



Original: English

No.: ICC-02/05-03/09

Date: 22 August 2011

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernandez de Gurmendi

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

Defence Response to Public Redacted Version of “Prosecution’s Request for Non-disclosure of Four Witnesses statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence”, filed on 15 July 2011

Sources: Defence Team of Abdallah Banda Abakaer Nourain
Defence Team of Saleh Mohammed Jerbo Jamus

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo
Ms. Fatou Bensouda
Mr. Adebawale Omofade

Counsel for the Defence

Mr. Karim A. A. Khan QC
Mr. Nicholas Koumjian
Mr. Ibrahim Yillah

Legal Representatives of the Victims

Mr. Brahim Kone
Ms. Hélène Cissé
Mr. Akin Akinbote
Mr. Frank Adaka
Sir Geoffrey Nice & Mr. Rodney Dixon

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") hereby submit their response to the Public Redacted Version of "Prosecution's Request for Non-Disclosure of Four Witness Statements, or in the alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence", filed on 15 July 2011 ("Request"), dated 1 August 2011.¹
2. In the Request, the Prosecutor asks the Trial Chamber to authorise him not to disclose the statements and witness material relating to witnesses 0304, 0305, 0306 and 0312. The basis for this Request is that "the Article 67(2) and Rule 77 material contained in these statements is minimal"² and that the Defence is already in possession of summarised versions of the witness statements.³
3. The Defence oppose the Request in its entirety. Pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence ("Rules"), the Prosecutor is under an absolute obligation to disclose the statements, that is, the transcripts of the interviews, of these four witnesses. According to established jurisprudence, the disclosure of summaries is not sufficient to satisfy the disclosure requirements at trial laid down in the Statute and the Rules.
4. The Defence understand that the Prosecutor has prepared redactions to the statements in accordance with Rule 81(4).⁴ For the avoidance of doubt, the Defence seek full disclosure of the witness statements and related material for witnesses 0304, 0305, 0306 and 0312, including information relating to the

¹ICC-02/05-03/09-181-Red, ("Request").

²Request, para. 7.

³Request, para. 8. See also ICC-02/05-03/09-183-Red, p. 3. The Prosecutor states that "whatever potentially exonerating evidence or information that would be material to the preparation of the Defence is contained within the statements, that evidence and information has already been disclosed in summaries previously provided."

⁴ See ICC-02/05-03/09-159-Red.

identity of the witnesses (“identifying information”). Similarly, the Defence request that the Prosecutor disclose in full all statements of witnesses on whom the Prosecutor no longer intends to rely at trial which constitute or contain elements of potentially Article 67(2) and Rule 77 material.

5. Messrs. Banda and Jerbo are facing very serious charges before this Court which attract severe penalties under the Statute. The Statute places an absolute obligation on the Prosecutor whose office triggers such charges to disclose to the Defence as soon as practicable evidence which potentially assists the Defence in its preparation. As such, any request by the Prosecutor, who is the author of the charges, to restrict disclosure of evidence which assists the Defence’s case should be treated with great circumspection because of its adverse effect and the manifest injustice that would occasion the Defence in presenting its case.

II. Background

6. On 31 August 2009, Pre-Trial Chamber I in the *Abu Garda* case authorised the non-disclosure of information relating to the identities of witnesses 304, 305, 306 and 312 and their family members in the summaries of the statements of these witnesses pursuant to Rule 81(4) of the Rules.⁵ This Chamber found that due to the nature of the witnesses a danger existed which would justify the non-disclosure of identifying information.⁶
7. On 8 July 2010, in the *Banda and Jerbo* case, the Prosecutor disclosed to the Defence revised and anonymous summaries of the statements of certain of his witnesses, including for witnesses 0304, 0305, 0306 and 0312, to be relied upon at confirmation *in lieu* of transcripts.⁷

⁵ICC-02/05-02/09-74.

⁶*Ibid.*, paras. 15-16.

⁷See Prosecution’s Communication of Incriminating Evidence Disclosed to the Defence on 8 July 2010, 9 July 2010, ICC-02/05-03/09-51-Conf-AnxB.

