Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No. ICC-02/05-03/09 OA 4
Date: 28 August 2013

THE APPEALS CHAMBER

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

SITUATION IN DARFUR, SUDAN

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

Public document

Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Karim A. A. Khan
Mr Nicholas Koumjian

REGISTRY

Registrar
Mr Herman von Hebel

AF

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor" of 23 January 2013 (ICC-02/05-03/09-443),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

(1) The "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor" of 23 January 2013 (ICC-02/05-03/09-443) is reversed.

(2) The Trial Chamber is directed to decide anew on the "Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor" of 20 October 2011 (ICC-02/05-03/09-235).

REASONS

I. KEY FINDINGS

1. Rule 77 of the Rules of Procedure and Evidence has two stages. First, it must be determined whether the "books, documents, photographs and other tangible objects" in question are "material to the preparation of the defence". If they are, they must be disclosed to the defence "subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82".

2. Any assessment of whether information is material to the preparation of the defence should be made on a *prima facie* basis.

II. PROCEDURAL HISTORY

3. Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus (hereinafter: "Mr Banda and Mr Jerbo") are charged with the war crimes of violence and attempted violence to life, intentionally directing attacks against personnel,

installations, materials, units and vehicles involved in a peacekeeping mission and pillaging.[1] The charges arise out of an attack, on 29 September 2007, on the military observer group site established by the African Union Mission in Sudan (hereinafter: "AMIS") at Haskanita.[2] The charges allege that Mr Banda and Mr Jerbo, together with others, killed twelve AMIS peacekeepers and attempted to kill eight others.[3] It is alleged that large-scale looting occurred during the attack.[4] On 7 March 2011, the charges against Mr Banda and Mr Jerbo were confirmed.[5]

A. Proceedings before the Trial Chamber

4. On 16 May 2011, the Prosecutor and Mr Banda and Mr Jerbo filed an agreement on the issues in dispute for the purposes of the trial, namely:

> 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.[6]

5. On 20 October 2011, Mr Banda and Mr Jerbo filed the "Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor"[7] (hereinafter: "Request for Disclosure"). They requested Trial Chamber IV (hereinafter: "Trial Chamber"), pursuant to article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence (hereinafter: "rule 77"), to order the Prosecutor to disclose to them all material that the Prosecutor had submitted confidentially in support of the application for a warrant of arrest against Mr Omar Hassan Ahmad Al

---

[1] "Public Redacted Version of Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute Filed on 19 October 2010", 11 November 2010, ICC-02/05-03/09-79-Red (hereinafter: "Document Containing the Charges"), para. 162.
[2] Document Containing the Charges, para. 72.
[3] Document Containing the Charges, para. 162.
[4] Document Containing the Charges, para. 85.
[5] "Corrigendum of the 'Decision on the Confirmation of Charges'", 7 March 2011, ICC-02/05-03/09-121-Corr-Red, p. 74.
[6] "Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons", 16 May 2011, ICC-02/05-03/09-148, para. 3. *See also* Trial Chamber IV, "Decision on the Joint Submission regarding the contested issues and the agreed facts", 28 September 2011, ICC-02/05-03/09-227, para. 46. The parties also reached certain agreements as to evidence, pursuant to rule 69 of the Rules of Procedure and Evidence, which were attached as "Confidential Annexure A" to the aforementioned filing (ICC-02/05-03/09-148-Conf-AnxA).
[7] ICC-02/05-03/09-235.

Bashir (hereinafter: "*Al Bashir* Application"),[8] with the exception of statements of victims and any information identifying insider witnesses.[9] They submitted that the information requested was material to the preparation of their defence in relation to the three contested issues as referred to above[10] and was relevant to their character and motives.[11]

6. On 10 November 2011, the Prosecutor opposed the Request for Disclosure (hereinafter: "Prosecutor's Response").[12] The Prosecutor argued that the "expansive request" was "completely unmerited" and that, "[m]oreover, because it seeks highly sensitive information that, if disclosed, would require substantial redactions and/or protective measures, the relief it seeks also is unduly burdensome to the Prosecution, the Chamber, and the Registry".[13] The Prosecutor submitted that the information requested was not relevant to the contested issues in the case or to the character and motives of Mr Banda and Mr Jerbo.[14] In addition, the Prosecutor argued that, even if "information about the 'context of the Darfur conflict'" was "in some obscure way" material to the preparation of the defence, such information had either been disclosed or was widely publicly available.[15]

7. On 30 November 2011, Mr Banda and Mr Jerbo filed a reply to the Prosecutor's Response,[16] in which they argued, *inter alia*, that neither the volume of the requested information, nor the fact that it was publicly available, relieved the Prosecutor from the obligation of disclosing it pursuant to article 67 (2) of the Statute or rule 77.[17]

8. On 23 January 2013, the Trial Chamber issued the "Decision on the Defence Request for Disclosure of Documents in the Possession of the Office of the

