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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

PUBLIC

Prosecution's Response to Defence Application for Leave to Appeal the "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor"

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I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("The Defence") is seeking leave to appeal ("Defence Application") Trial Chamber IV's "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor".
2. The Prosecution submits that the Defence Application should be rejected. The Issue raised in the Defence Application is not an appealable issue within the terms of Article 82(1)(d). In addition, it does not meet the criteria for leave to appeal under that provision.

II. Procedural Background

3. On 20 October 2011, the Defence submitted its "Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor"¹ ("Defence Request for Disclosure"). The Defence requested Trial Chamber IV ("Trial Chamber") to order the Prosecution to disclose documents ("Al Bashir Material") that were confidentially submitted by the Prosecution in support of its application for a warrant of arrest against Omar Hassan Ahmad Al Bashir ("Al Bashir Application") in the situation in Darfur.
4. The Defence excluded from this request the statements of victims and agreed that all names and identifying information of other witnesses who have expressed security concerns should be redacted by the Prosecution before being given to the Defence.²

¹ ICC-02/05-03/09-235.

² ICC-02/05-03/09-235, para.4.

5. The Defence stated that the Al Bashir Material was relevant (i) to the character and *mens rea* of the accused persons as exonerating or mitigating evidence, (ii) to whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations, (iii) to whether the attack on MGS Haskanita on 29 September 2007 was unlawful and (iv) to whether the accused persons were aware of the factual circumstances establishing the unlawful nature of the attack.³

6. On 10 November 2011, the Prosecution filed its response opposing the Defence Request for Disclosure.⁴ In so opposing, the Prosecution stated that the Al Bashir Material, taken as a whole, was not relevant to the issues cited by the Defence. The Prosecution noted that it had reviewed all material in its possession (including the Al Bashir Material) and disclosed what is relevant.⁵ The Prosecution noted that even if information about the “context of the Darfur conflict” is material in some way to the preparation of the Defence, a point not conceded by the Prosecution, such information has either been disclosed already⁶ or it is widely available in the public domain.⁷ On 30 November 2011, the Defence filed its reply to the Prosecution Response.⁸

7. On 23 January 2013, the Trial Chamber issued its “Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”⁹ (“Impugned Decision”) rejecting the Defence Request for Disclosure.

³ ICC-02/05-03/09-235.

⁴ ICC-02/05-03/09-251.

⁵ ICC-02/05-03/09-251 para.11.

⁶ ICC-02/05-03/09-251 para.5, noting in footnote 5 that in the List of Evidence provided to the Defence with the Document Containing the Charges, 69 items were disclosed relating to the background of the Darfur conflict.

⁷ ICC-02/05-03/09-251 para.5, referring in footnote 5 and 35 to some of the various sources available in the public domain.

⁸ ICC-02/05-03/09-264.

⁹ ICC-02/05-03/09-443.

8. It stated that “the prosecution’s obligations under rule 77 must be interpreted broadly” and is also “not linked to ‘any requirement that an accused provide advance revelation of his or her defences in order to receive full disclosure’.”¹⁰ But it also explained that there is no “unfettered” right to access to items under rule 77, that the Prosecution has the right under the rule to exercise judgment, and that in instances of dispute the Chamber will resolve whether the defence makes out a showing materiality within the meaning of the rule sufficient to require inspection.¹¹ Turning to the specifics of this request, the Trial Chamber then resolved the dispute in favour of the Prosecution, holding that “...a general right by the defence to inspection and disclosure of all material submitted in the Al Bashir case would be disproportionate”.¹² It noted the information already disclosed to the Defence¹³ and Prosecution’s assertion that there is ample material already in the public domain available to the defence which provides evidence of the context in which the alleged attack in Darfur occurred.¹⁴ The Chamber consequently rejected the Defence Request.¹⁵
9. The Trial Chamber recommended that the parties continue consultations to facilitate inspection of material for the preparation of the defence and to explore the possibility to agree on facts related to the alleged campaign of violence in Darfur. The Chamber also encouraged the Prosecution to consider disclosing to the Defence the Al Bashir Material to the extent it is possible to do so while taking into consideration the Prosecution’s concerns about the disclosure of sensitive information.¹⁶

¹⁰ ICC-02/05-03/09-443, para.14.

