

**Cour
Pénale
Internationale**

**International
Criminal
Court**

Original: **English**



No.: ICC-02/05-03/09
Date: **10 November 2011**

TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

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

Public Document
with Confidential Annexes A and B

Prosecution's Response to Defence Request for Disclosure

Sources: Office of the Prosecutor

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

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I. INTRODUCTION

1. The unredacted *ex parte* version of the application for the arrest of Omar Hasan Ahmad Al Bashir (“Al Bashir Application”) was 120 pages long. It contained 556 footnotes referring to approximately 375 documents (including witness statements). The documents alone exceed 5000 pages. Of these, the Prosecution furnished the PTC I with approximately 179 documents and seven videos to assist it in its consideration of the application.¹
2. The Defence is seeking disclosure of all this information in its “Request for Disclosure of Documents in the Possession of the Office of the Prosecutor” (Defence Request).² The Prosecution opposes this request. The Prosecution recognises the need to provide the Defence with meaningful disclosure in order to assist the Defence in its preparations. This expansive request, however, is completely unmerited. Moreover, 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.
3. Pursuant to an agreement between the parties³ that was accepted by the Chamber,⁴ there are three contested issues to be resolved: Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; if unlawful, whether the Accused persons were aware of the factual circumstances that established its unlawful nature; and whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations. The material requested by the Defence is not relevant to any of these issues.
4. The Prosecution conducted a comprehensive review of all the material in its possession in order to locate any potentially exculpatory evidence or information that is material to the preparation of the Defence. To this end, it carefully crafted search terms and criteria, to ensure that all relevant material is captured and reviewed.

¹ These documents were provided to the PTC in two additional filings after the Application itself had been filed.

² ICC-02/05-03/09-235.

³ ICC-02/05-03/09-148.

⁴ ICC-02/05-03/09-227.

5. With this process, all material that directly impacts upon the lawfulness of the attack, the impartiality of AMIS personnel or objects in MGS Haskanita or AMIS, and the general use if any, of GoS personnel in AMIS bases (or even in premises of other international organisations) for the purposes of acquiring intelligence has either been disclosed, or is being reviewed for disclosure. Even if information about the “context of the Darfur conflict” is material in some obscure way to the preparation of the defence, such information has either been disclosed already⁵ or is widely available in the public domain.⁶

II. PROCEDURAL HISTORY

6. On 16 May 2011, the Prosecution and Defence agreed to certain facts pursuant to Rule 69 of the Rules (“Rule 69 Agreement”), and determined that only three narrow issues remain to be contested at the trial of the Accused Persons.⁷
7. On 21 June 2011, the Defence proposed that the Prosecution agree on additional facts⁸ (attached to this filing as Confidential Annex “B”). These additional facts, extracted largely from the Prosecution’s arrest warrant application in the *Al Bashir* case and PTC I’s corresponding Decision, relate primarily to the genocidal campaign allegedly being conducted by the Government of Sudan (GoS) in Darfur before, during and after the attack on the MGS Haskanita. The Defence did not explain how it understood these facts to be relevant to the three contested issues remaining in this case, nor did the Prosecution see a correlation.
8. Accordingly, on 6 July 2011, the Prosecution declined to agree to those of the proposed additional facts that related to the alleged campaigns of the GoS in Darfur on the ground that they were not relevant to the three contested issues.⁹

⁵ In the List of Evidence provided to the Defence with the DCC, 69 items were disclosed relating to the background of the Darfur conflict.

⁶ See footnote 35 below.

⁷ ICC-02/05-03/09-148.

⁸ E-mail communication from Defence Counsel received on 21 June 2011 at 15:19 hours.

⁹ Email communication from the Trial Lawyer of the Office of the Prosecutor sent on 6 July 2011 at 19:54 hours.