---

[8] "Public Redacted Version of the Prosecutor's Application under Article 58", 12 September 2008, ICC-02/05-157-AnxA.
[9] Request for Disclosure, p. 19.
[10] Request for Disclosure, para. 3. *See* the Request for Disclosure generally.
[11] Request for Disclosure, paras 16-19.
[12] "Prosecution's Response to Defence Request for Disclosure", 10 November 2011, ICC-02/05-03/09-251.
[13] Prosecutor's Response, para. 2.
[14] Prosecutor's Response, para. 3 and paras 16-42.
[15] Prosecutor's Response, para. 5. *See also* para. 41.
[16] "Defence Reply to the Prosecution's Response to the Defence Request for Disclosure", ICC-02/05-03/09-264 (hereinafter: "Defence Reply"). Leave to reply had been granted by the Trial Chamber in its "Order on the defence's application for leave to reply", 24 November 2011, ICC-02/05-03/09-261.
[17] Defence Reply, paras 3 and 4-9.

Prosecutor"[18] (hereinafter: "Impugned Decision"), rejecting the Request for Disclosure.[19]

9. By reference, *inter alia*, to previous jurisprudence of the Appeals Chamber,[20] the Trial Chamber referred to article 67 (2) of the Statute and rule 77 respectively placing "mandatory disclosure and inspection obligations on the prosecution" and stated that the term "material to the preparation of the defence" within rule 77 was "to be understood as referring to 'all objects that are relevant for the preparation of the defence'"[21] and "must be interpreted broadly".[22] The Trial Chamber noted the disagreement between the parties as to the relevance of the material requested and found that, in those circumstances, the Chamber, recalling that an assessment of relevance required an exercise of judgment, "must determine whether the defence made a sufficient showing of materiality, within the meaning of Rule 77".[23]

10. The Trial Chamber characterised the material being sought by the defence as relating to two topics: (i) the alleged failure by the Government of Sudan to comply with peace agreements and (ii) the alleged existence of a campaign of violence in Darfur.[24] In respect of the first of these, stating that the defence contended that it was relevant to the third contested trial issue of whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations,[25] the Trial Chamber concluded that Mr Banda and Mr Jerbo had failed to make a sufficient showing of materiality, in particular by having "not demonstrated the link between the contested issue and the items of evidence sought to be disclosed".[26] The Trial Chamber found that Mr Banda and Mr Jerbo had failed to demonstrate how alleged violations of peace agreements could be of significance to any of the factors which the Pre-Trial Chamber had considered in making findings on this issue – namely, whether AMIS was deployed with the consent of the parties to the conflict, was impartial and whether

---

[18] ICC-02/05-03/09-443.
[19] Impugned Decision, para. 27.
[20] *Prosecutor v Thomas Lubanga Dyilo*, "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.
[21] Impugned Decision, para. 12.
[22] Impugned Decision, para. 14.
[23] Impugned Decision, para. 15.
[24] Impugned Decision, para. 16.
[25] Impugned Decision, para. 16.
[26] Impugned Decision, para. 18.

its personnel were not allowed to use force except in self-defence;[27] nor had they identified any other factors which were in their view of relevance to determining that third contested issue.[28]

11. In relation to material relating to the general campaign of violence throughout Darfur, the Trial Chamber referred to one of its previous decisions in which it had stated that, "[a]s a general proposition", a broad view of what was happening in Darfur did not readily appear to it to fall within the scope of the contested issues; and that its relevance "must depend upon a clearly articulated connection to what the parties had delineated in their agreement as to the facts and the contested issues".[29] The Trial Chamber took into consideration the different context in which that determination had been made and stated that, for the present decision, in relation to whether such evidence should be subject to inspection pursuant to rule 77, it would need to "strike a balance between the parties' arguments keeping in mind the contested issues at stake".[30]

12. The Trial Chamber proceeded to find that the significance of the existence of a campaign of violence to the contested issues "if any, is very limited and indirect even in developing the lines of defence identified in the present Request".[31] The Trial Chamber noted, "[i]n addition", the Prosecutor's submissions in relation to the "highly sensitive nature" of the information requested, the need to apply protective measures if it were to be inspected and that the redactions required would, in the absence of any clear justification, be unduly burdensome to the Prosecutor, the Registry and the Chamber.[32] The Trial Chamber stated that this may lead to an unjustified impact on the expeditiousness of the trial.[33]

13. The Trial Chamber proceeded to determine that to grant the Request for Disclosure "would be disproportionate" as a result of "the foregoing considerations as

---

[27] Impugned Decision, paras 17-18.
[28] Impugned Decision, para. 18.
[29] Impugned Decision, para. 20.
[30] Impugned Decision, para. 21.
[31] Impugned Decision, para. 22.
[32] Impugned Decision, para. 23.
[33] Impugned Decision, para. 23.