8. On 13 June 2011, the Prosecutor submitted the Prosecution's Revised List of Evidence and Revised List of Witnesses, in light of the Agreement of Facts between the Parties.⁸ According to this amended list of witnesses, witnesses 0304, 0305, 0306 and 0312 were not to be called by the Prosecutor to testify at trial. The revised witness list contained 16 witnesses.⁹
9. On 24 June 2011, the Prosecutor filed the Public Redacted Version of the "Prosecution's Application for Redactions Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence",¹⁰ in which he requested extensive redactions of the statements and transcripts of interviews of nine Prosecution witnesses, following the Trial Chamber's oral order on 19 April 2011 to apply immediately for redactions, including temporary ones, pending protective measures.¹¹ In his submission the Prosecutor applied for temporary redactions to names and other identifying information in the statements of witnesses 0304, 0305, 0306 and 0312, which are in transcript form,¹² pursuant to Rule 81(4) of the Rules.¹³
10. At the 12 July 2011 status conference, the Prosecution advised that, should the trial proceed on the basis of the agreed facts, it would no longer seek to rely on a further four witnesses – 0314, 0433, 0441 and 0466.¹⁴ These four witnesses were not listed on the Updated List of Witnesses filed on 5 August 2011. Three witnesses, 0485, 0486 and 0487, were added to the list. The list contained 15 witnesses.¹⁵

⁸ ICC-02/05-03/09-162.

⁹ *Ibid.*, Annex C.

¹⁰ ICC-02/05-03/09-159-Red. The confidential and *ex parte* version was filed on 6 June 2011.

¹¹ See ICC-02/05-03/09-T-12-ENG, p. 28, line 21 to p. 29, line 24.

¹² *Ibid.*, fn 4.

¹³ *Ibid.*, paras. 16 and 17. The Defence note that due to the redactions applied to the Prosecution's Application, the Defence is not in a position to conclude whether other redactions to the statements of the four witnesses have also been sought by the Prosecution pursuant to Rule 81(2) of the Rules.

¹⁴ ICC-02/05-03/09-T-12-ENG, p. 5, line 19 to p. 6, line 4.

¹⁵ See ICC-02/05-03/09-189, Annex A.

11. On 15 July 2011, as stated above in paragraph 2, the Prosecutor requested the non-disclosure of the statements and related materials for witnesses 0304, 0305, 0306 and 0312. In the alternative, the Prosecutor asked the Chamber to authorise the redactions sought by the Prosecution in its application for redactions on 6 June 2011.¹⁶
12. On 20 July 2011, in the Prosecution's Provision of Further and Revised Information on Four Witnesses' Statements, the Prosecutor informed the Trial Chamber that after a re-analysis of the statements of witnesses 0304, 0305, 0306 and 0312, it was concluded that these statements contain "some information of a potentially exonerating nature, and additional information that, broadly construed, might be material to the preparation of the defence."¹⁷
13. To date, the Defence is in possession of two statements in transcript form, the statements for witnesses 0307 and 0442. Additionally, the Defence has signed witness statements for all 6 AMIS witnesses, for all 5 third party witnesses and for Witness 0349. Finally, for 8 rebel witnesses, the Defence holds only summaries of their statements.¹⁸ The Defence are yet to receive the statements for witnesses 0484, 0485, 0486 and 0487.
14. The Chamber is already seized of the particular difficulties that the Defence faces in the unique circumstances of this case.¹⁹ Pursuant to the Trial Chamber's rulings,²⁰ the Defence sent a letter to the Prosecutor on 19 July 2011 requesting disclosure of material and information which the Defence requires for the preparation of the defence case and the Defence considers exculpatory.²¹ While the Prosecutor acknowledged receipt of this letter on the

¹⁶Request, para. 13.

¹⁷ICC-02/05-03/09-183-Red, paras.7 and 8. See also paras. 16, 18, 20 and 23.

¹⁸Witnesses 0304, 0305, 0306, 0441, 0466, 0312, 0314, and 0433.

¹⁹ See ICC-02/05-03/09-145 and ICC-02/05-03/09-146.

²⁰ See ICC-02/05-03/09-169 and ICC-02/05-03/09-170.

