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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 Reply to the Prosecution's Response to the Defence Request for
Disclosure**

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:

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I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully submit their reply to the Prosecution's Response to the Defence Request for Disclosure ("Response"), filed on 10 November 2011.¹
2. The Trial Chamber granted the Defence application for leave to reply to the Response² on the grounds "that the prosecution's Response [...] raises certain legal issues that the defence should be given the opportunity to reply to, especially as to the extent of the prosecution's disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules."³
3. In the present reply, the Defence submit that (i) the volume of the disclosable material, (ii) the fact that the material may be publically available, (iii) the possible testimony of an accused, and (iv) the existence of a Rule 69 Agreement do not relieve the Prosecution from their disclosure obligations pursuant to Article 67(2) of the Rome Statute ("Statute") and Rule 77 of the Rules of Procedure and Evidence ("Rules"). Furthermore, the Defence argue that the moving party is not required to give a detailed explanation on the relevance of the disclosable material. Additionally, it is submitted that the Prosecution misinterpret and misrepresent the applicable law or facts in order to avoid addressing the relevance of the material to the contested issues in this case and the corresponding obligation of the Prosecutor to disclose this exonerating evidence.

¹ ICC-02/05-03/09-251.

² ICC-02/05-03/09-261, para.6.

³ ICC-02/05-03/09-261, para.5.

II. Submissions

Whether either the volume of the material in question or the fact that the material is publically available relieves the Prosecution of its statutory duties under Article 67 and Rule 77 of the Rules

4. It is telling that in the first two paragraphs of the Response the Prosecution do not address whether the material sought in the Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor ("Request")⁴ is exonerating under Article 67 or material to the defence preparation under Rule 77 of the Rules. Rather, the Prosecution sidesteps the issue by arguing that disclosure would be "unduly burdensome"⁵ because of the volume of the material requested⁶ and the resulting need for redactions.⁷
5. This argument is diversionary, irrelevant and unsupported by the relevant jurisprudence and practice. In fact, nothing in the Statute, the Rules or the relevant jurisprudence exempts the Prosecution from disclosing material that falls under Article 67(2) or Rule 77 of the Rules because of the burden on the Prosecution to do so. Moreover, contrary to the Prosecution submissions, the Request is reasonable in as much as it reduces the burden on the Prosecution by being limited to material already collected and organised by the Prosecution when it was presented to the Pre-Trial Chamber seized of the Prosecution's application for the arrest of President Al-Bashir.⁸
6. The Prosecution's count of pages in the Response includes victim statements, which the Defence specifically agreed need not be included in order to accommodate the Prosecution and to avoid raising the issues of victims'

⁴ ICC-02/05-03/09-235.

⁵ Response, para. 2.

⁶ Response, para. 1.

⁷ Response, para. 2.

⁸ ICC-02/05-157-AnxA („Al Bashir Application“)

security or privacy.⁹ Why the Prosecution fail to recognise this extraordinary accommodation in the Response and to accordingly adjust the page count to the material actually being requested by the Defence is unclear.

7. Furthermore, the volume of the material at issue, allegedly exceeding 5000 pages, is hardly impressive in the context of an international tribunal or court, where tens of thousands of pages are often disclosed. As an example, the Defence note that at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), in the *Karadžić* case, the Prosecution disclosed, *inter alia*, within a period of only 10 days a total of 14'276 pages of documents pursuant to Rule 68 of the ICTY Rules of Procedure and Evidence, which governs the disclosure of potentially exculpatory material.¹⁰ Indeed, in his 2011 report to the UN Security Council, Prosecutor Serge Brammertz noted, when he addressed the issue of the "magnitude of the documents disclosed" in the *Karadžić* case, that the ICTY Prosecution's evidence collection comprises some 9 million pages.¹¹ This shows that disclosing an extremely large amount of evidence to the defence is normal practice at international tribunals and courts.
8. The Prosecution's assertion that much of the material sought is publically available¹² is irrelevant. The Court's jurisprudence specifically provides that "the Prosecution is obliged to disclose to [the Defence] article 67(2) and rule 77 materials in the Prosecution's "possession or control", whether or not they are

⁹ See Request, para. 4.

