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THE APPEALS CHAMBER

Before: **Judge Sang-Hyun Song**
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Ekaterina Trendafilova

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*
v.
ABDALLAH BANDA ABAKAER NOURAIN
&
SALEH MOHAMMED JERBO JAMUS

Public Document

Defence's Document in Support of Appeal against Trial Chamber IV's "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor"

Sources: **Defence Team of Abdallah Banda Abakaer Nourain**

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I. INTRODUCTION

1. Rule 77 of the Rules of Procedure and Evidence ("Rules"), which obliges the Prosecutor to disclose documents within their possession "which are material to the preparation of the defence" is fundamentally important because it is one of the primary ways in which the right of the accused to adequate facilities for the preparation of the defence[1] is guaranteed. It is vital not only for fairness and transparency of proceedings, but also because the Prosecutor's investigative resources are far greater than those available to the defence. The breadth of and timeframe for its collection of materials relevant to a situation are also much wider. As a result, the jurisprudence of this Court has always been clear. Rule 77 must be read broadly and must include within its purview contextual information, which will assist the defence to understand the situation in the relevant area at the relevant time.[2]

2. This appeal by the Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") raises, for the first time before the Appeals Chamber, the proper interpretation of Rule 77 of the Rules in a case where the parties have entered into an agreement as to specified facts pursuant to Rule 69 of the Rules and to limit the trial to certain contested issues.

II. BACKGROUND

3. On 14 July 2008, the Prosecutor applied for an arrest warrant against President Omar Hassan Ahmad Al Bashir of Sudan ("Al Bashir Application").[3] The Prosecutor alleged that President Al Bashir, as leader of the Government of Sudan ("GoS"), presided over repeated attacks on civilian towns or villages, which followed a common pattern whereby the towns and villages were bombed by military helicopters or aircraft and then surrounded and attacked by ground

[1] Article 67(1)(b) of the Rome Statute ("Statute").
[2] See full discussion below at paragraphs 11 to 13.
[3] ICC-02/05-157-AnxA.

forces.[4] The Prosecutor alleged that these attacks were facilitated and coordinated by the GoS intelligence networks.[5] At the same time, the Prosecutor alleged that GoS officials "regularly misinformed and obstructed the activities" of the African Mission in Sudan ("AMIS").[6]

4. Mr. Banda and Mr. Jerbo are charged with offences arising from an attack on the AMIS base near Haskanita on 29 September 2007. At the time of the attack the Prosecutor's own evidence demonstrates that there was a GoS offensive in the Haskanita area[7] supported by intelligence originating from the AMIS base.[8]

5. On 16 May 2011, the Defence and the Prosecutor informed Trial Chamber IV that they had agreed to contest only the following issues at trial:

   i. Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;
   ii. If the attack is deemed 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.[9]

6. On 21 June 2011, the Defence asked the Prosecutor to admit additional facts relating to the GoS's criminal campaign against civilians in Darfur.[10] These facts were drawn from the Al Bashir Application, the Second Warrant of Arrest for Omar Hassan Al Bashir dated 12 July 2010,[11] statements by the Prosecutor to the

[4] ICC-02/05-157-AnxA, paras. 101 and 106.
[5] *Ibid.*, paras. 251(d), 265 and 308.
[6] *Ibid.*, para. 322.
[7] DAR-OTP-0165-0489, p. 0496, para. 35 and p. 0497, para. 39; DAR-OTP-0169-0808, p. 0815, para. 52; DAR-OTP-0165-0489, p. 0497, para. 36.
[8] DAR-OTP-0168-0168, p. 0171, paras. 10 – 11; DAR-OTP-0165-0489, p. 0499, paras. 45 – 46; DAR-OTP-0168-0168, p. 0171, paras. 10 – 11; DAR-OTP-0169-0808, p. 0816, paras. 64 – 69.
[9] ICC-02/05-03/09-148, para. 3.
[10] Defence E-mail to the Prosecution "Proposed Additional Rule 69 Agreement as to Evidence", 21 June 2011.
[11] ICC-02/05-01/09-95.