²¹Letter "Request for disclosure", 19 July 2011, ref. D-AB/2011; 18-D-SJ/2011/19, with Annexes A to C.

same day, the Defence have yet to receive a substantive answer to their request.²²

15. Furthermore, on 6 June 2011, the Defence sent a request to the Prosecutor, in which it asked the Prosecutor to contact 8 Prosecution witnesses, including witnesses 0304, 0305, 0306 and 0312, and ask whether they are agreeable to being interviewed by the Defence.²³ The Prosecutor informed the Defence on 30 June 2011 that his office was attempting to contact the four witnesses and will get back to the Defence when a response from the witnesses was received.²⁴ Since the Defence still did not receive any substantive information regarding the request in respect of these four witnesses, a second request was sent to the Prosecutor on 4 August 2011.²⁵ No response has been received.

III. Applicable Law

16. Article 67(2) provides that:

“In addition to any other disclosure provided for in 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. In case of doubt as to the application of this paragraph, the Court shall decide.”

17. Rule 77 provides in part that:

“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,

²² The Defence sent a follow-up E-mail on 15 August 2011 requesting the Prosecutor for an update on this matter. See E-mail “19 July Disclosure request - Update requested”, 15 August 2011.

²³ Letter “Interview of Prosecution witnesses”, 6 June 2011, D-AB/2011/14; D-SJ/2011/14).

²⁴ Letter “Interview of Prosecution witnesses (Defence reference: D-AB/2011/14; D-SJ/2011/14”, 30 June 2011.

²⁵ E-mail communication by the Defence “Request to interview witnesses 304, 305, 306 and 312”, 4 August 2011.

documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence [...]."

IV. The Prosecutor Is Obligated to Disclose this Material

18. The Prosecutor accepts that the statements of witnesses 0304, 0305, 0306 and 0312 include potentially exculpatory material and evidence which is material to the preparation of the defence.²⁶ Nevertheless, the Request also suggests that the Article 67(2) and Rule 77 material is "minimal"²⁷ and does "not warrant" disclosure because the "Defence is already in possession of summarised versions of each of the four statements".²⁸

19. However, the Prosecutor is under an absolute obligation to disclose evidence which is potentially exculpatory to the Defence and an obligation to allow the Defence access to documents which are material to the preparation of the defence case, except in so far as the disclosure of this second category of documents is restricted by Rule 81 or 82 as set out below.

20. Firstly, Article 67(2) provides that the Prosecutor shall, as soon as practicable, disclose to the defence evidence in his possession or control which he or she believes is exculpatory. Thus, the Article places a mandatory obligation upon the Prosecutor. It is phrased in absolute terms. No exceptions or restrictions appear on the face of Article 67(2).²⁹

21. Secondly, Rule 77 also obliges the Prosecutor to permit the defence to inspect, *inter alia*, "documents" in the possession of the Prosecutor which are "material to the preparation of the defence". This Rule is expressly "subject to the

²⁶Request, para. 8. See also ICC-02/05-03/09-183-Red, paras. 8, 16, 20 and 23.

²⁷Request, para. 7.

²⁸Request, para. 8. See also ICC-02/05-03/09-183-Red, para. 9.

²⁹The Defence accept that difficult issues can occasionally arise where the Article 67(2) obligation clashes with another obligation in the Statute, for example Article 54(3)(e). But this situation does not arise here.

restrictions on disclosure as provided for in the Statute and in rules 81 and 82”.

22. In applying Article 67(2) and Rule 77, it is submitted that the starting point is full disclosure.³⁰ Indeed, the Court has consistently held that the general rule favours full disclosure and any departure from this rule must be justified. Thus, in *Katanga*,³¹ the Appeals Chamber held that:

“The overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule.”

23. And in *Lubanga*,³² the Trial Chamber held that:

“once [...] it is accepted that the material has, potentially, an exculpatory effect, only the Chamber can make a decision on non-disclosure if exceptional circumstances so require.”

24. The Defence submit that disclosure by the Prosecution of alternative analogous evidence and summaries of exculpatory material or evidence which is material to the defence case does not satisfy the disclosure obligations laid down in Article 67(2) and Rule 77.

25. The Trial Chamber in *Lubanga* expressed “grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence: the right of the accused is to both items”.³³

³⁰It is then for the Prosecutor to persuade the Chamber that there is a prescribed reason, laid down in Rule 81 or 82 or elsewhere in the Statute, why the statements should not be disclosed to the Defence in full.