¹⁰ See *Prosecutor v. Karadžić*, IT-95-5/18-T, 3 November 2010, T. 8906:22-25. Note the Trial Chamber addressed the issue of the volume of the material, not because the Trial Chamber considered it unduly burdensome for the Prosecution to disclose the material, but rather because it found that "the sheer volume of this material is such that it is in the interests of justice to suspend the proceedings temporarily [...] to allow the accused and his team time to conduct the necessary review of the material [...]. See T. 8907:4-14. See also *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Twenty-second, Twenty-fourth and Twenty-sixth Disclosure Violation Motions, 11 November 2010, paras. 37 and 38.

¹¹ S/2011/316, 18 May 2011, Annex II, Report of Serge Brammertz, Prosecutor of the International Tribunal for the Former Yugoslavia, provided to the Security Council under paragraph 6 of Security Council resolution 1534 (2004), para. 13.

¹² Response, para. 41.

also in the public domain.”¹³ This principle is also reflected in the case law of the *ad hoc* tribunals, where Chambers considered it insufficient that exculpatory material is available to the Defence through a search in the tribunal’s general database, called EDS, for it to be considered reasonably accessible.¹⁴ The *Karadžić* Trial Chamber only considered the establishment of a special folder for Rule 68 material in EDS and a written notice drawing the attention of the accused to such material, as well as continuously updating the folder and the resending of an updated notice to the accused sufficient to satisfy the Prosecution’s disclosure obligations.¹⁵ The jurisprudence of the international tribunals and courts, including this Court, shows that the fact that material is available in the public domain or even in any type of searchable database, including a tribunal’s or court’s database, does not relieve the Prosecution of their obligation to disclose Article 67(2) and Rule 77 materials.

9. The Prosecution also imply that the material exceeds what is necessary to prove the facts the Defence seek to establish concerning the Government of Sudan’s violent military campaign against civilian populations in Darfur and the fact that throughout the existence of the AMIS mission in Darfur, genocide was on-going. The Defence need to prove these facts, taken from the Prosecution’s *Al Bashir* Application, because the Prosecution refused to agree to include its own allegations in an agreement pursuant to Rule 69 of the Rules. If, as the Response implies, only limited publically available material is necessary to prove these facts and the 5000 pages are excessive, the question

¹³ *Prosecution v. Katanga*, Decision on the 19 June 2008 Prosecution Information and other Matters concerning Articles 54 (3)(e) and 67 (2) of the Statute and rule 77 of the Rules, 25 June 2008, ICC-01/04-01/07-646, para. 11.

¹⁴ See *Prosecutor v. Karemera et al.*, ICRT-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, para. 15, as well as 2, 10 and 13. See also *Prosecution v. Karadžić*, IT-95-5/18-PT, Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities, 10 March 2009, para. 20 and *Prosecutor v. Lukić et al.*, IT-98-32/1-T, Milan Lukic’s Motion to Suppress Testimony for Failure of Timely Disclosure With Confidential Annexes A and B, 30 September 2008.

¹⁵ *Prosecution v. Karadžić*, IT-95-5/18-PT, Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities, 10 March 2009, para. 20.

arises as to why the Prosecution included all these materials in its application for an arrest warrant where the burden is simply “reasonable grounds” to believe a person has committed a crime.

Whether the Prosecution may be relieved of its disclosure obligations where an accused before the Court may be able to testify to his own motives and indeed whether he is required to do so in order to relieve the Prosecution of the inconvenience of disclosing Article 67(2) and Rule 77 evidence

10. The Response argues that the material from the *Al Bashir* Application is not relevant to the character or motives of the accused.¹⁶ In other words, the Prosecution argue that the fact that Messrs. Banda and Jerbo were fighting against a campaign of violence by the Government of Sudan directed against civilians and intended to destroy the Zaghawa, Masalit and Fur people is irrelevant to their character or the motive of the attack. This argument is made despite the fact that the Prosecution recognise the relevance of evidence that the AMIS base at Haskanita was being used as a tool to provide intelligence to further the Government of Sudan military campaign,¹⁷ the very same criminal campaign that is the subject of the *Al Bashir* Application.

11. Motive is relevant to two of the contested issues, the lawfulness of the attack and whether Messrs. Banda and Jerbo were aware of factual circumstances which would establish the unlawful nature of the attack, as well as to sentencing. The Prosecution at the confirmation stage argued various theories as to motives claiming these established the unlawful nature of the attack.¹⁸

12. The fact that long before and at the time of the attack on MGS Haskanita on 30 September 2007 the Government of Sudan had engaged in a consistent pattern of attacks targeting civilians throughout Darfur is certainly relevant to both

¹⁶ Response, para. 36.

