

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh
5 Mohammed Jerbo Jamus - ICC-02/05-03/09
6 Single Judge Akua Kuenyehia
7 Appeals Chamber Judgment
8 Wednesday, 28 August 2013
9 (The hearing starts in open session at 5.32 p.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 JUDGE KUENYEHIA: Good afternoon.
14 Would the court officer please call the case.
15 THE COURT OFFICER: Yes, your Honour. Situation in Darfur, Sudan, in the case
16 of The Prosecutor versus Abdallah Banda Abakaer Nourain and Saleh Mohammed
17 Jerbo Jamus. This is case reference ICC-02/05-03/09, and for the record we are in
18 open session.
19 JUDGE KUENYEHIA: Thank you.
20 May I please ask the parties to introduce themselves for the record, starting with the
21 Defence?
22 MR KOUMJIAN: Good afternoon, your Honour. For the Defence today
23 Anand Shah and myself, Nicolas Koumjian, representing
24 Abdallah Banda and the late
25 Saleh Mohammed Jerbo Jamus.

1 JUDGE KUENYEHIA: Thank you.

2 The Office of the Prosecutor?

3 MR GALLMETZER: Good afternoon, your Honour. The Office of the Prosecutor is
4 represented by Ade Omofade, Pubudu Sachithanandan, Carmen Garcia Ramos and
5 myself, Reinhold Gallmetzer.

6 JUDGE KUENYEHIA: Thank you very much.

7 Today, the Appeals Chamber is delivering its unanimous judgment on the appeal by
8 Mr Banda and Mr Jerbo against the decision of Trial Chamber IV, entitled "Decision
9 on the Defence's Request for Disclosure of Documents in the Possession of the Office
10 of the Prosecutor." The Decision was rendered on 23 January 2013.

11 In today's summary, I will refer to this decision as the Impugned Decision.

12 I shall now summarise the Appeals Chamber's judgment. Please note that only the
13 Judgment is the authoritative version, which will be notified to the parties shortly;
14 this summary is not authoritative.

15 I shall start with the procedural background.

16 On 20 October 2011, Mr Banda and Mr Jerbo filed the "Defence Request for Disclosure
17 of Documents in the Possession of the Office of the Prosecutor" (which I shall refer to
18 as the "Request for Disclosure"). They requested Trial Chamber IV, pursuant to
19 Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence, to
20 order the Prosecutor to disclose to them all material that the Prosecutor had
21 submitted confidentially in support of the application for a warrant of arrest against
22 Mr Omar Hassan Ahmad Al Bashir, with the exception of statements of victims and
23 any information identifying insider witnesses.

24 On 10 November 2011, the Prosecutor opposed the Request for Disclosure.

25 On 23 January 2013, the Trial Chamber issued the Impugned Decision, rejecting the

1 Request for Disclosure.

2 In the Impugned Decision, the Trial Chamber, *inter alia*, characterised the material
3 being sought by the Defence as relating to two topics. In relation to the first - namely,
4 the alleged failure by the Government of Sudan to comply with peace
5 agreements - the Trial Chamber concluded that Mr Banda and
6 Mr Jerbo had failed to make a sufficient showing of materiality, in particular by
7 having not demonstrated the link between the contested issue and the items of
8 evidence sought.

9 In relation to the second - namely, the alleged existence of a campaign of violence in
10 Darfur - the Trial Chamber found that its significance to the contested issues in the
11 case, if any, was very limited and indirect. In addition, it noted the Prosecutor's
12 concerns about the highly sensitive nature of the information requested, the need to
13 apply protective measures if the Defence were to inspect it and the substantial
14 redactions required which would be, absent any clear justification, unduly
15 burdensome to the Prosecutor, Registry and Chamber, which may lead to an
16 unjustified impact on the expeditiousness of the trial. Those combined
17 considerations led the Trial Chamber to conclude that a general right to the disclosure
18 of all material submitted in the Al Bashir case would be disproportionate.

19 On 21 March 2013, further to an application by Mr Banda and Mr Jerbo, the Trial
20 Chamber granted leave to appeal the Impugned Decision in relation to: Whether the
21 Trial Chamber erred in its application of Rule 77 by (a) interpreting the scope of the
22 contested issues in the case too narrowly for the purposes of the Defence Request for
23 Disclosure and/or (b) considering the Defence Request for Disclosure
24 disproportionate in the light of the expeditiousness and security concerns.