regards security and expeditiousness, and the fact that the disclosure of [the information sought] is, if at all, only remotely linked to the contested issues".[34]

14. The Trial Chamber proceeded to state that "[a]t this stage" it was sufficient that the Prosecutor had, *inter alia*, disclosed all information material to the preparation of the defence "directly impacting the lawfulness of the attack and impartiality of AMIS".[35] It continued by noting the public availability of evidence providing the context in which the attack occurred, remarking that "[a]lthough 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".[36] The Trial Chamber recommended that the parties should explore the possibility of agreeing facts in relation to the alleged campaign of violence in Darfur and encouraged the Prosecutor to consider disclosing the material sought by Mr Banda and Mr Jerbo to the extent that it was possible to do so without unjustifiably impacting upon the expeditiousness of the trial as a result of the need to introduce protective measures or to redact the information.[37]

15. Further to an application by Mr Banda and Mr Jerbo,[38] on 21 March 2013, the Trial Chamber granted leave to appeal the Impugned Decision[39] (hereinafter: "Decision Granting Leave to Appeal"), in doing so reformulating the issue for which leave was sought.[40] Leave was granted in relation to:

> [W]hether 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

---

[34] Impugned Decision, para. 24.
[35] Impugned Decision, para. 24.
[36] Impugned Decision, para. 25.
[37] Impugned Decision, para. 26.
[38] "Defence Application for Leave to Appeal the '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)", ICC-02/05-03/09-447. The Prosecutor and the participating victims opposed the application. *See* "Prosecution's Response to Defence Application for Leave to Appeal the 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor'", 4 February 2013, ICC-02/05-03/09-449 and "Réponse des Représentants Légaux Communs à la Requête de la Défense Demandant à être Autorisée à Interjeter Appel contre la Décision sur la Requête de la Défense pour Obtenir la Divulgation des Documents en Possession du Procureur", 4 February 2013, ICC-02/05-03/09-450.
[39] "Decision on the Defence Application for Leave to Appeal the 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor'", ICC-02/05-03/09-457.
[40] Decision Granting Leave to Appeal, para. 18.

Request for Disclosure disproportionate in the light of the expeditiousness and security concerns.[41]

B. Proceedings before the Appeals Chamber

16. On 2 April 2013, Mr Banda and Mr Jerbo submitted their document in support of the appeal against the Impugned Decision (hereinafter: "Document in Support of the Appeal")[42] and on 15 April 2013 the Prosecutor filed her response[43] (hereinafter: "Response to the Document in Support of the Appeal").

III. MERITS

A. Submissions of the parties

1. The interpretation of rule 77

17. Under the sub-heading "The Proper Interpretation of Rule 77",[44] Mr Banda and Mr Jerbo recall that the Appeals Chamber previously held that the phrase "material to the preparation of the defence" in rule 77 of the Rules of Procedure and Evidence "should be understood as referring to all objects that are relevant for the preparation of the defence" and that rule 77 "must be interpreted broadly",[45] and refer to decisions of Trial Chambers of the Court that they submit take this approach.[46] They aver that, "[b]y contrast", the Impugned Decision "decided materiality by prejudging the validity of the Defence arguments on the contested issues"[47] and, in so doing, took "too narrow a view of whether the requested evidence was material to the preparation of the defence on the contested issues".[48]

18. Mr Banda and Mr Jerbo argue that the requested information is material to the contested issues, as are their character and motives; and that it is material to

---

[41] Decision Granting Leave to Appeal, para. 21.
[42] "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'", ICC-02/05-03/09-459 (OA 4).
[43] "Prosecution's Response to the Defence's Appeal against the 'Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor'", ICC-02/05-03/09-462.
[44] Document in Support of the Appeal, p. 6.
[45] Document in Support of the Appeal, paras 11-12, referring to *Prosecutor v Thomas Lubanga Dyilo*, "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, paras 77-78.
[46] Document in Support of the Appeal, para. 13.
[47] Document in Support of the Appeal, para. 14.
[48] Document in Support of the Appeal, para. 15.

mitigation.[49] They also elaborate elsewhere in their submissions that the information they request is relevant to the three contested issues.[50]

19. Furthermore, Mr Banda and Mr Jerbo submit that "the Trial Chamber erred in law in determining at this stage whether the material requested under Rule 77 would constitute relevant evidence", arguing that, pursuant to rule 77, they should only be required "to establish *prima facie* relevance to the preparation of the defence".[51] They argue that there should not be a detailed consideration of relevance at this stage as a result of their right to remain silent, the jurisprudence of the *ad hoc* tribunals and the fact that they have not yet had sight of the requested evidence.[52]