¹⁷ See ICC-02/05-03/09-112-AnxA, para. 91.

¹⁸ See e.g. ICC-02/05-03/09-112-Conf-AnxB, para. 151.

the subjective beliefs of Messrs. Banda and Jerbo as to the effect of the AMIS base providing intelligence and to the objective reasonableness of those beliefs. The fact that the attacks took place over a long period of time and at various locations only reinforces that the campaign deliberately targeted civilians as state policy and is further evidence of the reasonableness of the belief that thousands of civilians were at risk from the intelligence emanating from the MGS Haskanita base in 2007. The Defence submit that no one living in Darfur at this time would be unaware that the Government of Sudan was targeting civilians, killing many thousands, and that the entire civilian population remained at risk from these attacks at the time of the attack on MGS Haskanita. The evidence from the *Al Bashir* Application is expected to provide support to show that this was indeed the case and it was objectively reasonable to hold these views.

13. In their effort to deny the Defence access to this exonerating material, the Prosecution make the surprising assertion that “[s]urely the Accused persons, either themselves, or through evidence led by them, are in the best position to explain their personal motives.”¹⁹ One would not expect that the Prosecution would need to be reminded of Article 67(1)(g) of the Statute which guarantees Accused persons the fundamental right to remain silent and not to have the exercise of that right used against him. Here, the Prosecution would ask the Trial Chamber to compromise both the fundamental rights of the accused to remain silent and the right under Article 67(2) to have exonerating information disclosed by the Prosecution. Messrs. Banda and Jerbo do not have to testify, nor present witnesses as to their motives, and whether they do or do not choose to do so, they are entitled to disclosure of objective evidence of their motives in the possession of the Prosecution that tends to show

¹⁹ Response, para. 36. The Prosecution also refer to evidence led by Messrs. Banda and Jerbo, which may cast light on their motives. At this stage, the Defence will not address this point, since the materials which are subject to the Request may indeed be evidence which the Defence will present at trial to explain the motives of Messrs. Banda and Jerbo.

innocence. In fact, the Appeals Chamber confirmed in *Lubanga* that “the Prosecutor is duty-bound to provide full disclosure even if an accused elects to remain silent or does not raise a defence.”²⁰

Whether disclosure is only warranted where the Defence provide detailed explanations as to how the materials sought fit into the defence case and where the Prosecution agrees

14. The Appeals Chamber held that “the Statute and the Rules of Procedure and Evidence [...] indicate that the Prosecutor's duty to disclose information to the Defence is not linked to any requirement that the Defence reveal defence(s) in advance.”²¹ It went on: “Article 67 (2) and rule 77 place mandatory disclosure obligations on the Prosecutor. The Appeals Chamber notes the absence in these provisions of any requirement that an accused provide advance revelation of his or her defences in order to receive full prosecution disclosure.”²² The *Katanga* Trial Chamber also addressed the requirements of showing materiality pursuant to Rule 77 and stated that “contrary to what the Prosecutor suggests, the Defence does not have to provide concrete examples to support its allegations relating to discrepancies between different statements [...] or to the witness’s credibility, in order to demonstrate that the audio records in question are material to the preparation of the defence.”²³ The absence of the obligation to reveal how exactly the material sought will fit into the defence case is further evidenced by the fact that the Appeals Chamber accepted that evidence may be Rule 77 material because it contains

²⁰ *Prosecutor v. Lubanga*, Judgement 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, para. 50. The Appeals Chamber stated “The lack of any correlation between the right to receive prosecution disclosure and any disclosure obligations of the Defence is evident in that the Prosecutor is duty-bound to provide full disclosure even if an accused elects to remain silent or does not raise a defence.” While the issue was raised in a different context, Defence submit that this jurisprudence confirms that the Prosecution’s obligation to disclose is unaffected by a possible testimony of Messrs. Banda and Jerbo or any other witness of the Defence as to the motives.

²¹ ICC-01/04-01/06-1433, para. 46.

²² ICC-01/04-01/06-1433, para. 50.

