

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-03/09  
Date: 23 January 2013

**TRIAL CHAMBER IV**

**Before:** Judge Joyce Aluoch, Presiding Judge  
Judge Silvia Fernández de Gurmendi  
Judge Chile Eboe-Osuji

**SITUATION IN DARFUR, SUDAN**

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

**Public Document**

**Decision on the Defence's Request for Disclosure of Documents  
in the Possession of the Office of the Prosecutor**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

**Counsel for the Defence**

Mr Karim A.A.Khan

Mr Nicholas Koumjian

**Legal Representatives of Victims**

Ms Hélène Cissé

Mr Jens Dieckmann

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

Mr Xavier-Jean Keïta

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

**Victims and Witnesses Unit**

Ms. Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber IV** ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* ("Banda and Jerbo case"), acting pursuant to Articles 54(1)(a), 54(3)(f), 64(3), 67(2), 68(1) and 68(5) of the Rome Statute ("Statute") and Rules 77, 81 and 82 of the Rules of Procedure and Evidence ("Rules") issues the following Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor.

### **I. Background and submissions**

1. On 19 July 2011, the defence requested the Office of the Prosecutor ("the prosecution") to disclose evidence material for the preparation of the trial, including information on the situation in Darfur. In particular, it sought the communication of secondary materials, including open source, expert reports and evidence of statements by Government of Sudan's military or political leaders tending to demonstrate an attempt to persecute or destroy in whole or in part the Fur, Zaghawa and Masalit peoples.<sup>1</sup>
2. On 2 September 2011, the prosecution sent an email to the defence, wherein it refused to disclose, under either Article 67(2) of the Statute or Rule 77 of the Rules, evidence in its possession concerning the Government of Sudan's alleged campaign of violence.<sup>2</sup>
3. On 20 October 2011, the defence filed the "Defence Request for Disclosure of

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<sup>1</sup> Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, 20 October 2011, ICC-02/05-03/09-235, footnote 13; Prosecution's Response to Defence Request for Disclosure, 10 November 2011, ICC-02/05-03/09-251, paragraph 9 and footnotes 10-11 (referring to a communication from the defence to the prosecution on 19 July 2011). *See also* Annex A to the Prosecution's Response to Defence Request for Disclosure, 10 November 2011, ICC-02/05-03/09-251-Conf-AnxA.

<sup>2</sup> ICC-02/05-03/09-235, footnote 13; ICC-02/05-03/09-251, paragraph 9 and footnote 12 (referring to a communication from the prosecution to the defence on 2 September 2011).

Documents in the Possession of the Office of the Prosecutor” (“Defence Request”).<sup>3</sup> The defence seeks, pursuant to Article 67(2) of the Statute and Rule 77 of the Rules, the disclosure of documents that were confidentially submitted by the prosecution in support of its application for a warrant of arrest against Omar Hassan Ahmad Al Bashir in the situation in Darfur (“Requested Material”).<sup>4</sup> The defence explicitly excludes from its request the statements of victims and witnesses who have expressed security concerns.<sup>5</sup> It submits that documents relating to the existence of a Government of Sudan’s campaign of violence directed against the civilian population in Darfur are material to the defence preparation for the trial on the three contested issues in this case.<sup>6</sup>

4. In particular, the defence contends that the Requested Material is relevant (i) to the character and *mens rea* of the accused persons, as the context of the conflict could potentially explain why they took up arms and be considered as exonerating or mitigating evidence;<sup>7</sup> (ii) to whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations, as there was no peace in Darfur at the relevant period but rather an on-going campaign of genocide;<sup>8</sup> (iii) to whether the attack on MGS Haskanita on 29 September 2007 was unlawful, as the evidence of a recurring pattern of bombing civilian locations would support the defence position that the AMIS base was used by Government of Sudan’s agents directing the attacks, and thus that it was a legitimate military target;<sup>9</sup> and (iv) to whether the accused persons were aware of the factual circumstances establishing the unlawful nature of the attack, as the

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<sup>3</sup> ICC-02/05-03/09-235.