9. On 19 July 2011 the Defence sent a detailed letter (19 July letter)¹⁰ to the Prosecution requesting the disclosure of several categories of documents. In Annex C to the 19 July letter, the Defence reiterated its request for disclosure of material relating to the genocidal campaign conducted by the GoS in Darfur.¹¹ On 2 September 2011, the Prosecution reiterated its position regarding disclosure of the requested documents and indicated that enlarging the scope of the case to immaterial facts would contravene the spirit of the Rule 69 Agreement.¹²
10. On 20 October 2011, the Defence filed the “Defence Request”¹³ seeking an order that the Prosecution disclose **all** material (other than victim statements) previously submitted by the Prosecutor in support of the *Al Bashir* Application (“Requested Material”). The Defence also requests a hearing to allow the parties to present their arguments.¹⁴

III. PROSECUTION DISCLOSURE

11. The Prosecution commenced its disclosure of incriminatory material and of information that is potentially exculpatory or material to the preparation of the Defence as far back as 8 July 2010 (at the pre-trial stage of this case) and well before the Chamber issued a Decision confirming that the trial would proceed on the basis of the Agreed Facts, narrowing the contested issues.¹⁵ Accordingly, the information disclosed to the Defence has far exceeded that which would have been disclosed were a review to have been conducted solely on the narrow confines of the 3 contested issues. More importantly, the Prosecution has reviewed (and continues to review) the **entire** material in its possession. Such a review inevitably covers the material that was provided to PTC I in support of the *Al Bashir* Application.
12. However, in light of the Agreed Facts, the Prosecution case against Mr. Banda and Mr. Jerbo is now a focused one, dealing with three narrow contested issues¹⁶:

¹⁰ This letter and its 3 annexes are attached to this filing as Confidential Annex A.

¹¹ 19 July 2011 Letter from the Defence Ref.: D-AB/2011/18; D-SJ/2011/19.

¹² Email communication from the Legal Assistant of the Office of the Prosecutor sent on 2 September 2011 at 1844 hours.

¹³ ICC-02/05-03/09-235.

¹⁴ *Ibid.*, para. 39.

¹⁵ The Trial Chamber rendered its Decision on the Agreed Facts on 28 September 2011.

¹⁶ ICC-02/05-03/09-227.

- a. Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful.
- b. If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack.
- c. Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.¹⁷

13. Significantly, at the Pre-Trial stage in the *Abu Garda* case, the Prosecution conducted a similar review of its entire collection in accordance with its obligations pursuant to Article 67(2) and Rule 77, and consequently disclosed identified material to the Defence of Mr. Abu Garda, some of whom also represent the Accused persons in this case.¹⁸ The Prosecution also developed a number of detailed search criteria that it relayed to the Defence and sought input on the development of further search criteria. The Defence provided no such input.

14. Critically, limiting disclosure to only relevant material is not only consistent with the requirements and spirit of the Statute and the Rules but it also reduces the Chamber's need to review redactions and the Court's need to provide protection. Ultimately, it also eliminates overwhelming the Defence with material that is irrelevant to the case, thereby hindering its preparation to meet the Prosecution case. Given the significant costs of unnecessary and expansive disclosure to the Court and the parties, it should not be ordered absent a clear justification, absent here.

15. The Prosecution has continued to accommodate the Defence by further reviewing the materials in its possession pursuant to a detailed request for further disclosure contained in its 19 July letter.¹⁹ Consequently, the Prosecution has disclosed 336 items to the Defence, and continues to review the materials in its possession for relevant information falling within the scope of Annexes A & B to the 19 July letter.

IV. PROSECUTION'S SUBMISSIONS

¹⁷ ICC-02/05-03/09-148

¹⁸ Abu Garda and the 2 Accused persons in this case were part of the same Prosecutor's Application for Summonses, pursuant to Article 58(7). Therefore the material is equally applicable to both cases. Indeed, all 3 individuals have also been represented by the same lead Defence Counsel.

¹⁹ 19 July 2011 Letter from the Defence Ref.: D-AB/2011/18; D-SJ/2011/19

A. The Material Requested by the Defence is not Relevant to the Contested Issues in this Case

16. The case relates to a single attack carried out in a particular location (the MGS Haskanita) in South Darfur on 29 September 2007. Certain facts having been agreed, the case is now a compact and circumscribed one. The Defence request, however, relates to material which not only covers a completely different and much wider time period, but the entire geographical region of Darfur. The material requested by the Defence is not relevant to the case, and particularly not to the three contested issues that remain.

i The Material Sought is not relevant to whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations

17. The Defence submits that the material requested is relevant to whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.²⁰ The Prosecution disagrees.

