



Original: English

No. ICC-02/05-01/20

Date: 12 July 2024

TRIAL CHAMBER I

Before:

**Judge Joanna Korner, Presiding Judge
Judge Reine Alapini-Gansou
Judge Althea Violet Alexis-Windsor**

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI
KUSHAYB')***

Public

**Public redacted version of 'Decision on the Defence's Application for an order to
the Prosecution to make immediate disclosure', 2 July 2024, ICC-02/05-01/20-
1159-Conf**

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

The Office of the Prosecutor

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

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Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. In 2021 the Defence made a series of *inter partes* disclosure requests to the Prosecution, one of which related to Ja'afar Abd-Al-Hakam (the 'Individual'). As a result, during the course of the proceedings 289 documents pertaining to that Individual were disclosed during the course of the proceedings.¹
2. On 15 May 2024, the Defence disclosed to the Prosecution open source material related to the Individual.²
3. On 15 and 16 May 2024, *inter partes* exchanges took place regarding the aforesaid material.³
4. On 14 June 2024, the Defence filed its application requesting that Trial Chamber I (the 'Chamber') order the Prosecution to: (i) review material in its possession and affirm or deny the existence of any undisclosed items related to the Individual, and (ii) disclose them immediately to the Defence (the 'Application').⁴
5. On 24 June 2024, the Prosecution filed its response to the Application, opposing it (the 'Response').⁵
6. On 26 June 2024, with the Chamber's leave,⁶ the Defence filed its reply to the Response (the 'Reply').⁷

¹ APPLICATION FOR AN ORDER TO PROSECUTION TO MAKE IMMEDIATE DISCLOSURE with three confidential annexes, ICC-02/05-01/20-1149-Conf, para. 3.

² Annex B to APPLICATION FOR AN ORDER TO PROSECUTION TO MAKE IMMEDIATE DISCLOSURE, ICC-02/05-01/20-1149-Conf-AnxB. The Chamber notes the Defence's submission that the Individual is also referred to as Jaafar Abdel Hakam, *see* APPLICATION FOR AN ORDER TO PROSECUTION TO MAKE IMMEDIATE DISCLOSURE, 14 June 2024, ICC-02/05-01/20-1149-Conf, para. 1.

³ Annex C to APPLICATION FOR AN ORDER TO PROSECUTION TO MAKE IMMEDIATE DISCLOSURE, ICC-02/05-01/20-1149-Conf-AnxC.

⁴ APPLICATION FOR AN ORDER TO PROSECUTION TO MAKE IMMEDIATE DISCLOSURE with three confidential annexes, ICC-02/05-01/20-1149-Conf. A public redacted version was notified on 18 June 2024, ICC-02/05-01/20-1149-Red.

⁵ Prosecution's response to Defence's "APPLICATION FOR AN ORDER TO PROSECUTION TO MAKE IMMEDIATE DISCLOSURE" with confidential annex, ICC-02/05-01/20-1154-Conf. A public redacted version was notified on 28 June 2024, ICC-02/05-01/20-1154-Red.

⁶ E-mail from the Chamber, 25 June 2024, at 12:14.

⁷ Reply to "Prosecution's response to Defence's 'APPLICATION FOR AN ORDER TO PROSECTUION TO MAKE IMMEDIATE DISCLOSURE'", ICC-02/05-01/20-1155-Conf.

II. Applicable Law

7. The Chamber observes that the Prosecution’s relevant disclosure obligations stem from Article 67(2) of the Rome Statute (the ‘Statute’) ‘the Prosecutor 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’ and Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’).⁸ Rule 77 of the Rules provides, in its relevant part, that the Prosecution ‘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 [...]’.

8. The Chamber further observes that, with respect to items which are ‘in the possession or control of the Prosecutor’, Rule 77 of the Rules has two stages. First, whether the ‘books, documents, photographs and other tangible objects’ in question are ‘*material* to the preparation of the defence’ (emphasis added). Second, if they are, they must be disclosed subject to the restrictions as provided for in the Statute and in Rules 81 and 82 of the Rules.⁹

9. The Appeals Chamber has held that ‘the right to disclosure is not unlimited and which objects are “material to the preparation of the defence” will depend upon the specific circumstances of the case [...] such an assessment must be made on a *prima facie* basis placing on an accused only a low burden’.¹⁰ The Appeals Chamber has further stated that ‘material to

⁸ Appeals Chamber, *The 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 (OA11), para. 50 (hereinafter: ‘*Lubanga* Appeal Decision’); Public redacted version of the Reasons for the oral ruling on the Defence challenge to the Prosecution’s use of items during cross-examination, 22 November 2023, ICC-02/05-01/20-1041-Red, para. 7 (hereinafter: ‘Ruling on use of items during cross-examination’).

⁹ Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 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”, 28 August 2013, ICC-02/05-03/09-501 (OA4), para. 35 (hereinafter: ‘*Banda* Appeal Disclosure Decision’).