United Nations Security Council[12] and the Document Containing the Charges in the present case.[13] The Prosecutor refused to admit any of these facts.[14]

7. On 20 October 2011, the Defence submitted a Request for Disclosure of Documents in the Possession of the Office of the Prosecutor ("Request").[15] In the Request the Defence sought disclosure of a limited category of documents[16] ("requested evidence") which the Prosecutor had already gathered in support of the Al Bashir Application.[17]

8. On 23 January 2013, the Trial Chamber rejected the Request ("Impugned Decision").[18] In so doing, the Trial Chamber held that evidence relating to the GoS's violation of peace agreements was not material.[19] Further, the Trial Chamber held that the relevance of evidence relating to the GoS's campaign of violence in the area was "very limited and indirect".[20] The Trial Chamber also determined that the application of "substantial redactions" to the requested evidence would have an "unjustified impact" on the expeditiousness of the trial and would be "unduly burdensome to the prosecution, Registry and Chamber".[21]

9. On 21 March 2013, the Trial Chamber granted leave to appeal in part the Impugned Decision, certifying the following issue:

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[12] Thirteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005).
[13] ICC-02/05-03/09-79-Red.
[14] Prosecution's Response to the Defence E-mail "Proposed Additional Rule 69 Agreement as to Evidence", 6 July 2011.
[15] ICC-02/05-03/09-235.
[16] To assist the Prosecutor and to limit the number of documents, the Defence made it clear that they would not require the disclosure of statements of victims or the identifying information of other witnesses who had expressed security concerns. See ICC-02/05-03/09-225, para. 4.
[17] ICC-02/05-157-AnxA. This was a further way of limiting the amount of documents requested – the Defence maintain that they would have been entitled to ask for all documents held by the Prosecutor relating to this campaign of violence, rather than limiting disclosure to the arrest warrant application.
[18] Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, ICC-02/05-03/09-443.
[19] *Ibid.*, para. 18.
[20] *Ibid.*, para. 20.
[21] *Ibid.*, para. 23. *See* also paras. 24-25.

whether the Trial Chamber erred in its application of Rule 77 by (a) interpreting the scope of the contested issues too narrowly for the purposes of the Defence Request for Disclosure and / or (b) considering the Defence Request for Disclosure disproportionate in the light of the expeditiousness and security concerns.[22]

III. STANDARD OF REVIEW

10. The Appeals Chamber may reverse an interlocutory decision if the Trial Chamber made an error of law or fact,[23] which materially affected the Impugned Decision.[24]

IV. GROUND OF APPEAL & SUBMISSIONS

1. *The Trial Chamber erred in its application of Rule 77 by interpreting the scope of the contested issues too narrowly for the purposes of the Defence Request for Disclosure*

A) *The Proper Interpretation of Rule 77*

11. The Appeals Chamber has previously addressed the proper interpretation of Rule 77. In *Lubanga*, the defence appealed against Trial Chamber I's decision that "the Prosecution are not under an obligation to serve material that relates to the general use of child soldiers in the DRC."[25] The basis for Trial Chamber I's decision was that the evidence "will not undermine the Prosecution case and on the basis of what has been revealed by the Defence [...] it does not support any defence or line of argument to be relied on by the accused".[26] The Appeals Chamber disagreed and held that:

[22] Decision on the Defence Application for Leave to Appeal the "Decision on the Defence Request for Disclosure of Documents in the Possession of the Prosecutor", ICC-02/05-03/09-457, para. 21.
[23] *Prosecutor v. Lubanga*, Judgment on Disclosure Restriction pursuant to Rule 81 (2) and (4), 13 October 2006, ICC-01/04-01/06-568 OA3, para. 19; *Prosecutor v. Kony et al*, Judgment on Admissibility Appeal by Ad-Hoc Defence, 16 September 2009, ICC-02/04-01/05-408 OA3, para. 80. *See* also *Prosecutor v. Bemba*, Judgment on Prosecution's Conditional Release Appeal, 2 December 2009, ICC-01/05-01/08-631-Red OA2, para. 62.
[24] *Prosecutor v. Katanga and Ngudjolo*, Judgment on Admissibility Appeal, 25 September 2009, ICC-01/04-01/07-1497 OA8, para. 37.
[25] *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433 OA 11, para. 56 ("*Lubanga* Appeals Judgment").
[26] *Ibid.*, para. 57.