³¹ICC-01/04-01/07-475, para. 70.

³²ICC-01/04-01/06-1401, para.88.

³³*Ibid.*, para. 60.

26. In *Katanga*, the Single Judge held that “international human rights jurisprudence and that of the *ad hoc* Tribunals have rejected the adoption of certain alternative measures *in lieu* of actual disclosure of those materials that are potentially exculpatory or otherwise material to the preparation of the Defence.”³⁴ The Single Judge found that

“[s]uch alternative measures are unacceptable because they insufficiently safeguard the right of the accused to a fair trial. In particular, they include: (i) the Prosecution’s transmission to the Trial Chamber of summaries containing the information identified by the Prosecution as potentially exculpatory or material to the Defence; and (ii) the Prosecution’s disclosure of materials containing analogous information to that identified by the Prosecution as potentially exculpatory or material to the Defence.”³⁵

27. The summaries upon which the Prosecutor wishes to rely were created pursuant to Article 61(5) solely for the purposes of the confirmation hearing. Different considerations apply at the trial phase. Disclosure of summaries *in lieu* of full statements at trial is not adequate to satisfy the obligation of the Prosecutor under Article 67(2) and Rule 77 because it would prejudice the Defence’s ability to fully utilise and deploy that piece of evidence in preparing its case.

³⁴ ICC-01/04-01/07-621.

³⁵ *Ibid.*, para. 6.

V. The Full Statements are Material to the Preparation of the Defence and are Potentially Exculpatory

28. The Defence submit that the Prosecutor is under an obligation to disclose the full statements (in transcript form), including identifying information,³⁶ of witnesses 0304, 0305, 0306 and 0312, since they constitute Article 67(2) and Rule 77 material. The existence of an agreement on evidence pursuant to Rule 69³⁷ does not relieve the Prosecutor of his disclosure obligations regarding all statements of witnesses and contacted persons, which constitute Article 67(2) and Rule 77 material, including statements of witnesses on whom the Prosecutor no longer intends to rely upon in trial.

29. Regarding the materiality of evidence to the preparation of the defence, the Appeals Chamber has held that the term “material to the preparation of the defence” should be understood as referring to all objects that are relevant for the preparation of the defence.³⁸ The Appeals Chamber overturned the interpretation of the *Lubanga* Trial Chamber according to which evidence is not material to the preparation of the defence if it will not undermine the Prosecution case and it does not support any defence or line of argument to be relied on by the accused, in other words, evidence material to the defence preparation would either “relate to a live issue in the case” or assist the accused.³⁹ The Appeals Chamber found this interpretation too narrow.⁴⁰

³⁶ It is unclear to the Defence why the Prosecutor, as far as the Defence is aware, is not undertaking discussions with witnesses 0304, 0305, 0306 and 0312 regarding the disclosure of their identities to the Defence. In contrast, with respect to witnesses 0441 and 0466, who have also been dropped from the Prosecution’s revised list of witnesses and whose statements are currently undergoing Rule 77 and Article 67(2) review, the Prosecutor is engaging in such discussions and apparently offering the possibility of protective measures (see Public Redacted Version of “Prosecution’s request to retain temporary redactions to the identity of a Prosecution’s witness and to delay the disclosure of the identities of two former Prosecution’s witnesses”, filed on 29 July 2011, 15 August 2011, ICC-02/05-03/09-185-Red, para. 21). The Defence submit that the Prosecutor is obligated to discuss with all witnesses whose statements qualify as Rule 77 and /or Article 67(2) material the necessity of disclosing their identities to the Defence.

³⁷ See ICC-02/05-03/09-148 and ICC-02/05-03/09-148-Conf-AnxA.

³⁸ ICC-01/04-01/06-1433.

³⁹ *Ibid.*, para. 76. See also Oral Decision of the Trial Chamber, ICC-01/04-01/06-T-71-ENG ET WT, 18 January 2008, page 8, line 10 to page 9, line 3.

⁴⁰ *Ibid.*, para. 75.