<sup>4</sup> Annex A to Public Redacted Version of the Prosecutor’s Application under Article 58 filed on 14 July 2008, 12 September 2008, ICC-02/05-157-AnxA.

<sup>5</sup> ICC-02/05-03/09-235, paragraph 4.

<sup>6</sup> *Ibid.*, paragraph 3.

<sup>7</sup> *Ibid.*, paragraphs 16-19.

<sup>8</sup> *Ibid.*, paragraphs 20-25.

<sup>9</sup> *Ibid.*, paragraphs 26-32.

context of an on-going campaign of violence affects the trust they could reasonably place in any representations about the Government of Sudan's activities at the AMIS base and could potentially be considered as exonerating or mitigating evidence.<sup>10</sup>

5. The defence further submits that the Requested Material is limited, that disclosure would speed the defence preparation for trial<sup>11</sup> and that the prosecution is delaying the proceedings by denying access to material it has already assembled.<sup>12</sup> The defence also requests an oral hearing on the matter.<sup>13</sup>
6. On 10 November 2011, the prosecution filed its response to the Defence Request ("Prosecution Response").<sup>14</sup> It opposes the Defence Request as being expansive and without merit<sup>15</sup> and an oral hearing unnecessary.<sup>16</sup> The prosecution notes that its application for a warrant of arrest against Al Bashir was supported by 375 documents cited in footnotes, which exceed 5000 pages, as well as by 179 documents and seven videos.<sup>17</sup> It argues that the substantial redactions required to this highly sensitive information would be, absent any clear justification,<sup>18</sup> unduly burdensome to the prosecution, Registry and Chamber.<sup>19</sup> The prosecution further contends that the Requested Material is not relevant to the contested issues in this case.<sup>20</sup> In particular, it submits that (i) the Government of Sudan's alleged criminal campaign does not undermine the AMIS' peacekeeping status;<sup>21</sup> (ii) the Government of Sudan's campaign has no bearing

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<sup>10</sup> *Ibid.*, paragraphs 33-35.

<sup>11</sup> *Ibid.*, paragraphs 37-38.

<sup>12</sup> *Ibid.*, paragraphs 8-15.

<sup>13</sup> *Ibid.*, paragraph 39.

<sup>14</sup> ICC-02/05-03/09-251.

<sup>15</sup> *Ibid.*, paragraph 2.

<sup>16</sup> *Ibid.*, paragraph 43.

<sup>17</sup> *Ibid.*, paragraph 1.

<sup>18</sup> *Ibid.*, paragraph 14.

<sup>19</sup> *Ibid.*, paragraph 2.

<sup>20</sup> *Ibid.*, paragraph 16.

<sup>21</sup> *Ibid.*, paragraphs 17-21.

on the issue of whether or not AMIS personnel and objects at the MGS Haskanita were protected from attack;<sup>22</sup> (iii) the assessment of activities and trustworthiness of the Government of Sudan and of the AMIS' ability to effectively protect civilians are irrelevant;<sup>23</sup> and (iv) the Government of Sudan's campaign and the wider Darfur conflict are irrelevant to the character and motives of the accused persons and/or they are already documented in the public domain.<sup>24</sup>

7. The prosecution further submits that all potentially exculpatory evidence in its possession or information material to the preparation of the defence, directly impacting the lawfulness of the attack and impartiality of AMIS, have already been disclosed, are being reviewed for disclosure or are widely available in the public domain. It is argued that the material reviewed for the purpose of disclosure inevitably covers the Requested Material.<sup>25</sup>
8. On 17 November 2011, the defence sought leave to reply to the Prosecution Response.<sup>26</sup> On 18 November 2011, the prosecution opposed this request.<sup>27</sup>
9. On 24 November 2011, the Chamber issued an order granting the defence leave to reply to the Prosecution Response no later than 30 November 2011.<sup>28</sup>
10. On 30 November 2011, the defence filed its reply to the Prosecution Response ("Defence Reply").<sup>29</sup> The defence submits that (i) the volume of the disclosable

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<sup>22</sup> *Ibid.*, paragraphs 22-27.