20. The Prosecutor disagrees that the Trial Chamber took too narrow a view of whether the requested evidence was material to the preparation of the defence, arguing that the Trial Chamber was correct to assess materiality in light of a link between the contested issues and the information sought, as well as whether that information "could be of 'significance' or 'relevance' to the factual issues in the case".[53] Arguing that the Appeals Chamber in *Prosecutor v Thomas Lubanga Dyilo*, "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 (hereinafter: "*Lubanga OA 11* judgment") had endorsed a decision of the International Criminal Tribunal for the Former Yugoslavia[54] (hereinafter: "ICTY") in which it was held, *inter alia*, that the "requested evidence must be significantly helpful to an *understanding* of important inculpatory or exculpatory evidence", the Prosecutor contends that the Trial Chamber did not err in rejecting the Request for Disclosure on the basis that the requested material was "if at all, only remotely linked to the contested issues".[55]

21. The Prosecutor submits that the Trial Chamber did not err in law in deciding that evidence relating to context, character, motivation or mitigation was not

---

[49] Document in Support of the Appeal, para. 15. *See also* paras 16-18.
[50] Document in Support of the Appeal, paras 22-30.
[51] Document in Support of the Appeal, para. 20.
[52] Document in Support of the Appeal, para. 21.
[53] Response to the Document in Support of the Appeal, para. 10 [footnotes omitted].
[54] ICTY, Trial Chamber, *Prosecutor v. Zejnil Delalić et al.*, "Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence", 26 September 1996, IT-96-21-T.
[55] Response to the Document in Support of the Appeal, paras 12-13 (emphasis is in the Appeals Chamber's judgment).

"significantly helpful to an understanding of the three Contested Issues".[56] The Prosecutor further argues that the Trial Chamber did not rule on materiality by prejudging the validity of the arguments of Mr Banda and Mr Jerbo.[57] She submits that it simply determined whether the information requested was *prima facie* relevant to the issues in the case, with it being legitimate for the Chamber to reject "wholly unsupported or unconvincing" arguments – and that there was no indication that the Trial Chamber had applied "an unduly high standard".[58] The Prosecutor also avers that the findings of the Trial Chamber did not affect the right to remain silent.[59] Elsewhere in her submissions, the Prosecutor further argues that the Trial Chamber did not commit any error in determining that the information requested was not relevant to the contested issues.[60]

2. Whether the Trial Chamber erred in holding the Request for Disclosure to be disproportionate

22. In submitting that the Trial Chamber erred in holding that the Request for Disclosure was disproportionate, Mr Banda and Mr Jerbo argue that the Trial Chamber erred in law and in fact by considering matters such as the burden on the Prosecutor and the effect on the expediency of the trial.[61] They aver that rule 77 "does not require any assessment to be made regarding gradations of materiality such as indirect or limited", with that rule also providing that information that is 'material to the preparation of the defence' can only be withheld subject to restrictions on disclosure provided for in the Statute and in rules 81 and 82 of the Rules of Procedure and Evidence.[62] As such, they submit that security concerns can only be taken into account to enable the requested material to be redacted, with any burden on the Prosecutor being irrelevant to the question of whether disclosure should be made.[63] They argue that the factors relied upon by the Trial Chamber to reject the Request for Disclosure and its proportionality assessment have no legal basis in either the legal instruments or jurisprudence of the Court.[64] They aver that non-disclosure is an

---

[56] Response to the Document in Support of the Appeal, para. 14.
[57] Response to the Document in Support of the Appeal, para. 16.
[58] Response to the Document in Support of the Appeal, paras 16-17.
[59] Response to the Document in Support of the Appeal, paras 18-19.
[60] Response to the Document in Support of the Appeal, paras 20-30.
[61] Document in Support of the Appeal, para. 31.
[62] Document in Support of the Appeal, para. 32.
[63] Document in Support of the Appeal, para. 32.
[64] Document in Support of the Appeal, paras 32-34.

exception that can only be permitted where there is an express legal basis, emphasising that "disclosure is a vital tool to redress inequality of arms" when comparing the investigative resources of the defence and the Prosecutor.[65]

23. Mr Banda and Mr Jerbo further argue that, even if the Appeals Chamber finds that, as a matter of law, the approach of the Trial Chamber was appropriate, the Trial Chamber in any event erred in fact as there was no factual basis upon which it could determine that any undue burden would be placed on the Prosecutor or that the expeditiousness of the trial would be affected.[66] They submit that the Trial Chamber did not have any information about the extent of the redactions actually required and that there was therefore no basis upon which to accept the submission of the Prosecutor that it would be unduly burdensome to redact the material, noting that it amounted to only 5,000 pages, that Mr Banda and Mr Jerbo had limited what was required by excluding statements of victims and that the Prosecutor had implied that much of the material was publicly available.[67] They also aver that, "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".[68] In this latter regard, they argue that redactions should reasonably be expected to be completed prior to the date that has been set for trial; and that it would be more efficient to receive this material from the Prosecutor than for them to have to investigate these matters.[69] They also contend that the Prosecutor has to disclose material even if it is publicly available, and that in such circumstances this will be a simple task.[70]