18. A mission is a peacekeeping mission if it:

- (i) is impartial
- (ii) has host nation consent and
- (iii) does not use force except in self-defence.²¹

19. A mission is in accordance with the UN Charter if it comports generally with the UN charter and with the provisions of Article 52(1) of the UN Charter, which “provides for the existence of regional arrangements [...] for the maintenance of international peace and security.”²²

20. Even if the GoS allegedly conducted a criminal campaign while the AMIS mission was in existence, that does not undermine AMIS’s peacekeeping status as enshrined in Article 8(2)(e)(iii) of the Statute. What would undermine its peacekeeping status is

²⁰ Defence Request, paras 20-25.

²¹ Abu Garda Public Redacted Version - Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red (“Abu Garda Confirmation Decision”), para 71; see also *Prosecutor vs. Sesay, Kallon and Gbao* (RUF Case), Case No. SCSL-04-15-T, Trial Chamber, Judgement of 2 March 2009, para. 225.

²² Abu Garda Public Redacted Version - Decision on the Confirmation of Charge: ICC-02/05-02/09-243-Red, para. 120.

evidence that AMIS carried out its mandate partially and assisted, militarily, one side over the other.

21. Accordingly, the Prosecution designed specific search terms and set criteria to enable it capture such material for disclosure. Disclosing the material provided to PTC I in support of the Al Bashir Application can therefore not be justified on this ground.

ii The Material Sought is not relevant to the issue of whether the attack on MGS Haskanita was unlawful

22. The Defence submits that the material requested is relevant to the issue of whether the attack on the MGS Haskanita was unlawful.²³ Here, the Defence supports its claim by stating that:

- GoS attacks were being directed by GoS agents within the AMIS base.²⁴
- Given the recurring pattern of such crimes in the Bashir application, the base was a legitimate military target and the attack was lawful.²⁵
- The attack on MGS Haskanita was justified by military necessity, given the risk the GoS offensive in Haskanita posed to the thousands of civilians.²⁶
- AMIS would have been aware of the GoS campaign - it is relevant to the decisions they made to protect Captain Bashir, who was contributing to this criminal activity.²⁷

23. This argument by the Defence is an improper conflation of two issues:

24. Firstly, the issue whether *AMIS personnel* in the MGS Haskanita were taking a direct part in hostilities or in combat-related activities at the time of the attack²⁸ or whether *AMIS objects* in the MGS Haskanita made an effective contribution to the military action of a party to a conflict and whether the objects' total or partial destruction, capture or

²³ Defence Request, paras 26-32

²⁴ Defence Request, para 28

²⁵ Defence Request, paras 30-31

²⁶ Defence Request, para 31

²⁷ Defence Request, para 32

²⁸ Abu Garda Confirmation Decision, para 83

neutralisation, in the circumstances at the time, offered a definite military advantage.²⁹ This issue impacts on whether AMIS personnel and objects in the MGS Haskanita were protected from attack (and the military necessity to attack AMIS personnel or objects).

25. Secondly, the issue of GoS campaigns in Darfur, as depicted in the materials submitted with the Al Bashir application. This impacts on only whether GoS personnel and objects were legitimate targets or alternatively, protected from attack (and the military necessity to attack GoS personnel or objects).
26. The Banda and Jerbo case relates only to the *first* issue. However, the Defence Request, which focuses on evidence relating to GoS campaigns in Darfur, relates only to the *second* issue, which is irrelevant to the Banda and Jerbo case.
27. Put simply, evidence of the GoS campaign in Darfur broadly, or even just in Haskanita, would only be relevant if it showed some involvement of AMIS (e.g. AMIS personnel taking a direct part in hostilities, or an AMIS object making an effective contribution to the military action of a party). Material that relates to the GoS campaign where there is no mention of AMIS' involvement is *not* relevant to this case, since it has no bearing on the issue of whether or not AMIS personnel and objects at the MGS Haskanita were protected from attack (and the related question of the military necessity to attack AMIS personnel or objects). As noted above, to the extent the Al Bashir application contains information pertaining to AMIS's involvement in the GoS campaign, or information otherwise relevant to the three specific issues in this case, it has been disclosed.

iii The Material Sought is not relevant to whether Banda and Jerbo were aware of the factual circumstances that established the unlawful nature of the attack

28. The Defence submits that the material requested is relevant to the issue of whether Banda and Jerbo were aware of the factual circumstances that established the unlawful nature of the attack.