<sup>23</sup> *Ibid.*, paragraphs 28-34.

<sup>24</sup> *Ibid.*, paragraphs 35-41.

<sup>25</sup> *Ibid.*, paragraphs 4-5, 11-15.

<sup>26</sup> Defence Application for Leave to Reply to the Prosecution's Response to the Defence Request for Disclosure, 17 November 2011, ICC-02/05-03/09-255.

<sup>27</sup> Prosecution's Response to Defence Application for Leave to Reply to the Prosecution's Response to the Defence Request for Disclosure, 18 November 2011, ICC-02/05-03/09-256.

<sup>28</sup> Order on the defence's application for leave to reply, 24 November 2011, ICC-02/05-03/09-261.

<sup>29</sup> Defence Reply to the Prosecution's Response to the Defence Request for Disclosure, 30 November 2011, ICC-02/05-03/09-264.

material;<sup>30</sup> (ii) the fact that the material may be publicly available;<sup>31</sup> (iii) the possible testimony of an accused;<sup>32</sup> and (iv) the existence of a Rule 69 Agreement<sup>33</sup> do not relieve the prosecution from its disclosure obligations. It further submits that the defence is not required to give a detailed explanation on the relevance of the disclosable material or to reveal defence(s) in advance.<sup>34</sup>

## **II. Analysis and conclusions**

11. The Chamber is seised with a request for disclosure of material submitted in support of the prosecution application for a warrant of arrest against Omar Hassan Ahmad Al Bashir in the situation in the Darfur.

12. Pursuant to Article 67(2) of the Statute, the prosecution shall, as soon as practicable, disclose to the defence evidence “in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence”. Rule 77 of the Rules grants to the defence the right to inspect documents which are “material to the preparation of the defence”. The term “material to the preparation of the defence” is to be understood as referring to “all objects that are relevant for the preparation of the defence”.<sup>35</sup> Article 67(2) of the Statute and Rule 77 of the Rules respectively place

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<sup>30</sup> *Ibid.*, paragraphs 3, 4-7.

<sup>31</sup> *Ibid.*, paragraphs 3, 8.

<sup>32</sup> *Ibid.*, paragraphs 3, 10-13.

<sup>33</sup> *Ibid.*, paragraphs 3, 16-18.

<sup>34</sup> *Ibid.*, paragraphs 3, 14-15.

<sup>35</sup> 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, paragraph 2; Decision on the prosecution's request for non-disclosure or redactions of material relating to Witnesses 304, 305, 306 and 312, 16 December 2011 (notified on 19 December 2011), ICC-02/05-03/09-265-Conf-Exp, paragraph 19; Public Redacted Decision on the prosecution's request for non-disclosure or redactions of material relating to Witnesses 304, 305, 306 and 312, 28 February 2012, ICC-02/05-03/09-265-Red, paragraph 19.

mandatory disclosure and inspection obligations on the prosecution.<sup>36</sup>

13. The Chamber notes the prosecution's declaration that it has already disclosed and/or is reviewing all potentially exculpatory evidence in its possession or information material to the preparation of the defence,<sup>37</sup> including 69 items relating to the background of the Darfur conflict.<sup>38</sup> It further notes the prosecution's concern about the volume of the documents requested and the burdensome redactions to sensitive information that would be required.<sup>39</sup> However, the Chamber also notes that the defence explicitly exclude from its request the statements of victims and witnesses who have expressed security concerns.<sup>40</sup>

14. The Chamber recalls that the prosecution's inspection obligations under Rule 77 must be interpreted broadly. The Appeals Chamber, in its judgment of 11 July 2008, determined that the Trial Chamber had interpreted Rule 77 of the Rules too narrowly when it concluded for instance that evidence relating to the general use of child soldiers in the Democratic Republic of the Congo does not relate to a live issue in the case, and that it will not assist the accused.<sup>41</sup> The Appeals Chamber further held that the prosecution's duty to disclose information to the defence is not linked to "any requirement that an accused provide advance revelation of his or her defences in order to receive full disclosure".<sup>42</sup>

15. The Chamber takes note of the parties' disagreement as to the relevance of the Requested Material. The Chamber recalls that the subjective approach of the

<sup>36</sup> ICC-01/04-01/06-1433, paragraph 50; ICC-02/05-03/09-265-Red, paragraph 20.