30. Furthermore, the *Lubanga* Trial Chamber later ruled that the Prosecution's disclosure obligations under Rule 77 include "not only material that may undermine the prosecution case or support a line of argument of the defence, but also anything substantive that is relevant, in a more general sense, to defence preparations. This means that the prosecution is to communicate to the defence any material in its possession that may significantly assist the accused in understanding the incriminatory and exculpatory evidence, and the issues, in the case."⁴¹

Only Disclosure of the Full Statements Satisfies the Disclosure Requirements under Article 67(2) and Rule 77

31. The Defence submit that the statements of witnesses 0304, 0305, 0306 and 0312, i.e. the transcript of the interviews with these witnesses, are either material to the preparation of the Defence or are of potentially exculpatory nature. The reason is that the charges relate to a single incident: the attack on MGS Haskanita which occurred on 29 September 2007. All four witnesses say that they were part of the rebel movement in the area at the time of the attack and that they participated, to varying extents, in the attack.

32. In practice it is inconceivable that the full evidence of witnesses who participated in both the attack and the preparation for the attack would not be material to the preparation of the defence case or potentially exculpatory. Firstly, even apparently minor details about the way in which the attack was conducted are likely to be relevant to the contested issues. Secondly, Article 67(2) expressly applies to evidence "which may affect the credibility of prosecution evidence". Since the Prosecution still intend to call witnesses to the attack, the complete statements of these four witnesses fall within Article 67(2) because any inconsistency between these statements and the evidence of

⁴¹ ICC-01/04-01/06-2624, para. 16 (emphasis added).

other Prosecution witnesses will affect the credibility of that evidence. Thirdly, in the circumstances of this case, it is particularly important to the Defence to have access to these statements given the severe difficulties faced by the Defence in contacting other witnesses and carrying out investigations.

33. As a result, the Defence is extremely concerned by the Prosecutor's assessment that the Article 67(2) and Rule 77 material is minimal. Due to the redactions on the Prosecutor's Request, the Defence does not have access to any submissions from the Prosecutor that might substantiate this assessment. It is therefore difficult to respond constructively to this aspect of the Request. Nevertheless, it is clear that unless a very broad approach is taken to determining what is material to the preparation of the Defence, relevant material is likely not to be disclosed, simply because the Prosecutor cannot know exactly what approach the Defence is adopting.

34. Indeed, the Defence's concern in this regard is justified as the Defence's review of the Prosecutor's submissions had revealed errors in the Prosecutor's assessment in relation to these four witnesses. In the Public Redacted Version of "Prosecution's Provision of Further and Revised Information on Four Witnesses' Statements" filed on 29 July 2011,⁴² it is clear that the Prosecutor has "slightly changed" the "categorisations" of the evidence since 15 July 2011.⁴³ This strongly suggests that the initial categorisation was wrong, and that the Prosecutor belatedly realised that more material was relevant to the preparation of the defence than had first been thought.

35. As the *Bemba* Trial Chamber stated, where the Prosecutor in his assessment has to make a judgement call there is "an unacceptable risk that the defence may be deprived of materials to which it is entitled as a result of incorrect

⁴² ICC-02/05-03/09-183-Red.

⁴³ *Ibid.*, paras. 16, 18, 20 and 23.

judgement calls.”⁴⁴ The re-categorisation by the Prosecutor shows that such judgement calls are made and bear the risk identified by the *Bemba* Trial Chamber. This risk is heightened, so the Trial Chamber held in *Bemba*, by the fact that the Prosecutor “will seldom know the precise contours of the defence strategy.”⁴⁵ Only access to the full transcripts for witnesses 0304, 0305, 0306 and 0312 can eliminate such an unacceptable risk.

36. The concerns that the Prosecutor’s judgement calls negatively affect the right of the Defence to disclosure also arise with respect to the witness summaries. After careful analysis and comparison between the summaries and the transcripts of the interviews, the Defence have identified certain inaccuracies in the Prosecution’s summaries of the interviews of witnesses 0442 and 0307. For instance, Witness 0442’s summary contains: (i) mistakes relating to the names of individuals, (ii) mistakes altering the meaning of sentences and (iii) the omission of certain material relevant to the preparation of the Defence. Similarly, Witness 0307’s summary lacks evidence material to the Defence preparation, which would provide the Defence with information on the witness’ background and the context surrounding the attack on Haskanita MGS.