¹⁰ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Public redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red (A A2 A3 A4 A5), para. 55 referring to *Banda* Appeal Disclosure Decision, ICC-02/05-03/09-501 (OA4), paras 39, 42 (hereinafter: ‘*Bemba* Appeal Article 74 Judgment’).

the preparation of the defence' is to 'be understood as referring to all objects that are relevant for the preparation of the defence.'¹¹

III. Submissions and analysis

10. The Defence submits that: (i) the requested items are material to the Defence case;¹² and (ii) the Chamber's intervention is necessary.¹³

11. The Prosecution contends that: (i) it has met its ongoing disclosure obligations in relation to the Individual;¹⁴ and (ii) there is no necessity for the Chamber to order any disclosure pursuant to Rule 84 of the Rules.¹⁵ Moreover, the Prosecution avers that, [REDACTED],¹⁶ it has already informed the Defence that it does not possess a screening note or a witness statement from the Individual.¹⁷ Further the Prosecution asserts that a review of the evidence shows that the Individual implicated the Accused in the charged crimes¹⁸ and that the Defence made no effort to interview him during its mission to Khartoum [REDACTED].¹⁹

12. In its Reply, the Defence argues that: (i) the Application seeks disclosure of more than a screening note or statement;²⁰ (ii) the fact that the Individual may have made incriminating comments in the past is irrelevant;²¹ and (iii) whether the Defence sought to interview the Individual [REDACTED] is irrelevant.²²

13. The Chamber notes that, the Defence does not challenge the veracity of the Prosecution's assurances in respect of the screening notes or statement.²³ Moreover whilst the Defence makes, what may be considered to be undisputed, general statements about the materiality of the Individual to the Defence case, it does not explain how, at this stage of the case, documents outside screening notes or statements can fall within the requirements of Article 67(2) or Rule 77.²⁴

¹¹ *Lubanga* Appeal Decision, ICC-01/04-01/06-1433 (OA11), para. 77.

¹² Application, ICC-02/05-01/20-1149-Conf, paras 10-11.

¹³ Application, ICC-02/05-01/20-1149-Conf, paras 12-14.

¹⁴ Response, ICC-02/05-01/20-1154-Conf, paras 3-5.

¹⁵ Response, ICC-02/05-01/20-1154-Conf, paras 6-14.

¹⁶ Response, ICC-02/05-01/20-1154-Conf, para. 4.

¹⁷ Response, ICC-02/05-01/20-1154-Conf, para. 3.

¹⁸ Response, ICC-02/05-01/20-1154-Conf, para. 7.

¹⁹ Response, ICC-02/05-01/20-1154-Conf, para. 12.

²⁰ Reply, ICC-02/05-01/20-1155-Conf, para. 3.

²¹ Reply, ICC-02/05-01/20-1155-Conf, para. 4.

²² Reply, ICC-02/05-01/20-1155-Conf, para. 5.

²³ Reply, ICC-02/05-01/20-1155-Conf, para. 3.

²⁴ Reply, ICC-02/05-01/20-1155-Conf, para. 4.

14. As observed by the Prosecution,²⁵ the fact that the Prosecution met with a potential witness, the circumstances and details of any such contact, and whether and why this person agreed or not to an interview is information which fall short of meeting the requisite standard under Rule 77 of the Rules.

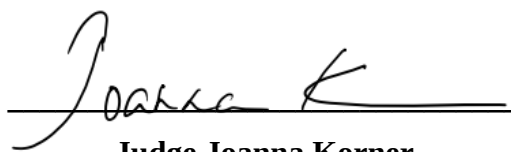
15. In addition, the Chamber takes note of the Prosecution's renewed assurance that it has disclosed all relevant information subject to disclosure under Rule 77 of the Rules. A striking feature of these proceedings has been the fact that whilst the Defence from time to time have complained of late disclosure by the Prosecution,²⁶ at no stage has any suggestion been made that disclosure mandated by Article 67(2) of the Statute and Rule 77 of the Rules has been withheld. In those circumstances, taken with the fact, that the Defence has not provided grounds for the Chamber to find, on the balance of probabilities, that the Prosecution has failed to comply with its disclosure obligations, the Chamber is satisfied that no basis has been provided for its intervention.

IV. Disposition

16. In light of the above, the Chamber:

REJECTS the Defence's Application in its entirety and;

DIRECTS the Defence to file a public redacted version of its Reply within one week of the notification of the present decision.



Judge Joanna Korner

Presiding Judge



Judge Reine Alapini-Gansou



Judge Althea Violet Alexis-Windsor

Dated this 2 July 2024

At The Hague, The Netherlands

²⁵ Response, ICC-02/05-01/20-1154-Conf, para. 4.

²⁶ See e.g. Transcript of hearing, 20 November 2023, ICC-02/05-01/20-T-138-ENG-ET, p. 13-15.