> *the Trial Chamber interpreted rule 77 of the Rules of Procedure and Evidence too narrowly because it excluded objects which, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence. The wording of rule 77 of the Rules of Procedure and Evidence does not suggest that the term "material to the preparation of the defence" should be construed as narrowly as the Trial Chamber did. Rather, the term should be understood as referring to all objects that are relevant for the preparation of the defence.*[27]

12. The Appeals Chamber specifically held that Rule 77 "must be interpreted broadly".[28] This led the Appeals Chamber to conclude that evidence relating to the general use of child soldiers was material to the preparation of the defence because it was "necessary to understand the situation [...] in Ituri at that time [...] [which] might be relevant, for example, to understand the phenomenon of the use of child soldiers [...] [which] might be relevant at the sentencing phase".[29]

13. Successive trial chambers have heeded this guidance. In *Bemba*, Trial Chamber III held "the prosecution's disclosure obligations under Rule 77's materiality prong are broad".[30] In *Lubanga*, Trial Chamber I held "the prosecution's disclosure obligations under Rule 77 of the Rules are wide, and they encompass, *inter alia*, any item that is relevant to the preparation of the defence, and including not only material that may undermine the prosecution case or support a line of argument of the defence but also anything substantive that is relevant, in a more general sense, to defence preparation [...] [it includes] any material in its possession that

[27] *Ibid.*, para. 77.
[28] *Ibid.*, para. 78.
[29] *Ibid.*, para. 82.
[30] Redacted Version of Decision on the Defence Motion for Disclosure Pursuant to Rule 77, 29 July 2011, ICC-01/05-01/08-1594-Red, para. 21.

may significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues, in the case."[31]

14. By contrast, in the Impugned Decision, the Trial Chamber decided materiality by prejudging the validity of the Defence arguments on the contested issues. In relation to the issue of whether AMIS was a "peacekeeping mission", it held that "the defence has failed to make a sufficient showing of materiality, within the meaning of Rule 77, and in particular, it has not demonstrated the link between the contested issue and the items of evidence."[32] The Trial Chamber further held that "the significance of the existence of a campaign of violence to the contested issues in the present case, if any, is very limited and indirect."[33]

15. In so doing, the Trial Chamber erred by taking too narrow a view of whether the requested evidence was material to the preparation of the defence on the contested issues. The situation in Darfur where the attack occurred is material to the contested issues, as are the character and motives of Mr. Banda and Mr. Jerbo. Further, if the Trial Chamber's narrow approach is correct it would not be possible for either party to lead evidence at trial relevant to sentencing.

16. First, the requested evidence certainly contains "contextual evidence"[34] which is required in order for the Defence, and ultimately the Trial Chamber, to understand the situation in the Haskanita area at the time of the attack. The Appeals Chamber correctly held in *Lubanga* that "material to the preparation of the defence" includes evidence which is necessary to "understand the situation" persisting in the relevant area at the time that the alleged crimes occurred. The requested evidence is material to the preparation of the defence in exactly the

[31] Decision on the Scope of the prosecution's disclosure obligations as regards defence witnesses, 12 November 2010, ICC-01/04-01/06- 2624, para. 16.
[32] Impugned Decision, para. 18 (emphasis added).
[33] *Ibid.*, para. 22 (emphasis added).
[34] Request, paras. 15 and 36.

same way as evidence relating to the general use of child soldiers was material to the preparation of the defence in *Lubanga*. The context in which the attack took place is material to a general understanding of the contested issues. It is also material to the preparation of the cross-examination of Prosecution witnesses, many of whom describe their understanding of this context.[35]

17. Second, the Trial Chamber approached Rule 77 too narrowly by failing to take into account the materiality of the requested evidence to the character[36] and motivation of Mr. Banda and Mr. Jerbo.[37] Evidence relating to the character and motivation of the accused is material to the credibility of Mr. Banda and Mr. Jerbo's oral evidence should they be called as witnesses; their motives in attacking the Haskanita base[38] and to *mens rea*.[39] The Prosecutor has alleged that the motive for the attack on the MGS Haskanita was simply material gain.[40] Thus, understanding why Mr. Banda and Mr. Jerbo selflessly risked their lives to fight against the GoS is relevant to understanding their character and why the Prosecutor's allegations that they were motivated by greed are untenable. It is also clearly relevant to the first contested issue which is whether the base was a legitimate military objective.