24. The Prosecutor argues that Mr Banda and Mr Jerbo "mischaracterize the [Impugned] Decision", submitting that the factors addressed by them in this part of the appeal "were not determinative for the Chamber to reject the Defence Motion".[71] The Prosecutor contends that the Trial Chamber rejected the Request for Disclosure "based on its assessment [of] whether the Requested Material is material for the preparation of the defence".[72] Furthermore, the Prosecutor argues that, even if the

---

[65] Document in Support of the Appeal, para. 33.
[66] Document in Support of the Appeal, para. 35.
[67] Document in Support of the Appeal, para. 36.
[68] Document in Support of the Appeal, para. 38.
[69] Document in Support of the Appeal, para. 38.
[70] Document in Support of the Appeal, para. 39.
[71] Response to the Document in Support of the Appeal, para. 32.
[72] Response to the Document in Support of the Appeal, para. 33.

Appeals Chamber were to find that the Trial Chamber should not have referred to considerations of security and expeditiousness, any such error did not materially affect the Impugned Decision as the Trial Chamber was required to reject the Request for Disclosure, having concluded that the requested material was not material to the preparation of the defence.[73]

B. Determination by the Appeals Chamber

25. Mr Banda and Mr Jerbo raise two grounds of appeal in the Document in Support of the Appeal. The first ground ("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")[74] is divided into two sub-headings: "(A) The Proper Interpretation of Rule 77"[75] and "(B) The Requested Evidence is Relevant to the Three Contested Issues".[76] The second ground is headed: "2. The Trial Chamber erred in holding that the Defence Request was disproportionate to concerns of security and expeditiousness".[77] This second ground is divided into alleged errors of law and fact.[78]

26. The Appeals Chamber will first consider matters raised under grounds 1(A) and 2 of the Document in Support of the Appeal, essentially addressing whether there was any error of law in the legal standard that the Trial Chamber applied to the case that materially affected the Impugned Decision.[79]

27. In the context of considering the matters raised by grounds 1(A) and 2 of the Document in Support of the Appeal, an important preliminary question arises out of the submissions of the parties: namely, whether the arguments that Mr Banda and Mr Jerbo raise under ground 2 of the Document in Support of the Appeal need to be addressed. Given that those arguments, if relevant, directly relate to the legal standard that the Trial Chamber applied, the Appeals Chamber will consider this preliminary question first.

---

[73] Response to the Document in Support of the Appeal, para. 34.
[74] Document in Support of the Appeal, p. 6.
[75] Document in Support of the Appeal, p. 6.
[76] Document in Support of the Appeal, p. 11.
[77] Document in Support of the Appeal, p. 16.
[78] Document in Support of the Appeal, paras 31-39.
[79] The first two paragraphs (20-21) of ground 1(B) also raise matters relating to the legal standard to be applied and will therefore also be considered here.

1. Whether the issue of the Request for Disclosure being disproportionate needs to be addressed

28. The Appeals Chamber recalls that Mr Banda and Mr Jerbo argue, *inter alia*, that the Trial Chamber erred, when rejecting the Request for Disclosure, by considering factors such as the burden that would be imposed on the Prosecutor and the resulting effect on the efficiency of the trial if disclosure were granted pursuant to rule 77.[80] The Prosecutor argues that, in so doing, they "mischaracterize the Decision",[81] submitting that the Trial Chamber's "additional observations"[82] in relation to security and expeditiousness "were not determinative for the Chamber to reject the [Request for Disclosure]".[83]

29. The Appeals Chamber finds that the Trial Chamber came to its decision based upon considerations of both materiality and security and expeditiousness. In relation to whether alleged failures by the Government of Sudan to comply with peace agreements were relevant to the third contested issue at trial, the Trial Chamber determined that Mr Banda and Mr Jerbo had failed to make a sufficient showing of materiality.[84] A finding that the Request for Disclosure was disproportionate was not expressly made in relation to the alleged failures by the Government of Sudan to comply with peace agreements. However, in relation to the alleged existence of a campaign of violence within Darfur, the Trial Chamber held that its significance to the contested issues "if any, is very limited and indirect even in developing the lines of defence identified in the present Request".[85] The Trial Chamber then proceeded as follows:

> 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. 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, Registry and Chamber. This may lead to an unjustified impact on the expeditiousness of the Trial.

---

[80] Document in Support of the Appeal, para. 31.
[81] Response to the Document in Support of the Appeal, para. 32.
[82] Response to the Document in Support of the Appeal, para. 32.
[83] Response to the Document in Support of the Appeal, para. 32. *See*, generally, paras 31-34.
[84] Impugned Decision, para. 18. *See also* Decision Granting Leave to Appeal, para. 18.
[85] Impugned Decision, para. 22.