¹¹ ICC-02/05-03/09-443, para.15.

¹² ICC-02/05-03/09-443, para.24.

¹³ ICC-02/05-03/09-443, para.24.

¹⁴ ICC-02/05-03/09-443, para.25.

¹⁵ ICC-02/05-03/09-443, para.27.

¹⁶ ICC-02/05-03/09-443, para.26. The Prosecution is currently considering these additional steps.

10. On 29 January 2013 the Defence submitted an application seeking leave to appeal the Impugned Decision (“Defence Application”).¹⁷ The Defence seeks leave to appeal the following issue:

Whether the Trial Chamber erred in its application of Rule 77 when evaluating the [Defence Disclosure] Request by restricting the scope of information which is material to the preparation of the defence to information which the Trial Chamber considers at this time would be directly relevant to the resolution of the contested issues at trial as opposed to material relevant to the preparation of the Defence for trial, and by interpreting the scope of the contested issues too narrowly.¹⁸
 (“Issue”)

III. Submissions

A. The Issue raised by the Defence is not appealable within the terms of Article 82(1)(d)

11. The Issue raised by the Defence contains two separate sub-issues:

i. Sub-Issue 1

12. Sub-Issue 1 is whether the Trial Chamber erred in its application of Rule 77 when evaluating the Defence Disclosure Request by allegedly restricting the scope of information which is material to the preparation of the defence to information which the Trial Chamber considers at this time would be directly relevant to the resolution of the contested issues at trial.

¹⁷ ICC-02/05-03/09-447.

¹⁸ ICC-02/05-03/09-447, para.3.

13. The Defence submits that Sub-Issue 1 concerns the proper interpretation of the term “material to the preparation of the defence” in Rule 77. It notes the Chamber’s references to the contested issues in the case and claims that the Impugned Decision erroneously assessed materiality and whether the requested evidence should be disclosed pursuant to Rule 77 “...by reference to ... the contested issues *alone...*”.¹⁹ The Defence submits that if leave to appeal is granted, it will argue before the Appeals Chamber that evidence of relevance to any *prima facie* reasonable defence theory should be disclosed pursuant to this Rule.²⁰

14. This is a mischaracterization of the Impugned Decision. The Trial Chamber did not limit its analysis to the three contested issues in this case, ignoring the possibly broader defence theory in the manner alleged by the Defence, nor did it reject the Defence position that the rule 77 materiality trigger applies to a reasonable defence theory. Rather, it found that the Defence in this instance failed to make a sufficient materiality showing in its application. The Issue raised by the Defence accordingly does not accurately reflect the Chamber’s decision.

15. For example, the Chamber stated that the “significance of a campaign of violence to the contested issues in the present case, if any, is very limited and indirect *even in developing the lines of defence identified in the present Request*”.²¹ When dealing with evidence regarding alleged violations of its peace agreements by the Sudanese Government, the Chamber also stated “in this particular instance, the defence has failed to make a sufficient showing of materiality... and *in particular*, it has not demonstrated the link between the

¹⁹ ICC-02/05-03/09-447, para.23 [emphasis added].

²⁰ ICC-02/05-03/09-447, para.23.

²¹ ICC-02/05-03/09-443, para.22 [emphasis added].

contested issue and the items of evidence [or] demonstrated how the alleged violations of peace agreements by the Government of Sudan could be of significance to any of the three factors [previously] identified by the Pre-Trial Chamber.”²²

16. Indeed, when the Chamber referred to the three contested issues, it was merely following the principal line of argument used by the Defence itself – i.e. the relevance of the Al Bashir Material to the three contested issues.²³ While the Defence clearly disagrees with the Trial Chamber’s determination, mere disagreements do not suffice to demonstrate that the issue is appealable under article 82(1)(d).

17. Hence, since the Chamber has not limited its analysis to the contested issues *alone* when assessing materiality and whether evidence should be disclosed, Sub-Issue 1 does not arise from the Impugned Decision.²⁴

ii. Sub-Issue 2

18. Sub-Issue 2 is whether the Trial Chamber erred in its application of Rule 77 when evaluating the Defence Disclosure Request by interpreting the scope of the contested issues too narrowly.