18. Third, the Trial Chamber approached Rule 77 too narrowly by failing to take into account whether the requested evidence could be material to matters of

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[35] For instance: DAR-OTP-0181-0204, p. 0218, para. 78 to p. 0220, para. 91; DAR-OTP-0165-0489, p. 0502, para. 64 to p. 0503, para. 72.
[36] Character evidence has been admitted in cases before the *ad hoc* tribunals including *Prosecutor v. Kupreškić et al.*, IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999.
[37] As argued in the Request, paragraphs 17 to 18.
[38] See *Prosecutor v. Vujin*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 130 ("such evidence is relevant because it bears on the questions as to whether the conduct alleged to constitute contempt was deliberate or accidental, and whether it is likely that a person of good character would have acted in the way alleged").
[39] *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-A, Judgment, 14 December 2011, para. 227 ("such evidence was indeed relevant to the assessment of Ntawukulilyayo's *mens rea*").
[40] ICC-02/05-03/09-112-Conf-AnxB, para. 132.

mitigation.[41] The requested evidence is material to mitigation because it was the GoS' campaign of violence which caused Mr. Banda and Mr. Jerbo to take up arms in order to protect the civilian population of Darfur and explains why they viewed it as their duty to again risk their own lives to attack a base that was assisting the Sudanese government in that criminal campaign. Mitigation is material at this stage of proceedings, because there is no automatic provision requiring a separate sentencing phase.[42] The Trial Chamber is obliged to "take into account the evidence presented [...] during the trial that are relevant to the sentence".[43] Therefore, while the trial will focus on the contested issues, evidence of mitigation remains material.[44] Mr. Banda and Mr. Jerbo did not waive their right to lead evidence relating to mitigation at trial. The Joint Submission says expressly that "the Parties agree that, apart from the [contested] issues [...] the Parties shall not submit additional evidence or make additional submissions regarding the guilt or innocence of the Accused persons".[45] This plainly preserves the right to lead evidence regarding mitigation.

19. Finally, none of the above considerations is affected by the existence of a Rule 69 agreement as to facts.[46] Whilst Mr. Banda and Mr. Jerbo agreed certain facts, they maintain their innocence on the charges and expect the right to fully challenge the Prosecutor's case on the contested issues. In order to make this challenge, they need access to the material in the Prosecutor's possession which is relevant to the preparation of the defence on the contested issues.

[41] This was argued at paragraph 35 of the Request.
[42] Article 76(2) of the Statute provides that a separate sentencing hearing must be held if the Prosecutor or defence request it, or if the Trial Chamber decides to hold one at its discretion.
[43] Article 76(1) of the Statute.
[44] This line of argument was also specifically accepted by the Appeals Chamber in the *Lubanga* Appeals Judgment, para. 82.
[45] ICC-02/05-03/09-148, para. 6 (emphasis added).
[46] A finding that a Rule 69 agreement does significantly restrict disclosure obligations would have the unfortunate consequence of discouraging the defence in other cases from entering into agreements pursuant to Rule 69, or at least of delaying agreements pursuant to Rule 69 until disclosure is complete.

B) The Requested Evidence is Relevant to the Three Contested Issues

20. The Defence submit that the Trial Chamber erred in law in determining at this stage whether the material requested under Rule 77 would constitute relevant evidence. In the Impugned Decision, the Trial Chamber evaluated the relevance of the requested evidence by reference to specified lines of defence, including the contested issues, and reached conclusions.[47] In determining whether evidence is material to the preparation of the defence for the purpose of Rule 77, the Defence should only need to establish *prima facie* relevance to the preparation of the defence. The Defence should not have to establish relevance before viewing the material and the Trial Chamber should not rule on relevance at such an early pre-trial stage before hearing any evidence or hearing the parties' arguments on all issues and on the relevance of evidence to those issues.

21. There are three reasons for restricting the detailed consideration of relevance at this juncture. First, Mr. Banda and Mr. Jerbo have the right to remain silent.[48] In accordance with this fundamental right, Rules 78 and 79 of the Rules place only very limited disclosure obligations on the Defence, which do not apply at this stage of proceedings. Further, to protect this fundamental right, the Appeals Chamber has held that "the Prosecutor's duty to disclose information to the Defence is not linked to any requirement that the [Lubanga] Defence reveal defence(s) in advance".[49] In the Impugned Decision, the Trial Chamber did exactly what the Appeals Chamber sought to prohibit: it required the Defence to reveal detailed defences in advance. Second, the *ad hoc* tribunals have consistently held that what is required to trigger materiality in disclosure is to