> 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.[86] [Footnotes omitted]

30. The Appeals Chamber finds that, in the above circumstances, the Trial Chamber did take into account, *inter alia*, the undue burden to the Prosecutor, the Registry and the Chamber of the substantial redactions required, and the potential resulting impact upon the expeditiousness of the trial, in reaching its determination that the Request for Disclosure should be rejected, as to grant it would be "disproportionate".

31. The Appeals Chamber further notes that its above conclusion is consistent with the Trial Chamber's own subsequent explanation, in the Decision Granting Leave to Appeal, of what it had determined. At paragraph 18 of that latter decision, the Trial Chamber stated that its considerations of security and protective measures and the related impact on expeditiousness represented "a critical aspect of the Impugned Decision".[87] Indeed, it was as a result thereof that the Trial Chamber amended the issue for which leave to appeal had been sought to include "whether the Trial Chamber erred in its application of Rule 77 by (a) [...] and/or (b) considering the Defence Request for Disclosure disproportionate in the light of the expeditiousness and security concerns".[88]

32. The Appeals Chamber therefore finds that the substance of the arguments of Mr Banda and Mr Jerbo in respect of this aspect of the Impugned Decision need to be considered in addressing the overall question of whether there was any error of law in the legal standard that the Trial Chamber applied to the case that materially affected the Impugned Decision. It is to that question that the Appeals Chamber will now turn.

2. *Whether there was any error of law in the legal standard applied by the Trial Chamber*

33. Rule 77 provides, in relevant part:

---

[86] Impugned Decision, paras 23 and 24.
[87] Decision Granting Leave to Appeal, para. 18.
[88] Decision Granting Leave to Appeal, paras 18 and 21.

> The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence [...]

34. The Appeals Chamber emphasises that the disclosure process is essential in ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms. This must remain paramount in decisions that are taken in relation to disclosure. The Prosecutor has an obligation to disclose information that is material to the preparation of the defence pursuant to rule 77 independently of any request from the defence. In this regard, the Appeals Chamber notes the difference in wording between rule 77 and its equivalent at the ICTY and the International Criminal Tribunal for Rwanda (hereinafter: "ICTR"), in which specific provision is included for a request by the defence to be made.[89] No such requirement appears in rule 77.[90] The Appeals Chamber also emphasises that the Prosecutor, pursuant to rule 77, has an obligation to disclose information that is in her possession or control to the defence even if it is publicly available. More generally, the Appeals Chamber reminds the parties of their responsibilities to make the disclosure process practical and manageable.

35. Rule 77 has two stages. First, it must be determined whether the "books, documents, photographs and other tangible objects" in question are "material to the preparation of the defence". If they are, they must, subject to what follows, be disclosed to the defence. This determination of materiality must be carried out before turning to the second stage of the process in rule 77, which provides that the

---

[89] Rule 66 (B) of the ICTY Rules of Procedure and Evidence provides: "The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused." Rule 66 (B) of the ICTR Rules of Procedure and Evidence similarly provides: "At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused."

[90] *See*, in this connection, the following passage by a commentator on the disclosure regime established by rule 77: "A previous draft of Rule 77 obliged the Prosecutor to disclose such material and permit inspection only 'on request by the defence.' However a strong view emerged during debates that it was inappropriate to require a request from the defence to 'trigger' this right". [Footnotes omitted]: *see* H. Brady, "Disclosure of Evidence", in R. S. Lee (ed.), *The International Criminal Court/Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Incorporated, 2001), p. 403 at pp. 410-11.

obligation to allow inspection of objects which are material to the preparation of the defence is "subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82". Such restrictions include where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93 of the Statute and the protection of the safety of individuals in accordance with article 68 of the Statute.[91] In such circumstances, the information shall not be disclosed except in accordance with those articles of the Statute.[92] Thus, it is only if it is first determined that information is material to the preparation of the defence that consideration may be given to whether any restrictions on the right of disclosure should be imposed pursuant to the Statute and rules 81 and 82.[93]

36. In the present case, in relation to the alleged existence of a campaign of violence within Darfur, the Trial Chamber did not separately determine whether the information sought was material to the preparation of the defence. Instead, it combined its consideration that the information sought was "if at all, only remotely linked to the contested issues"[94] with its considerations about the highly sensitive nature of the material and the need to apply protective measures, the substantial redactions required being "absent any clear justification, unduly burdensome to the prosecution, Registry and Chamber"[95] and the potential resulting impact on expeditiousness. It was those combined considerations that led the Trial Chamber to conclude that to grant the Request for Disclosure would be disproportionate.