25 On 2 April 2013, Mr Banda and Mr Jerbo submitted their document in support of the

1 appeal. On 15 April 2013, the Prosecutor filed her response.

2 Having regard to the issues on appeal and the submissions of the parties, the Appeals
3 Chamber considers whether there was any error of law in the legal standard that the
4 Trial Chamber applied to the case that materially affected the Impugned Decision.

5 In so doing, the Appeals Chamber addresses matters arising out of the submissions of
6 the parties relevant to that standard in relation to the interpretation of Rule 77 of the
7 Rules of Procedure and Evidence (which I shall refer to simply as "Rule 77") and
8 whether the Trial Chamber erred in considering the Request for Disclosure to be
9 disproportionate in the light of expeditiousness and security concerns.

10 The arguments of the parties:

11 Among the arguments raised by the parties, Mr Banda and Mr Jerbo submit that the
12 phrase "material to the preparation of the defence" in Rule 77 "should be understood
13 as referring to all objects that are relevant for the preparation of the defence" and that
14 Rule 77 "must be interpreted broadly." They submit that the Impugned Decision
15 decided materiality by prejudging the validity of the Defence arguments on the
16 contested issues and thus took "too narrow a view of whether the requested evidence
17 was material to the preparation of the defence on the contested issues." Mr Banda
18 and Mr Jerbo further argue that they should only need to establish prima facie
19 relevance to the preparation of their Defence. They also submit that the requested
20 information is indeed material to the contested issues, as are their character and
21 motives, and that it is material to mitigation.

22 In submitting that the Trial Chamber erred in holding that the Request for Disclosure
23 was disproportionate, Mr Banda and Mr Jerbo argue that Rule 77 does not require
24 any assessment to be made regarding gradations of materiality and provides that
25 information that is 'material to the preparation of the defence' can only be withheld

1 subject to restrictions on disclosure provided for in the Statute and in Rules 81 and 82
2 of the Rules of Procedure and Evidence. As such, they submit that the factors relied
3 upon by the Trial Chamber in rejecting the Request for Disclosure, which included
4 concerns about security and expeditiousness, had no legal basis in either the legal
5 instruments or jurisprudence of the Court.

6 Conversely, the Prosecutor argues, *inter alia*, that the Trial Chamber was correct to
7 assess materiality in the light of a link between the contested issues and the
8 information sought, as well as whether that information "could be of 'significance' or
9 'relevance' to the factual issues in the case." The Prosecutor argues that the Trial
10 Chamber did not err in rejecting the Request for Disclosure on the basis that it
11 requested -- that the requested material was "if at all, only remotely linked to the
12 contested issues." She also argues that the Trial Chamber did not commit any error
13 in determining that the information requested was not relevant.

14 The Prosecutor further submits that the considerations in relation to security and
15 expeditiousness referred to in the Impugned Decision were not determinative of the
16 Chamber to reject the Request for Disclosure, and therefore that, even if such
17 considerations were erroneous, this error did not materially affect the Impugned
18 Decision.

19 Now, whether the Request for Disclosure being disproportionate needs to be
20 addressed.

21 In relation to that latter submissions of the Prosecutor, the Appeals Chamber finds
22 that the Trial Chamber, in relation to material relating to the alleged general
23 campaign of violence, did not take into account, amongst other factors, the undue
24 burden to the Prosecutor -- did take into account - I'm sorry - among other factors, the
25 undue burden to the Prosecutor, the Registry and the Chamber of the redactions

1 required, and the potential resulting impact upon the expeditiousness of the trial, in
2 reaching its determination that the Request for Disclosure should be rejected, because
3 to grant it would be "disproportionate." The Appeals Chamber notes that this
4 conclusion is consistent with the Trial Chamber's statement, in the Decision Granting
5 Leave to Appeal, that considerations of security and protective measures and the
6 related impact on expeditiousness represented, and I quote, "a critical aspect of the
7 Impugned Decision."

8 In its determination the Appeals Chamber emphasises that the disclosure process is
9 essential in ensuring the fairness of the proceedings. The Appeals Chamber finds that
10 Rule 77 has two stages. First, it must be determined whether the "books, documents,
11 photographs and other tangible objects" in question are "material to the preparation of
12 the defence." If they are, they must, subject to what follows, be disclosed to the
13 Defence. This determination of materiality must be carried out before turning to the
14 second stage of the process in Rule 77, which provides that the obligation to allow
15 inspection of objects which are material to the preparation of the defence is "subject to
16 the restrictions on disclosure as provided for in the Statute and in Rules 81 and 82."
17 Thus, it is only if it is first determined that information was material to the
18 preparation of the defence that consideration may be given to whether any
19 restrictions on the right of disclosure should be imposed pursuant to the Statute and
20 Rules 81 and 82.