37. Related to the concern regarding the accuracy of a summary is the concern as to whether the summaries are comprehensive. When summarising a transcript of a witness interview, the Prosecutor inevitably makes a judgement call as to what information provided by that witness is relevant to the case, including the defence case. However, the Prosecutor’s assessment on what information needs to be included in summaries and, therefore, whether the disclosure of those summaries is sufficient to fulfil the disclosure obligation laid down in

⁴⁴ ICC-01/05-01/08-1594, para. 23. This ruling by the Trial Chamber was made in the context of the Prosecution’s submission according to which the evidence was cumulative and had, therefore, not to be disclosed under Rule 77. While the context is different in the present situation, the underlying concern is the same, the unacceptable risk that the Defence is deprived of materials to which it is entitled as a result of incorrect assessment by the Prosecution.

⁴⁵ ICC-01/05-01/08-1594, para. 23.

Article 67(2) and Rule 77 carries an “unacceptable risk”⁴⁶ that the defence is deprived of evidence to which it is entitled.

38. As the Trial Chamber is aware, the Defence’s ability to conduct its own investigations is severely compromised by the non-cooperation of the Government of Sudan and by the prevailing security situation in Darfur. Non-disclosure of material the Defence is entitled to under the Statute and the Rules would further impede the Defence preparation and ultimately the Accuseds’ right to a fair hearing.

Irrelevance of the Rule 69 Agreement

39. Further, and contrary to the Prosecution’s assertion,⁴⁷ the existence of the agreed facts has no bearing on the Defence’s right to disclosure, pursuant to Rule 77 and Article 67(2). In fact, as the Court’s jurisprudence suggests and practical considerations dictate, the Rule 77 disclosure obligation is not only limited to evidence directly going to contested issues.

40. No limitation referring to agreements as to evidence pursuant to Rule 69 can be found in Article 67(2) or Rule 77.

41. Indeed, the evidence provided by the four witnesses may assist the Defence in understanding a central issue in the case, namely the preparation and the carrying out of the attack on Haskanita MGS. Therefore, pursuant to *Lubanga*,⁴⁸ their evidence is material to the defence preparation.

42. Furthermore, the Defence note that whilst the effect of the agreed facts is to list three contested issues, this does not automatically mean that that the preparation of the defence is limited to those issues narrowly defined. The truth is that in order to investigate those three issues, the Defence need to

⁴⁶See ICC-01/05-01/08-1594-Red, para. 23.

⁴⁷Request, para. 7.

⁴⁸ICC-01/04-01/06-2624, para. 16.

prepare more broadly. The Defence anticipate that the Chamber will not determine the contested issues in isolation, divorced from their factual context. Rather, the broader context of the attack and situation prevailing in Darfur at the material time, will inevitably inform the Chamber's decision. The broader context⁴⁹ is, therefore, material to the preparation of the defence case. Furthermore, it is submitted that the statements may be material to the preparation of the Defence, not only for the probative value of the information contained in them, but also because they may provide a starting point which suggests other fruitful avenues for the Defence to investigate and may generate new evidence.

43. Also, regarding Article 67(2), the existence of an agreement on evidence does not mean that evidence provided by witnesses 0304, 0305, 0306 and 0312 or information contained in the transcripts of the interviews of these witnesses would not affect the credibility of other Prosecution witnesses.

44. In addition, the approach by the Prosecutor of limiting his assessment of whether or not evidence is material to the preparation of the defence or potentially exculpatory based upon the agreed facts, is wrong because the Trial Chamber has not decided whether it will approve the agreed facts. Unless and until the Trial Chamber does, the parties must prepare their case for trial on the basis that there are no agreed facts. Therefore, to exclude evidence from the analysis on the basis of the agreed facts is, at this stage, entirely erroneous and premature.

45. Lastly, the Defence have cooperated extensively with the Prosecution during these proceedings. Such cooperation ought not to be used against the Defence. The Defence's willingness to agree on evidence should not lead to a violation

⁴⁹ In support, the Defence note that in *Lubanga* the Appeals Chamber accepted the submission of the Lubanga defence according to which evidence may be relevant to understand a „phenomenon“- in this particular case the phenomenon of the use of child soldiers and their demobilisation in the DRC.

of the rights of Messrs. Banda and Jerbo to have access to evidence material the preparation of their defence.