37. In light of the interpretation of rule 77 that it has set out above, the Appeals Chamber determines that the Trial Chamber's application of that rule amounted to an error of law. First, the Trial Chamber did not make a definitive finding about whether the information sought was "material to the preparation of the defence". Second, in

---

[91] Rule 81 (3) of the Rules of Procedure and Evidence.
[92] Rule 81 (3) of the Rules of Procedure and Evidence.
[93] In this context, the Appeals Chamber notes the finding of the *Lubanga* Trial Chamber in a decision subsequent to the Appeals Chamber's *Lubanga OA 11* judgment. Having referred to the *Lubanga OA 11* judgment, the Trial Chamber concluded that: "the disclosure obligations of the Prosecutor [...] pursuant to Rule 77 of the Rules are subject to a two-fold test. First, the information must be material to the preparation of the defence. If that is satisfied, then, second, the use of the word 'shall' in Rule 77 of the Rules indicates that an order for non-disclosure can only be based on 'restrictions on disclosure as provided for in the Statute and in rules 81 and 82'": *Prosecutor v Thomas Lubanga Dyilo*, "Decision on the prosecution's request for an order on the disclosure of *tu quoque* material pursuant to Rule 77", 2 October 2009, ICC-01/04-01/06-2147, para. 20.
[94] Impugned Decision, para. 24.
[95] Impugned Decision, para. 23 [footnotes omitted].

rejecting the Request for Disclosure as disproportionate, the Trial Chamber considered factors that are of relevance only once it has been determined that information is in principle subject to disclosure (namely potential restrictions on disclosure pursuant to the Statute and rules 81 and 82). Third, among the factors that the Trial Chamber considered to determine that the Request for Disclosure was disproportionate was the burden to the Prosecutor, the Registry and the Chamber in implementing redactions – an element that is not found in rule 77 as a basis for restricting disclosure. Finally, while as a general obligation the Trial Chamber has to ensure that proceedings are fair and expeditious (see articles 64 (2) and 67 (1) (c) of the Statute), considerations of expeditiousness are not explicitly found in rule 77 as a basis for restricting disclosure. It is in any event noted that, in the present case, the trial is only due to commence in May 2014,[96] the Impugned Decision was rendered in January 2013 and the Request for Disclosure was made in October 2011. While there may have been good reasons for this timeline, it at least calls into question whether expeditiousness could have been a relevant consideration in the present case.

38. Regarding the application of rule 77 in general, the Appeals Chamber recalls that in its *Lubanga OA 11* judgment, it held that "the term 'material to the preparation of the defence' must be interpreted broadly".[97] It found that documents that were "not directly linked to exonerating or incriminating evidence"[98] were nevertheless material to the preparation of the accused's defence in that case. The overarching consideration is whether the objects are "material to the preparation of the defence", which was found in that judgment to "be understood as referring to all objects that are relevant for the preparation of the defence".[99] In the *Lubanga OA 11* judgment, the Appeals Chamber held that "material relating to the general use of child soldiers in the DRC", and not only information relating to the alleged use of child soldiers by the accused, was material to the preparation of the defence in that case.[100]

39. However, the right to disclosure is not unlimited and which objects are "material to the preparation of the defence" will depend upon the specific

---

[96] *See* "Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings", 6 March 2013, ICC-02/05-03/09-455, para. 25(ii).
[97] *Lubanga OA 11* judgment, para. 78. *See also* paras 79-81.
[98] *Lubanga OA 11* judgment, para. 77.
[99] *Lubanga OA 11* judgment, para. 77.
[100] *Lubanga OA 11* judgment, para. 82.

circumstances of the case. The Chamber may need to be provided with further information by the Prosecutor about the documents being sought, either in the form of lists of the documents or the documents themselves, as well as an accompanying explanation, in order to be placed in the best position to take an informed decision with regard to whether the documents in respect of which disclosure was requested are material to the preparation of the defence.

40. Where appropriate, in deciding whether the information sought continues to be material to the preparation of the defence, the Chamber may also take into account whether the defence has already received relevant documents from the Prosecutor. However, caution should be exercised in taking such an approach as it must not undermine the paramount right of the defence to disclosure of all information material to the preparation of the defence. In this regard, the Appeals Chamber again recalls that the disclosure process is essential in ensuring the fairness of the proceedings.

41. In this context, the Appeals Chamber notes the submission of the Prosecutor, referred to at paragraph 13 of the Impugned Decision, that 69 items of evidence relating to the background of the Darfur conflict had already been disclosed to the defence;[101] and that, in the Prosecutor's Response, the Prosecutor, in effect, disclosed the existence of 12 other publicly available reports about the context of the conflict.[102] In the present case, the Trial Chamber should first have determined whether the alleged campaign of violence by the Government of Sudan was relevant to the preparation of the defence. Had it so determined, it could have considered, in light of the disclosure of the aforementioned documents, whether part or all of the information sought indeed remained material to the preparation of the defence, while noting the caution expressed in the previous paragraph in taking that approach.