²³ *Katanga*, Trial Chamber II, Decision on the Application by the Defence for Germain Katanga for Disclosure of the Audio Records of Interview of Witness P-219, 30 August 2010, ICC-01/04-01/07-2309-Red-t-ENG, para. 4. The *Katanga* defence argued that audio records are material to the preparation of the cross-examination of that witness. See para. 1.

information on a situation which needs to be understood *before* setting a defence line.²⁴

15. As the Chambers of the ICC have recognised, the Defence is under no obligation to provide detailed explanation in order to obtain disclosure of materials relevant to its preparation. In fact, the Defence already submitted in their Request quite extensive arguments on the exonerating nature and the materiality to the defence preparation with regards to the three contested of the material sought. These arguments more than meet the threshold of showing materiality.

Whether an agreement pursuant to Rule 69 of the Rules relieves the Prosecution of its obligation to disclose evidence which the Defence consider may be exonerating or material for the defence preparation

16. The Response states that the material requested is irrelevant to the three contested issues in this case.²⁵ The Request explained how evidence of the Government of Sudan's consistent pattern of targeting civilians was relevant to each of the three contested issues in the case and the Response fails to deal directly with any of these arguments.

17. The Prosecution argue that by seeking evidence relevant to the on-going violent campaign by the Government of Sudan, the Defence are violating the spirit of the Rule 69 Agreement, pursuant to which the parties agreed to limit the trial to the three contested issues.²⁶ At no time did Messrs. Banda and Jerbo when entering into the Rule 69 Agreement waive their rights to present all evidence relevant to these issues or evidence relevant to mitigation. Messrs. Banda and Jerbo sought a trial on the three contested issues because in their view and the view of Counsel, AMIS was not a peacekeeping mission in

²⁴ ICC-01/04-01/06-1433, para. 82.

²⁵ Response, para. 3.

²⁶ Response, para. 9.

accordance with the UN Charter, as required by Statute, the attack on MGS Haskanita was not unlawful according to international law and Messrs. Banda and Jerbo were not aware of any facts that would indicate that the AMIS personnel were entitled to the protection given to civilians at the time of the attack on the base.

18. Messrs. Banda and Jerbo narrowed the issues for the trial precisely because they are not guilty of the charges and seek to focus the trial on the issues that prove their actions were not unlawful. As explained in the Request, the ongoing criminal campaign by the Government of Sudan against civilian populations in Darfur is relevant to all three contested issues. If there is a violation of “the spirit” of the Rule 69 Agreement, it is by the Prosecution which now seem to seek to use the agreement of Messrs. Banda and Jerbo to deny them fundamental fair trial rights by limiting their ability to present relevant facts to the Trial Chamber that in fact prove their innocence. While Messrs. Banda and Jerbo agreed to narrow the issues and lessen the Prosecution’s burden on facts not in dispute, their agreement never included a waiver of their right to present all relevant facts to the Trial Chamber on these contested issues that in fact prove their innocence.

The Prosecution’s arguments as to the elements of the crimes charged and to the guilt or innocence of Messrs. Banda and Jerbo

19. The Prosecution made ample submissions on elements of the crimes and on guilt or innocence, which the Defence argue are matters for trial. However, since these submissions were made in order to prevent the disclosure of Article 67(2) and Rule 77 material and contain misstatements and misrepresentation of the applicable law or facts, the Defence submit hereby their brief reply.

(a) *Disclosable material and the definition of peacekeeping mission*

20. When arguing the irrelevance of the material sought as to the contested issue of whether AMIS was a peacekeeping mission, the Prosecution submit their definition of the Statute's reference to a peacekeeping mission in accordance with the United Nations Charter.²⁷ The Prosecution argue that "[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."²⁸ In support, the Prosecution refer to the *Abu Garda* confirmation decision²⁹ and the *Sesay et al.* trial judgment at the Special Court for Sierra Leone ("SCSL").³⁰ However, in both cases the respective Chambers ruled that the consent required for a "peacekeeping mission" is in fact the "consent of the parties" to the conflict, not just the consent of the host state or government.³¹ This distinction is crucial in the present case, due to the lack of consent by the relevant warring parties at the time of the attack against MGS Haskanita. The Prosecution's misrepresentation of the applicable law for the purposes of opposing the disclosure of Article 67(2) and Rule 77 material is serious.

21. Furthermore, the Defence argue in this trial that the proposed definition of a peacekeeping mission is incomplete. Implicitly, the Response appears to suggest that it is irrelevant to the question of qualification of a mission as a peacekeeping mission whether or not there was peace, however tentative in existence, at the time of the attack or at any time during the existence of the AMIS mission.