The Prosecutor Relied on the Four Witnesses at Confirmation

46. The importance of these witnesses is reflected by the fact that the Prosecutor did rely on them at confirmation and Pre-Trial Chamber I considered evidence provided by these witnesses in its Confirmation Decision.⁵⁰ The Document Containing Charges (“DCC”) itself is based on the evidence of these witnesses,⁵¹ amongst others. As a result this case was committed to trial on the basis of the evidence provided by these witnesses, amongst others. The significance of the requested full disclosure of the statements of these witnesses must, therefore, be seen in the light of their use at the confirmation stage.

47. The significance of the full disclosure of the statements of these witnesses should also be viewed from the Defence’s numerous requests to the Prosecutor to contact the four witnesses in order that the Defence can interview them. No substantive response has been received.⁵² The Defence believe that the Prosecutor is obliged to produce these witnesses relied upon on at confirmation for interview by the Defence.⁵³ Whilst this issue does not arise for determination in this filing, the Defence submit that the likely

⁵⁰ Indeed, Pre-Trial Chamber I relied upon the evidence of these witnesses in the Decision on the Confirmation of Charges – ICC-02/05-03/09-121-CORR-RED, *inter alia*, paras. 84, 107, 113 – 114, 131 – 132, 134, 141 142, 146 – 147 and 156.

⁵¹ The DCC contains references to evidence provided by the four witnesses. Namely, Witness 0304 is referred to in paras. 55, 68, 75, 80, 113 – 116, 119, 131, 134, 141 - 142, 146, and 156; Witness 0305 in paras. 84, 113 – 115, 131, 133 and 134, 141 – 143, 146 – 147, and 156; Witness 0306 in paras. 114 – 115, 131, 133 – 134, 141 – 143, 146 – 147, and 156; and finally Witness 0312 in paras. 68, 84, 107, 113 – 116, 119 – 120, 132 – 134, 141 – 142, 146, and 156.

⁵² See paragraph 15 of the present response. See also E-mail communication by the Defence “Request to interview witnesses 304, 305, 306 and 312”, 4 August 2011.

⁵³ See ICC-01/04-01/06-T-139-Red-ENG, 3 March 2009; page 93-94. Judge Fulford stated: “Given that the Defence would have anticipated that that evidence was going to form part of this trial, now that you have decided you will not call them as part of your case, the Prosecution must, nonetheless, ensure that the witnesses, if required by the Defence, are available to be called during the course of the Defence case so that the Defence is not prejudiced by being unable to put before the Chamber evidence which they had originally understood would be before us as part of the overall picture that we are to evaluate in this case.”

Defence interviews of these witnesses are a further indication of the materiality of their statements to the preparation of the Defence.

The Prosecutor's Obligation to Fully Disclose Statements of Other Witnesses

48. The Defence note that there is an emerging trend of requests of similar nature by the Prosecutor which require multiple responses from the Defence.⁵⁴ Such an approach does not bode well for the fair conduct of these proceedings because it would not lead to finality to litigation on these issues. For this and the reasons stated above, the Defence restate their position that they request full disclosure of the statements of all witnesses that the Prosecutor no longer intends to rely upon at trial that constitute potentially exculpatory and Rule 77 material. The Defence requests that the Chamber issues an authoritative ruling to this effect to bring an end to the multiple requests and thereby provide guidance for the treatment of similar requests in the future.

⁵⁴See e.g. ICC-02/05-03/09-185-Red.

Relief Requested

For the reasons set out above and pursuant to Article 67(2) of the Statute and Rule 77 of the Rules, the Defence respectfully request the Trial Chamber to:

- (a) order the Prosecutor to fully disclose to the Defence the interview transcripts of witnesses 0304, 0305, 0306 and 0312, including identifying information; and
- (b) issue an authoritative ruling on the obligation of the Prosecutor to fully disclose all statements of all witnesses, including those witnesses on whom the Prosecutor no longer intends to rely upon in trial which contain exculpatory evidence and/or information material to the preparation of the defence.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 22nd Day of August 2011
At Nairobi, Kenya

Dated this 22nd Day of August 2011
At Dhaka, Bangladesh