²⁹ Abu Garda Confirmation Decision, para 87

29. In support of this contention, the Defence states that:

- o Banda and Jerbo did not have months to assess the protected status of MGS Haskanita. They had to make life-or-death battlefield decisions.³⁰
- o They made these decisions in the context of an ongoing GoS campaign against the civilians of Darfur.³¹
- o The evidence of the GoS campaign is relevant to the risk they perceived from the GoS representatives at MGS Haskanita and how much they could trust GoS representatives.
- o The evidence of the GoS campaign is also relevant to how much they could trust AMIS to protect civilians.

30. However, the Prosecution considers that in this regard, only the following issues are relevant to the three contested issues:

- o Information regarding GoS representatives in AMIS bases.
- o Any AMIS involvement in the transfer of intelligence to the GoS.
- o Any knowing or unwitting use of an AMIS base as a tool for GoS intelligence.
- o The information/intelligence regarding MGS Haskanita available to Banda and Jerbo prior to the attack.
- o Precautionary measures, if any, taken by Banda and Jerbo prior to attacking MGS Haskanita.

31. Applying these criteria, the Prosecution has searched (both on its own initiative and also pursuant to Defence requests³²) for information relating to the above, and disclosed all material that it has come across. The Prosecution is also willing to conduct further searches of the material in its possession on these same issues should the Defence provide additional focused search terms.

32. However, a detailed assessment of the activities and trustworthiness of all persons within the GoS in general (via the disclosure of all the evidence provided by the OTP in support of the Bashir application) is not relevant for the purpose of the Banda/Jerbo case.

³⁰ Defence Request, para 34

³¹ *ibid*

³² Annex B to the 19 July letter.

33. Additionally, the issue whether AMIS could effectively protect civilians from attack is not a relevant issue in the Banda and Jerbo case. It does not relate to whether the attack on the MGS Haskanita on 29 September 2007 was unlawful, since failure to protect civilians does not render any person/object a military target.

34. Nor does it relate to whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations unless it relates to AMIS' impartiality, host nation consent or AMIS' use of force except in self-defence. The Prosecution has reviewed its material in this regard and disclosed all material falling within Article 67(2) and Rule 77. It will continue to do so. However, if the Defence identifies any additional search terms or information that relates to this focussed issue, the Prosecution will further review its material accordingly.

B. The Material Sought is not relevant to the character and motives of Banda and Jerbo

35. The Defence submits that the Requested Material is relevant to the character and motives of Banda and Jerbo³³ as to:

- Why they took up arms and decided to resort to violent resistance of the government; and
- Why they decided to attack MGS Haskanita.³⁴

36. There is no reason why the Defence would require information relating the GoS campaign elsewhere in Darfur (other than at the MGS Haskanita) and at different times in order to demonstrate the motives of the Accused persons. Surely the Accused persons, either themselves, or through evidence led by them, are in the best position to explain their personal motives. Moreover, motive relates to the purely subjective minds of the Accused persons, the reasons they did what they did. And their character, as opposed to their motives, is completely unrelated to the alleged activities at other places and times by GoS forces. Even if motive or character can be linked somehow to GoS activities, what is relevant is not what the GoS was doing, but what they reasonably believed the GoS was doing at the time. The requested disclosures cannot bear on what information

³³ Defence Request, paras 16-19.

³⁴ *Id.*, para 19.

the Accused persons possessed at the time, or what subjective purposes underlay their actions. Information acquired now but not known to the Accused persons at the time will have no bearing on their motives in September 2007.

37. In short, information related to alleged crimes committed by the GoS in different regions and at different time periods to that of the current charges has no bearing on the issues in dispute here.
38. Furthermore, whether the GoS collected or used intelligence during the conflict in Darfur is, of itself, of no relevance whatsoever to the instant case unless AMIS was involved in such use or collection of intelligence. A belief that the GoS committed serious crimes in Darfur, however well-founded, would not bear on the determination of an appropriate punishment for the Accused persons' attack – if proven at trial – on *AMIS or the MGS Haskanita*.
39. Even if motive were relevant, notwithstanding the narrowed issues and Agreed Facts in this case, it would only be to explain why Banda and Jerbo attacked the personnel and objects of the MGS Haskanita (not the GoS in general).
40. The Prosecution's disclosure review already extends to such information, and material found to fit into this category has been disclosed. The Prosecution's review in this regard already includes searching for any information as to whether or not AMIS was passing or being used to pass on any intelligence to the GoS.
41. Even if the context in which the MGS Haskanita attack occurred (the GoS campaign and the wider Darfur conflict) could logically bear on the appropriate punishment, a position with which the Prosecution disagrees, there is already ample material on the conflict in the public domain.³⁵