19. The Defence submits that Sub-Issue 2 concerns the interpretation / scope of the contested issues. It claims that this emanates from the Impugned Decision, because the Chamber held that the Al Bashir Material was not sufficiently linked, and thus irrelevant, to the contested issues.

²² ICC-02/05-03/09-443, para.18 [emphasis added].

²³ See for example ICC-02/05-03/09-235, paras.3, 13, 15.

²⁴ Where the issue stems from a misrepresentation of the actual terms of the Impugned Decision, it cannot be considered an appealable issue. See for example, ICC-01/05-01/08-75 para.31.

20. Regarding the first contested issue in this case (whether the attack on MGS Hasakanita on 29 September 2007 was unlawful), the Defence claims that the Chamber ruled that a consideration of this contested issue may not include the alleged existence of a violence campaign perpetrated by the Government of Sudan against the civilian population in Haskanita and Darfur generally.²⁵

21. Again, this is a mischaracterization of the Impugned Decision. The text relied on by the Defence is not an actual finding of the Trial Chamber in the Impugned Decision, but an *excerpt* that the Chamber quoted from its Decision on the Defence request for a temporary stay of proceedings. The relevant part of the quotation reads:

*“As a general proposition ... the alleged existence of a violence campaign perpetrated by the GoS against the civilian population in Haskanita and Darfur generally... do not readily appear to the Chamber to fall within the scope of the issues that the Chamber will review during the trial. Their relevance in the case must depend upon a clearly articulated connection to what the parties had delineated in their agreement as to the facts and the contested issues”.*²⁶

22. Moreover, immediately after quoting this text, the Trial Chamber qualified its position by stating that:

“Certainly, this determination of "relevance" was made in the context of a request for stay of proceedings. As such, it was informed by the strict standards and thresholds required by this exceptional remedy. The Chamber takes this into consideration in its analysis on whether such evidence

²⁵ ICC-02/05-03/09-447, para.25.

²⁶ ICC-02/05-03/09-443, para.20, quoting ICC-02/05-03/09-410, para.106. [emphasis added].

shall be subject to inspection under Rule 77 of the Rules.” [emphasis added]²⁷

23. Consequently, the Trial Chamber did not state conclusively that a consideration of the first contested issue may not include the alleged existence of a violence campaign perpetrated by the Government of Sudan.

24. The Defence further claims that the Trial Chamber approached the third contested issue in this case (whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations), not on the basis that all elements of the contested issue are the subject of challenge but on the basis that the definition of a peacekeeping mission pursuant to Article 8(e)(iii) of the Statute is limited to the definition used by the Pre-Trial Chamber in the Confirmation Decision.²⁸

25. This is too a mischaracterization of the findings of the Trial Chamber. The Trial Chamber did not limit itself to examining *only* the factors considered by the Pre-Trial Chamber when defining the meaning of “a peacekeeping mission in accordance with the Charter of the United Nations”. The Trial Chamber merely stated that it “...takes note of the factors which the Pre-Trial Chamber considered...”²⁹ The fact that the Trial Chamber did not limit its analysis in this way is indicated by its observation, after analysing the factors cited by the Pre-Trial Chamber, that “[n]or does the defence identify *any other factors* which in its view are of relevance to the determination of whether AMIS was a peacekeeping mission in accordance with the UN Charter”.³⁰

²⁷ ICC-02/05-03/09-443, para.21.

²⁸ ICC-02/05-03/09-447, para.26.

²⁹ ICC-02/05-03/09-443, para.17.

³⁰ ICC-02/05-03/09-443, para.18.

26. In light of the mischaracterizations described above, Sub-Issue 2 does not arise from the Impugned Decision.³¹ And as with Sub-Issue 1, ultimately the Defence disagrees with the conclusions of the Trial Chamber, but mere disagreements with the Chamber's decision are not sufficient to justify appeal.