[47] In relation to the third contested issue, it held that the Defence had not demonstrated the "significance" of the requested evidence to "the three factors identified by the Pre-Trial Chamber" in relation to the definition of peacekeeping or "identif[ied] any other factors which in its view are of relevance" (Impugned Decision, para. 18). Similarly in relation to the first and second contested issues, the Trial Chamber held that "the significance of the existence of a campaign of violence to the contested issues, if any, is very limited and indirect" (Impugned Decision, para. 22).
[48] Article 67(1)(g) of the Statute.
[49] *Lubanga* Appeals Judgment, para. 46.

"establish *prima facie* the materiality of the document sought to the preparation of the defence".[50] The Appeals Chamber has previously held that it is "useful" to consider this jurisprudence of the *ad hoc* tribunals in construing Rule 77 because its wording is based on Rule 66(b) of the Rules of Procedure of the International Criminal Tribunal for Yugoslavia.[51] Third, in the nature of such applications, the Defence have not yet seen the requested evidence. To require a detailed discussion of relevance, of the kind required when assessing the subsequent admissibility of evidence, is unfair when the Defence have not seen the underlying material.

22. In any event, the Trial Chamber erred in its application of Rule 77 by interpreting the scope of the contested issues too narrowly. In fact, the requested evidence is material to all three contested issues.[52]

23. The first contested issue is whether the attack on MGS Haskanita was unlawful. On this contested issue, the Defence argue, *inter alia*, that MGS Haskanita was a legitimate military target because intelligence leaking from MGS Haskanita to the GoS was supporting the latter's campaign of violence in the local area. The requested evidence is plainly material to this issue for the following reasons. First, the requested material includes evidence of how the GoS's intelligence operations were integrated into its campaign of violence in Darfur. This pattern of similar fact evidence would support the Defence contention that the information leaking from the AMIS base was being used for this purpose.[53] Second, one aspect of whether an attack is lawful is whether it was proportionate. The Prosecutor argued at the confirmation stage that the attack was

[50] See *Prosecutor v. Karemera et al*, ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para. 12.
[51] *Lubanga* Appeals Judgment, para. 78.
[52] The Defence submit that relevance to one of the contested issues alone would be sufficient to order disclosure.
[53] Evidence of a pattern of past conduct may be admissible against an accused in the form of similar fact evidence. *See Prosecutor v. Bagosora*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals regarding Exclusion of Evidence, 19 December 2003.

disproportionate, saying that "the presence of one GoS representative passing information [...] does not render the entire camp a target, and it certainly does not justify an armed attack <u>of this scale</u>".[54] The requested evidence is material to the assessment of proportionality because it will show that the intelligence leaking from the base was supporting GoS military operations which were part of a well-established pattern of bombing, attacking and destroying towns and villages with devastating loss of civilian life. The material requested will assist the Defence to show that the attack was proportionate given the magnitude of this threat.

24. The second contested issue relates to the *mens rea* of the accused – that is, whether Mr. Banda and Mr. Jerbo were aware of facts that would establish the MGS Haskanita base was part of a peacekeeping mission in accordance with the UN charter entitled to the protection given to civilians. In order to assess Mr. Banda's and Mr. Jerbo's knowledge, it is necessary to consider the context in which they were operating. The material requested is likely to show that any commander familiar with the pattern of GoS military operations would be aware that the ultimate target of the GoS military operations was the civilian population in the Haskanita area and that any force providing intelligence to GoS operations was putting this population at very serious risk. Moreover, the material is likely to explain or corroborate why Mr. Banda and Mr. Jerbo would not believe that AMIS was a "peacekeeping" mission acting "in accordance with the UN Charter" given the unrelenting GoS military operations taking place against both the armed opposition forces and civilian populations in Darfur. As correctly alleged by the Prosecutor in its arrest warrant application against President Al-Bashir, the events in Haskanita in 2007 took place in the midst of a genocidal campaign that had been on-going since 2003 and throughout the deployment of the AMIS mission. These facts should be relevant in the Trial Chamber's ultimate

[54] ICC-02/05-03/09-112-Conf-AnxA, para. 91 (emphasis added).

determination as to whether the accused were aware of facts that would establish the status of AMIS as a "peacekeeping mission" acting "in accordance with the UN Charter."