³⁵ See, among other authorities referenced in previous Darfur cases: - Amnesty International, *Sudan, Darfur, Too many people killed for no reason* (February 2004), available online at <http://www.amnesty.org/en/library/asset/AFR54/008/2004/en/41ee9af7-d640-11dd-ab95-a13b602c0642/afr540082004en.pdf>

- Report of the International Commission of Inquiry on Darfur (January 2005), available online at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf

- International Crisis Group, *Darfur: The Failure to Protect* (March 2005), available online at <http://www.crisisgroup.org/home/index.cfm?id=3314&l=1>

42. Finally, the Defence effort at justifying its overly broad demand³⁶ relies on a decision in the Lubanga case regarding the Prosecution's obligations to disclose materials relevant to defence witnesses.³⁷ That decision, however, is irrelevant to the matter at hand; the Defence in this case is not seeking information in the Prosecution's possession bearing on its identified defence witnesses. Rather, it seeks all information bearing on matters in a completely different case - wholly irrelevant to the now circumscribed case and its three remaining contested issues.

43. As for the Defence request for an oral hearing on this issue, it is made without statutory basis. Moreover, the Prosecution does not see any exceptional issues arising out of the Defence Request meriting a departure from written submissions.

- Human Right Watch, *Entrenching Impunity, Government Responsibility for International Crimes in Darfur* (December 2005), available online at [http://protection.unsudanig.org/data/darfur/papers/HRW%20-%20Entrenching%20Impunity-Govt%20Resp%20for%20Intl%20Crimes%20Darfur%20\(Dec05\).pdf](http://protection.unsudanig.org/data/darfur/papers/HRW%20-%20Entrenching%20Impunity-Govt%20Resp%20for%20Intl%20Crimes%20Darfur%20(Dec05).pdf)

- African Union, *Report of the Chairperson of the Commission on the Situation in Darfur, the Sudan* (January 2006), available online at

http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2004_2007/pdfs/2006/2006_45_R1E.pdf

- UN, *Final Report of the Panel of Experts submitted in accordance with resolution 1591 (2005)* (January 2006), available online at

<http://daccessdds.un.org/doc/UNDOC/GEN/N05/632/74/PDF/N0563274.pdf>

- UN, *Third Periodic Report of the United Nations High Commissioner for Human Rights on the human rights situation in Sudan* (April 2006), available online at

<http://www.ohchr.org/Documents/Countries/3rdOHCHRApril06.pdf>

- Human Rights Watch, *Darfur 2007: Chaos by Design, Peacekeeping challenges for the UNMIS and the UNAMID against displaced persons* (September 2007), available online at

<http://www.hrw.org/reports/2007/09/19/darfur-2007-chaos-design>

- UN, *Report of the Panel of Experts established pursuant to resolution 1591 (2005) concerning the Sudan prepared in accordance with paragraph 2 of resolution 1713 (2006)* (October 2007), available online at

http://www.un.org/ga/search/view_doc.asp?symbol=S/2007/584

- International Crisis Group, *Darfur's New Security Reality* (November 2007), available online at

<http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/Darfurs%20New%20Security%20Reality.pdf>

- Amnesty International, *Sudan, Displaced in Darfur, A generation of anger* (January 2008), available online at

<http://www.unhcr.org/refworld/docid/4795a5692.html>

- Human Rights Watch, *They Shot at Us as We Fled, Government Attacks on Civilians in West Darfur* (May 2008), available online at

<http://www.hrw.org/reports/2008/darfur0508/>

³⁶ Defence request, para. 7.

³⁷ "Decision on the scope of prosecution's disclosure obligations as regards Defence witnesses, 12 November 2010, ICC-01/04-01/06-2624.

V. REQUEST FOR RELIEF

44. The Prosecution requests the Chamber to reject the Defence Request.



Luis Moreno – Ocampo
Prosecutor

Dated this 10th Day of November 2011

At The Hague, The Netherlands