates to the First Issue, and the inadequacy of the remedies and safeguards proposed by the Trial Chamber in the Impugned Decision, which relates to the Second Issue.⁴⁷ As noted above, this is entirely a speculative argument that, moreover, would apply to every request for interlocutory appeal. Nor is it accurate or legitimate to predict that the ameliorative measures cited by the Chamber, which the Defence concedes have not been exhausted,⁴⁸ will necessarily be inadequate.

Relief sought

47. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Application.



Fatou Bensouda,
Prosecutor

Dated this 9th day of November 2012
At The Hague, The Netherlands

⁴⁷ Defence Application, para.33.

⁴⁸ Defence Application, para.24.