²⁷ Response, paras. 18 and 19.

²⁸ Response, para. 18.

²⁹ Response, fn 21. Reference to ICC-02/05-02/09-243-Red, para 71.

³⁰ Response, fn 21. Reference to *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009, para. 225 ("RUF Trial Judgement").

³¹ See ICC-02/05-02/09-243-Red, para 71; and RUF Trial Judgement, para. 225.

22. The sole jurisprudence that exists regarding the definition of a “peacekeeping mission” is the RUF Trial Judgment at the SCSL.³² The RUF Trial Judgment discussed what is meant by a “peacekeeping mission” and refers to the United Nations own definition: “Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers.”³³
23. Thus, it is clear both from jurisprudence and common sense that in order for a “peacekeeping” mission to exist, there must be some peace agreement in place between the parties. The Prosecution’s own position from the *Al Bashir* Application is that at the very time of the attack that forms the basis of the charges in this case, there was no peace in Darfur, but rather an on-going violent campaign directed against civilians by the Government of Sudan, in fact, directed by the President of Sudan with genocidal intent. The Prosecution cannot avoid its responsibility to reconcile such disparate positions in two separate cases by denying the Defence the right to present relevant facts to the Trial Chamber. The materials sought are relevant for the Defence with regards to the contested issue whether AMIS was a peacekeeping mission.

(b) Disclosable material and the Prosecution’s case

24. The Prosecution state that they are conducting searches and plan to disclose the Defence evidence of intelligence activities of Government of Sudan personnel at any AMIS base,³⁴ thus, implicitly acknowledging that the intelligence activities of the Government of Sudan at the AMIS bases is material to the contested issues in this case. Yet, in the same Response the Prosecution claim that the evidence of the Government of Sudan’s criminal

³² The discussion of the meaning of “peacekeeping mission in accordance with the United Nations Charter” in the *Abu Garda* case was *obiter dictum*, as pointed out by the Judge Tarfusser in his separate opinion, since the Chamber had unanimously found that there was no evidence Mr. Abu Garda had participated in the attack. See ICC-02/05-02/09-243-Red, Separate Opinion of Judge Cuno Tarfusser, paras. 5 to 10.

³³ RUF Trial Judgement, para. 224 (emphasis added).

³⁴ According to paragraph 5 of the Response, the Prosecution are planning to disclose to the Defence all evidence of Government of Sudan personnel intelligence activities at AMIS bases.

campaign is only relevant to the lawfulness of attacks on government personnel, but irrelevant to the lawfulness of the attack on MGS Haskanita.³⁵

25. The Prosecution's concession that the campaign of violence is relevant to an attack on government personnel is important as the evidence in this case will show that the Government of Sudan's personnel were using the MGS Haskanita base for military intelligence purposes. They benefitted from AMIS equipment, the protection of AMIS military personnel and the very presence of the base in an area otherwise controlled by revolutionary movements and were themselves integrated into the AMIS mission. Accordingly, the Prosecution's attempt to separate the government's activities from those of the AMIS Haskanita MGS base must fail under the facts of this case which show that the two were integrated.³⁶

26. The disclosure of the material on the government's violent military campaign is necessary as the use of the base by the Government of Sudan in this very campaign affects the lawfulness of the attack and the issue as to whether AMIS personnel were protected as civilians under the laws of war.

³⁵ See Response, paras. 22 to 27. However, the Prosecution conceded that the Government of Sudan's criminal campaign targeting the civilian population in Darfur is relevant to the contested issues in this trial *if* it is shown that AMIS personnel or objects were making a contribution to the campaign. Response, para. 27.

³⁶ In this context it is worth mentioning that at the confirmation stage the Prosecution advanced the argument that the threat posed by the intelligence emanating from a Government of Sudan representative at the MGS Haskanita could not justify the scale of the 29 September 2007 attack. It appears that at that moment, the Prosecution did not challenge that the MGS Haskanita may have become a military objective, but questioned rather whether the attack was proportional. See ICC-02/05-03/09-112-Conf-AnxA, para. 91.

Relief Requested

Based on the above submissions, the Defence respectfully request that the Trial Chamber grant the Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor.

Respectfully Submitted,



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Dated this 30th Day of November 2011
At The Hague, The Netherlands

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