25. The third contested issue is "whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations". In assessing whether the requested evidence is material to the preparation of the Defence on this issue, the Trial Chamber approached the issue too narrowly by relying exclusively on the three factors identified by the Pre-Trial Chamber in the confirmation decision.[55] This was an error. In an attempt to expedite proceedings, Mr. Banda and Mr. Jerbo agreed not to contest the Prosecutor's submissions at confirmation[56] or advance submissions on the novel issue of the legal definition of a peacekeeping mission and even waived their presence at the hearing. At trial, however, the Defence will vigorously contest the issue of whether AMIS was a peacekeeping mission at the time of alleged crimes.[57] In particular, the Defence will contest whether AMIS was operating with the consent of the parties to the conflict. The Trial Chamber erred by relying on the Pre-Trial Chamber's definition of a peacekeeping mission rather than considering whether the requested evidence was *prima facie* relevant to contesting whether AMIS met the definition of a peacekeeping mission under any possible legal definition of the term.[58]

26. This error was compounded when the Trial Chamber found that, apart from the three factors identified by the Pre-Trial Chamber, the Defence did not "identify any other factors which in its view are of relevance to the determination of whether AMIS was a peacekeeping mission in accordance with the UN Charter."

[55] Impugned Decision, para. 18.
[56] Joint Submission by the Office of the Prosecutor and the Defence as to Agreed Facts and submissions regarding Modalities for the conduct of the Confirmation hearing, ICC-02/05-03/09-80, paras. 5–7.
[57] This was clearly identified in both paragraphs 21–25 of the Request and, in particular, paragraph 21 of the Reply which submitted that the three factors alone were "incomplete".
[58] To determine otherwise would be to force the Defence to run every argument at the confirmation stage that it intends to run at trial, for fear of circumscribing the accused's rights at trial. This would have a significantly adverse effect on the expeditiousness of the confirmation proceedings.

Paragraph 25 of the Request itemised a list of other factors which the Defence suggest are relevant to this determination. The Trial Chamber erred in either overlooking these submissions or improperly determining before trial has begun that the factors identified by the Defence are irrelevant to the definition of a peacekeeping mission, and without giving reasons for this determination.

27. In any event, the requested evidence is plainly relevant even to the three factors identified by the Pre-Trial Chamber and considered by the Trial Chamber.

28. First, in the confirmation decision paragraph cited in the Impugned Decision, Pre-Trial Chamber I held that "AMIS was deployed with the consent of the parties to the conflict".[59] The Pre-Trial Chamber based this finding on certain agreements between the GoS and the revolutionary movements.[60] The requested evidence is expected to show, as the former Prosecutor repeatedly publicly stated, the GoS repeatedly materially breached each of these agreements in a pattern that can only lead to the conclusion that there was never an intent on their part to abide by such agreements. These material breaches negated any prior consent. So, by September 2007, there was no longer consent.

29. Second, the Defence argue that in order for there to be a peacekeeping mission, there must, as a minimum requirement, be a tentative peace to keep. A peacekeeping mission in contrast to a peace enforcement mission cannot be deployed in a war zone. The sole jurisprudence on this issue from the Special Court for Sierra Leone held that "[p]eacekeeping is a technique designed <u>to preserve the peace</u>, however fragile, <u>where fighting has been halted</u>".[61] This authority alone suggests this argument should not have been dismissed out of hand. The requested evidence is material because it tends to show that in September 2007 there was not even a tentative peace on the ground in Darfur.

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[59] Confirmation Decision, para. 63.
[60] Confirmation Decision, footnote 80.
[61] *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009, para. 224 (emphasis added).

30. Third, the requested evidence is material because, prompted in particular by the experience of Rwanda, it is now recognised that an international mission "in accordance with the UN Charter" has a responsibility to protect civilians. UN doctrine is clear that impartiality is not the same as neutrality; where one party is engaged in obvious aggression an impartial peacekeeping mission may be required to confront that party.[62] The requested evidence tends to show that AMIS did not seek to protect civilians, but simply was an observer to a campaign of violence against civilians perpetrated by the GoS. Hence it tends to show that AMIS was not a peacekeeping mission in accordance with the UN Charter.