<sup>37</sup> ICC-02/05-03/09-251, paragraphs 4-5, 11-15.

<sup>38</sup> *Ibid.*, paragraph 5 and footnote 5.

<sup>39</sup> *Ibid.*, paragraphs 1-2.

<sup>40</sup> ICC-02/05-03/09-235, paragraph 4.

<sup>41</sup> ICC-01/04-01/06-1433, paragraphs 77-78.

<sup>42</sup> *Ibid.*, paragraph 50.



level of relevance inevitably requires an exercise of judgment, and there is a possibility that the defence may be deprived of materials to which it is entitled to as a result of incorrect judgment calls.<sup>43</sup> Having said that, Rule 77 does not necessarily provide for an unfettered “right to inspection”, triggered by any unsubstantiated claim of relevance made by the defence. Inspection should be allowed where the conditions set out in that rule, including the requirement of “materiality”, are met. In cases of disagreements between the parties, the Chamber, bearing in mind the above-mentioned possibility of incorrect judgment calls, must determine whether the defence made a sufficient showing of materiality, within the meaning of Rule 77.

16. The issues which the defence submits are dealt with in the Requested Material relate to two topics: the Government of Sudan’s failure to comply with peace agreements and the existence of a campaign of violence in Darfur. The first of these topics concerns the Government of Sudan’s alleged violations of its peace agreements and the allegedly broken promises by President Al Bashir with regard to the peace agreements, including deceitful promises of the recognition of traditional land rights and the disarmament of the Militia/Janjaweed.<sup>44</sup> The defence contends that such material may be of relevance to the third contested issue at trial, namely whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations (“UN”). The defence also intends to use such material in order to demonstrate that the genuine intention of the Government of Sudan to destroy certain ethnic groups in Darfur rather than to abide by the agreements and that the presence of AMIS was a tactic of the Government of Sudan to hinder any effective international intervention. The defence contends that this material may also be of relevance to the *mens rea* of

<sup>43</sup> See, albeit in different context: Redacted Version of Decision on the “Defence Motion for Disclosure Pursuant to Rule 77”, 29 July 2011, ICC-01/05-01/08-1594-Red, paragraph 23.

<sup>44</sup> ICC-02/05-03/09-235, paragraphs 22-23.

the accused.<sup>45</sup>

17. In this respect, the Chamber takes note of the factors which the Pre-Trial Chamber considered when making its findings on this contested issue: “there are substantial grounds to believe that AMIS (...) was established under the auspices of the African Union, a regional agency within the meaning of Article 52 of the UN Charter with a mandate to maintain peace and security and (a) was deployed with the consent of the parties to the conflict active at the time of the agreements; (b) was impartial in its dealings with all parties to the conflict and (c) its personnel were not allowed to use force except in self-defence”.<sup>46</sup>
18. The Chamber considers that in this particular instance, 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 sought to be disclosed by the prosecution. Indeed, it has not demonstrated how the alleged violations of peace agreements by the Government of Sudan could be of significance to any of the three factors identified by the Pre-Trial Chamber. Nor does the defence 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.
19. The defence also seeks access to material regarding the general campaign of violence throughout Darfur, including the ongoing risk to civilians in light of the Government of Sudan’s offensive, the recurring and consistent pattern of the crimes. The defence argues that the Requested Material is relevant to the character and motives of Mr Banda and Mr Jerbo, as well as to the issue of why they took up arms and why they attacked MGS Haskanita. Further, the defence

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<sup>45</sup> ICC-02/05-03/09-235, paragraphs 20-25, 35.