42. In relation to the argument of Mr Banda and Mr Jerbo that the defence should only need to establish *prima facie* relevance, the Appeals Chamber finds that any assessment of whether information is material to the preparation of the defence pursuant to rule 77 should indeed be made on a *prima facie* basis. This places a low burden on the defence. It is emphasised that rule 77 concerns material that the defence is entitled to have disclosed to it in order to prepare its defence. It may be that

---

[101] Prosecutor's Response, para. 5 and footnote 5.
[102] Prosecutor's Response, para. 41 and footnote 35.

information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a *prima facie* assessment.[103]

43. A related point of general importance arises out of the above. The Appeals Chamber emphasises the importance of the proceedings of the Court being public.[104] In the present case, the Appeals Chamber notes that all of the material that supported the *Al Bashir* Application was filed confidentially (under seal). Yet the categories of evidence and information referred to at paragraph 68 of the public redacted version of that application apparently include public and open source materials. The Appeals Chamber emphasises that reasons must exist for maintaining the under seal classification and reminds the Prosecutor of her obligations under regulation 23 *bis* (3) of the Regulations of the Court. That regulation, in keeping with the principle of publicity of proceedings, provides, in relevant part:

> Where the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to re-classify the document. A Chamber may also re-classify a document upon request by any other participant or on its own motion.

44. Therefore, if the Prosecutor is aware of information that was submitted with the *Al Bashir* Application that no longer needs to be under seal, an application to the relevant Chamber should be made for the re-classification of any such document(s). In the circumstances of the present case, if there were documents that no longer needed to be under seal, and had the Prosecutor made such an application, that might already have reduced the amount of information that was in dispute between the parties.

IV. APPROPRIATE RELIEF

45. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence).

---

[103] The Appeals Chamber also notes that this standard is used at the ICTY and ICTR in relation to rule 66 (B) of their Rules of Procedure and Evidence. *See*, by way of example, ICTR, Appeals Chamber, *Prosecutor v Karemera et al.*, "Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations", 23 January 2008, ICTR-98-44-AR73.11, para. 12. Given the similarity of rule 66 (B) to rule 77, the Appeals Chamber has previously considered that the jurisprudence of those tribunals in this respect is useful when interpreting rule 77. *See Lubanga OA 11* judgment, para. 78.
[104] *See* article 67 (1) of the Statute.

46. For the reasons set out above, the Appeals Chamber finds that the Trial Chamber erred in law in its application of rule 77 and that the error of law identified materially affected the Impugned Decision. The Trial Chamber did not make a definitive finding as to whether the information sought was material to the preparation of the defence. The Appeals Chamber is unable to discern what the conclusion of the Trial Chamber would have been if its sole focus, in relation to the first limb of rule 77, had been upon the question of whether the information sought was material to the preparation of the defence in the manner outlined in this judgment. The Appeals Chamber notes that the Trial Chamber considered that the requested information was, at best, of very limited and indirect significance to the contested issues[105] and proceeded to take into account the factors referred to at paragraph 23 of the Impugned Decision in determining that the Request for Disclosure was disproportionate.[106] Yet, having done so, the Trial Chamber continued by noting that contextual evidence was in the public domain, which would "counterbalance the defence's alleged prejudice".[107] It further recommended that the parties should continue to explore the possibility to agree upon facts in relation to the campaign of violence; and that the Prosecutor should consider disclosing to the defence the information sought to the extent that it could do so without engaging the concerns that led the Trial Chamber to conclude that granting the Request for Disclosure would be disproportionate.[108]

47. In the above circumstances, the Appeals Chamber deems it appropriate to reverse the Impugned Decision and to remand to the Trial Chamber the question of whether the information sought is "material to the preparation of the defence" pursuant to rule 77. If the information is material, the question of whether it should be subject to any restrictions on disclosure will need to be separately addressed.

48. The Appeals Chamber recognises that the finding in the Impugned Decision that Mr Banda and Mr Jerbo had failed to make a sufficient showing of materiality in relation to its request for information relating to the alleged violations of peace agreements by the Government of Sudan was rejected on the basis of materiality alone (and not on the basis that to grant the request for this information would be

---

[105] Impugned Decision, paras 22 and 24.
[106] Impugned Decision, para. 24.
[107] Impugned Decision, para. 25.
[108] Impugned Decision, para. 26.

disproportionate).[109] However, given that (i) the Appeals Chamber does not read the Request for Disclosure to have made any particular distinction between the request for information concerning alleged breach of peace agreements and that concerning the alleged general campaign of violence and that (ii) the Trial Chamber erred in law in its application of rule 77 in the Impugned Decision when considering the Request for Disclosure, the Appeals Chamber, in remanding the case to the Trial Chamber, regards it as appropriate for the Trial Chamber to decide anew on the entirety of the Request for Disclosure.

49. For the above reasons, the Impugned Decision is reversed and the Request for Disclosure remanded to the Trial Chamber to make a fresh determination thereon.

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

Judge Akua Kuenyehia
Presiding Judge

Dated this 28th day of August 2013
At The Hague, The Netherlands

[109] *See* Impugned Decision, para. 18 and Decision Granting Leave to Appeal, para. 18, first sentence.