2. *The Trial Chamber erred in holding that the Defence Request was disproportionate to concerns of security and expeditiousness*

31. The Trial Chamber further erred by considering factors such as the burden that the disclosure of the requested material under Rule 77 of the Rules would place on the Prosecution and the resulting effect on the expediency of the trial when determining that the Prosecution was not required to affect disclosure.[63] The Trial Chamber's approach has no basis in law or fact.

32. Dealing first with the Trial Chamber's legal error, Rule 77 by its plain terms requires disclosure of evidence in the possession of the Prosecutor subject only to the condition that it is "material to the preparation of the defence". The Rule does not require any assessment to be made regarding gradations of materiality such as indirect or limited. Further, the Rule specifically provides that material which

[62] United Nations Peacekeeping Operations, Principles and Guidelines, 2008, Chapter 3.1, pgs. 31 – 33; A/55/305, Report of the Panel on United Nations Peace Operations, 21 August 2000, para. 50.
[63] Impugned Decision, paras. 23-24. Note, while security considerations were mentioned at paragraph 24, it is clear that the Trial Chamber's concern was the burden the Prosecution would face in dealing with security considerations via redactions and the effect the length of time it would take for the Prosecution to apply these redactions would have on the length of the trial. *See* para. 23 ("The Chamber also notes the submission that the substantial redactions required to this highly sensitive information would be, absent any clear justification, unduly burdensome to the prosecution, the Registry and Chamber. This may lead to an unjustified impact on the expeditiousness of the Trial") (footnotes omitted).

falls within its terms may only be withheld in certain limited circumstances, that is where "the restrictions on disclosure as provided for in the Statute and in rules 81 and 82" apply. No other exceptions to disclosure are mentioned and no balancing of interests is expressly required. Therefore, while the rule permits security concerns to be taken into account, this is only to permit redactions to be made to the requested material pursuant to Rules 81 and 82. Any alleged or actual burden on the Prosecution in applying such redactions has no role to play in determining whether disclosure should be made. To hold otherwise, is to impermissibly read a proportionality assessment into the rule.

33. Indeed, to permit the Prosecution to avoid its disclosure obligations on the basis of alleged, or even actual, burden, runs counter to this Court's expansive approach to disclosure. As already stated above, this Court's jurisprudence is unequivocal – a broad interpretation of the Prosecution's disclosure obligations under Rule 77 must be taken.[64] Further, the Appeals Chamber has repeatedly stressed that it is an overriding principle of this Court that full disclosure should be made.[65] The only exceptions to full disclosure are where "specific provision is made for restrictions".[66] An analysis of this Court's legal instruments establishes that there is no provision which permits the Prosecution to be relieved of its disclosure obligations due to burden or workload. Similar attempts by the Prosecution at the *ad hoc* tribunals to avoid disclosure obligations based on work-load and administrative difficulties have been rejected.[67] Clearly, therefore, non-disclosure is the exception to the rule and can only be permitted where it has an express legal basis. Such an approach is justified given, as stated at the outset,

[64] *Supra*, paras. 11-13.
[65] *See, e.g., Prosecutor v. Katanga*, Judgment on Prosecution's Appeal against the First Redaction Decision, ICC-01/04-01/07-475, 13 May 2008, para. 70; *Prosecutor v. Lubanga*, Judgment on Appeal against Oral Disclosure, ICC-01/04-01/06-1433, 11 July 2008, para. 45.
[66] *Prosecutor v. Lubanga*, Judgment on Appeal against Oral Disclosure, ICC-01/04-01/06-1433, 11 July 2008, para. 45. *See also* para. 55.
[67] *See, e.g., Prosecutor v. Brđanin*, IT-99-36-T, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68*bis* and Motion for Adjournment while matters affecting Justice and a Fair Trial can be Resolved", 30 October 2002, para. 29.

that disclosure is a vital tool to redress inequality of arms *vis-à-vis* the investigative resources of the Defence as compared with those of the Prosecution.

34. The factors identified by the Trial Chamber as militating against disclosure and the proportionality assessment which the Trial Chamber performed have no legal basis in the plain wording of the rule nor in the Court's jurisprudence. The Trial Chamber, therefore, erred in law.

35. Even if, *arguendo*, the Appeals Chamber finds that the factors and balancing test which the Trial Chamber imported into Rule 77 are legitimate, then the Trial Chamber erred in fact as there was no factual basis before it to find that there was any undue burden placed on the Prosecution as a result of the Request or that the expeditiousness of the trial would be affected.