<sup>46</sup> Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, paragraph 63 [internal references omitted].

also intends to use such materials to demonstrate the existence of intelligence activities at AMIS bases including the MGS Haskanita, facilitating the campaign of violence. The defence also intends to demonstrate the lawfulness of the attack and that the Haskanita base was a legitimate military target.<sup>47</sup>

20. The Chamber notes that, subsequent to the Defence Request, it ruled in its Decision on the defence request for a temporary stay of proceedings that:

[...] 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.<sup>48</sup>

21. Certainly, this determination of "relevance" was made in the context of a request for stay of proceedings. As such, it was informed by the strict standards and thresholds required by this exceptional remedy. The Chamber takes this into consideration in its analysis on whether such evidence shall be subject to inspection under Rule 77 of the Rules. For the purpose of the present Decision, the Chamber must strike a balance between the parties' arguments keeping in mind the contested issues at stake.

22. The Chamber considers 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 even in developing the lines of defence identified in the present Request.

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<sup>47</sup> ICC-02/05-03/09-235, paragraphs 17-19, 27-28, 30-35.

<sup>48</sup> Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, paragraph 106.

23. In addition, in the particular circumstances of the present case, the Chamber takes note of the prosecution's concerns regarding the highly sensitive nature of the Requested Material and the need to apply protective measures if the defence were to inspect it.<sup>49</sup> The Chamber also notes the submission that the substantial redactions required to this highly sensitive information would be, absent any clear justification,<sup>50</sup> unduly burdensome to the prosecution, Registry and Chamber.<sup>51</sup> This may lead to an unjustified impact on the expeditiousness of the Trial.

24. In view of the foregoing considerations as regards security and expeditiousness, and the fact that the disclosure of documents that were confidentially submitted by the prosecution in support of its application for a warrant of arrest against Omar Hassan Ahmad Al Bashir in the situation in Darfur is, if at all, only remotely linked to the contested issues, the Chamber is of the view that a general right by the defence to inspection and disclosure of all material submitted in the *Al Bashir* case would be disproportionate. At this stage, it is sufficient that the prosecution, as submitted, has reviewed the Requested Material for the purpose of disclosure<sup>52</sup> and it has disclosed all potentially exculpatory evidence in its possession or information material to the preparation of the defence, directly impacting the lawfulness of the attack and impartiality of AMIS.<sup>53</sup> To date, the Chamber has no reason to doubt the prosecution's submission that it properly discharged its disclosure obligation in this respect.

25. The Chamber further takes note of the prosecution's assertion that there is ample material already in the public domain available to the defence which

<sup>49</sup> ICC-02/05-03/09-251, paragraph 2.

<sup>50</sup> ICC-02/05-03/09-251, paragraph 14.

<sup>51</sup> *Ibid.*, paragraph 2.

<sup>52</sup> *Ibid.*, paragraphs 4-5, 11-15.

<sup>53</sup> See above paragraph 7.

provides evidence of the context in which the alleged attack in Darfur occurred.<sup>54</sup> Although the availability of evidence in the public domain does not automatically discharge the prosecution from its disclosure obligations, once again, in the particular circumstances of the Request, such occurrence will counterbalance the defence's alleged prejudice.

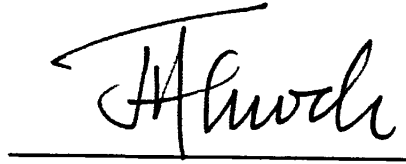
26. The Chamber recommends that the parties continue consultations to facilitate inspection of material for the preparation of the defence pursuant to Rule 77 of the Rules and guidance given in the present Decision, and to explore, as the case may be, the possibility to agree on facts related to the alleged campaign of violence in Darfur. In view of the specific circumstances of this case, as indicated in the stay of proceedings litigation, the Chamber also encourages the prosecution to consider disclosing to the defence, without prejudice, the Requested Material to the extent it is possible to do so without engaging the concerns indicated in paragraph 23 above.

27. For the foregoing reasons, the Chamber **rejects** the Defence Request.

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<sup>54</sup> ICC-02/05-03/09-251, paragraph 41, footnote 35.

Done in both English and French, the English version being authoritative.

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**Judge Joyce Aluoch**

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**Judge Fernández de Gurmendi**

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**Judge Chile Eboe-Osuji**

Dated this 23 January 2013

At The Hague, The Netherlands