21 In the present case (specifically in relation to the alleged existence of a campaign of
22 violence within Darfur), the Trial Chamber did not separately determine whether the
23 information sought was material to the preparation of the defence. Instead, it
24 combined its consideration that the information sought was "if at all, only remotely
25 linked to the contested issues" with its considerations about the highly sensitive

1 nature of the material and the need to apply protective measures, the substantial
2 redactions required being "absent any clear justification, unduly burdensome to the
3 Prosecution, Registry and Chamber" and the potential resulting impact on
4 expeditiousness.

5 It was those combined considerations that led the Trial Chamber to conclude that to
6 grant the Request for Disclosure would be disproportionate.

7 In the light of its interpretation of Rule 77, the Appeals Chamber determines that the
8 Trial Chamber's application of that rule amounted to an error of law. First, the Trial
9 Chamber did not make a definitive finding about whether the information sought
10 was "material to the preparation of the defence." Second, in rejecting the Request for
11 Disclosure as disproportionate, the Trial Chamber considered factors that are of
12 relevance only once it has been determined that information is in principle subject to
13 disclosure. Third, among the factors that the Trial Chamber considered to determine
14 that the Request for Disclosure was disproportionate was the burden to the
15 Prosecutor, the Registry and the Chamber in implementing redactions - an element
16 not found in Rule 77 as a basis for restricting disclosure. Further, while the Trial
17 Chamber must ensure that proceedings are fair and expeditious as a general
18 obligation, considerations of expeditiousness are not explicitly found in Rule 77 as a
19 basis for restricting disclosure.

20 Regarding the application of Rule 77 more generally, the Appeals Chamber recalls
21 that in a previous judgment it held that "the term 'material to the preparation of the
22 defence' must be interpreted broadly." The overarching consideration is whether the
23 objects are "material to the preparation of the defence," which was found in that
24 judgment to "be understood as referring to all objects that are relevant for the
25 preparation of the defence."

1 However, the right to disclosure is not unlimited, and which objects are "material to
2 the preparation of the defence" would depend upon the specific circumstances of the
3 case. The Chamber may need to be provided with further information by the
4 Prosecutor about the documents being sought in order to be placed in the best
5 position to take an informed decision about whether the documents in respect of
6 which disclosure was requested are material to the preparation of the defence.
7 Where appropriate, in deciding whether the information sought continues to be
8 material to the preparation of the defence, the Chamber may also take into account
9 whether the Defence has already received relevant documents from the Prosecutor.
10 However, caution should be exercised in taking such an approach, as it must not
11 undermine the paramount right of the Defence to disclosure of all information
12 material to the preparation of the defence.

13 In the present case, the Trial Chamber should first have determined whether the
14 alleged campaign of violence by the Government of Sudan was relevant to the
15 preparation of the defence. Had it so determined, it could have considered, in light
16 of documents that had already been disclosed to the Defence in the present case,
17 whether part or all of the information sought remained material to the preparation of
18 the defence, while noting the caution expressed in taking that approach.

19 The Appeals Chamber further finds that any assessment of whether information is
20 material to the preparation of the defence should be made on a prima facie basis. This
21 places a low burden on the Defence. It is emphasised that Rule 77 concerns material
22 that the Defence is entitled to have disclosed in order to prepare its defence.

23 For the reasons referred to, the Appeals Chamber determines that the Trial Chamber
24 erred in law in its application of Rule 77 and that this error materially affected the
25 Impugned Decision. The Trial Chamber did not make a definitive finding as to

1 whether the information sought was material to the preparation of the defence. The
2 Appeals Chamber is unable to discern what the conclusion of the Trial Chamber
3 would have been if its sole focus, in relation to the first limb of Rule 77, had been
4 upon that question.

5 The Appeals Chamber therefore reverses the Impugned Decision and remands the
6 Request for Disclosure to the Trial Chamber to make a fresh determination thereon.

7 This concludes my summary of the judgment. It only remains for me to thank the
8 parties, the interpreters and the court reporters. Thank you very much. The session
9 is now closed.

10 (The hearing ends in open session at 5.50 p.m.)