36. According to the Prosecutor's submissions, the material submitted for the Al Bashir Application totalled only 5,000 pages,[68] hardly unusual or lengthy by the standards of international tribunals. Further, the Defence limited the scope of the requested evidence by excluding victim statements. Moreover, the Prosecution has implied that much of the material came from public sources.[69] In fact, no information was given about the extent of the redactions actually required. Thus, the Trial Chamber had no basis on which to accept the Prosecutor's submissions that redacting the material would be unduly burdensome.

37. In any event, the application of redactions to the requested evidence is not some extraneous and unnecessary activity which the Defence are asking the Prosecution to undertake. Rather, this exercise should already have been done to some extent in order to be "confirmation ready" in the *Al Bashir* case. While the Defence submit that burden has no role to play when assessing the Prosecution's

[68] ICC-02/05-03/09-251, para. 1.
[69] Request, para. 37.

disclosure obligations from a legal perspective, it should also have no role to play from a practical and professional perspective because the application of redactions in readiness for confirmation is work that should already have been done in the period since the arrest warrants were granted in 2009 and 2010.[70]

38. As regards expeditiousness, given that the extent of the redaction work is unknown, the extent of any effect on the expeditious conduct of the trial is purely speculative. The Request was filed in October 2011 and the trial is now set for May 2014, still over one year away.[71] It is reasonable to conclude that the redaction work will be completed well within this period and that disclosure can be made on a rolling basis. Moreover, it stands to reason that it will be faster and more efficient for the Defence to receive the requested evidence from the Prosecution, a body which has already collated the information, rather than for the Defence to duplicate the process with the concomitant waste in time and Court resources.[72] Accordingly, trial expediency concerns are, in the worst-case scenario, eminently manageable given the current trial timetable and, in the best-case scenario, derisory once an audit of the actual work anticipated is undertaken. Work undertaken to comply with the current Request will have the added benefit of ensuring the expeditious conduct of the *Al Bashir* case.

39. Finally, in the Impugned Decision the Trial Chamber recognised the fact that requested evidence might be publicly available does not discharge the

[70] The Defence note that there appears to be a pattern in the Prosecution's approach to cases which is to leave time consuming, but necessary work until the last minute. In the present case, the Prosecution did not begin translating into Zaghawa any of the witness statements and related material it intended to rely upon at trial until the Trial Chamber issued an order on 16 August 2011 (*see* Order on translation of witness statements, 16 August 2011, ICC-02/05-03/09-199). This was despite the fact that the Prosecution had known since January 2010 at the latest that audio translations into Zaghawa could be required for at least one accused (*see* Prosecution's Status Report on arrangements for the execution of Second Decision on the Prosecutor's Application under Article 58, 26 January 2010, ICC-02/05-03/09-18-US, para. 21). The resulting effects of a seeming failure to pre-plan on the expeditiousness of the trials at issue are, therefore, of the Prosecution's own making.
[71] ICC-02/05-03/09-455.
[72] The Defence observe that this would likely involve researching publically available documentary material, interviewing witnesses and, perhaps, seeking expert evidence. The Prosecutor has had over six years to investigate the crimes with vastly greater resources and access to material from governments, international organizations, and experts in the field.

Prosecution from its disclosure obligations but relied on the public availability to "counterbalance the defence's alleged prejudice"[73] The Trial Chamber also encouraged the Prosecution to consider disclosing the requested material.[74] These observations contradict the Trial Chamber's conclusion that the requested evidence is either of no or very limited and indirect relevance to Defence preparations. The fact that any of the requested evidence is publically available does not excuse the Prosecution from fulfilling its obligations under the Request. It just means that providing this portion of the material will be a simple exercise requiring no redactions. Therefore, the material which is publically available can be disclosed now at little "burden" to the Prosecution, while the remainder can be disclosed later following application for any necessary redactions.

V. REQUEST FOR RELIEF

40. For all the above reasons, the Defence request the Appeals Chamber to reverse the Impugned Decision, and grant the Defence request for disclosure.

Respectfully Submitted,

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for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 2nd Day of April 2013
At The Hague, The Netherlands

Dated this 2nd Day of April 2013
At Yerevan, Armenia

[73] Impugned Decision, para. 25.
[74] *Ibid.*, para. 26.