27. If the Trial Chamber finds that Sub-Issue 1 and Sub-Issue 2 do arise from the Impugned Decision and are appealable issues (and not mere disagreements with the Chamber's resolution), then the Prosecution submits in the alternative that the Defence has failed to prove that they meet the requirements for leave to appeal under Article 82(1)(d).

B. The Issue does not affect the fair and expeditious conduct of the proceedings

i. Fair Conduct of Proceedings

28. The Defence argues that issues about the proper scope of Prosecution disclosure, whether under Article 67(2) or Rule 77, are closely related to the right to adequate time and facilities for the preparation for the Defence.³² According to the Defence, since the proposed issue concerns the proper interpretation of Rule 77 and, therefore, the scope of the Prosecution's disclosure obligations, it significantly affects the fairness of proceedings.³³

29. This general argument is insufficient to demonstrate that this specific Issue significantly affects the fair conduct of proceedings. The mere fact that an issue relates to the scope of the Prosecution's disclosure obligations does not

³¹ See footnote 24, *supra*.

³² ICC-02/05-03/09-447, para.29.

³³ ICC-02/05-03/09-447, para.29.

mean that it significantly affects the fair and expeditious conduct of the proceedings.³⁴ Neither does the fact that an issue generally relates to the modalities of applying article 67(2) or Rule 77.³⁵ Rather, the Defence must demonstrate that the specific Issue arising from the Decision affects the fairness of the proceedings in the circumstances of this case.

30. In this particular case, the concerns regarding the fairness raised by the Defence are unsubstantiated.

31. The Defence claims that, if incorrect, the Impugned Decision would prevent the Defence from using a substantial amount of relevant material for the purposes of investigations and also from admitting such material into evidence which would significantly affect the fairness of proceedings.³⁶

32. This argument is incorrect. As noted above, evidence that is analogous to the Al Bashir Material has either been disclosed already³⁷ or it is widely available in the public domain.³⁸ Should the Defence wish to lead evidence analogous to the Al Bashir Materials during the trial, or use it for investigations, it can use evidence already disclosed to it, or obtain analogous evidence from the public domain. The Impugned Decision does not prevent the Defence from

³⁴ See for example ICC-01/04-01/10-116 paras.18-25, ICC-01/05-01/08-75 para 39. The Defence relies on a finding of Pre-Trial Chamber (ICC-01/04-01/06-166) to argue (ICC-02/05-03/09-447, para.29) that issues relating to disclosure and attempts by the Prosecution to restrict disclosure directly relate to the fairness of proceedings. However, the issue in that case was the non-disclosure of the identity of the witnesses on which the Prosecution intends to rely at a confirmation hearing – i.e. a situation that is clearly different from the current circumstances.

³⁵ ICC-01/05-01/08-75 paras.47-58.

³⁶ ICC-02/05-03/09-447, para.30.

³⁷ ICC-02/05-03/09-251 para.5, noting in footnote 5 that in the List of Evidence provided to the Defence with the Document Containing the Charges, 69 items were disclosed relating to the background of the Darfur conflict.

³⁸ ICC-02/05-03/09-251 para.5, referring in footnotes 5 and 35 to some of the various sources available in the public domain.

doing so, and hence does not significantly affect the fair conduct of proceedings.

ii. Expeditious conduct of Proceedings

33. The Defence claims that if the Impugned Decision is wrong and the Al Bashir Material is relevant to the contested issues, then the Defence will have to investigate these issues itself from the beginning – delaying the start of the trial.³⁹ As noted above, material relevant to this issue has already been disclosed to the Defence by the Prosecution and is also easily accessible in the public domain. Hence, if the Defence wishes to lead evidence of this nature, this will not significantly affect the expeditious conduct of the proceedings.

34. The Defence also claims that if evidence of the type identified in the Defence Request for Disclosure is not relevant to the contested issues, then this would impact on the scope of the trial and on what types of evidence are likely to be considered relevant, probative and admissible. According to the Defence, this will in turn impact defence case strategy.⁴⁰

35. This argument is based on a misreading of the Trial Chamber's decision. The Chamber has not decided the scope of the trial, nor the types of evidence that will be considered relevant, probative and admissible. The principal finding of the Trial Chamber in the Impugned Decision is that "...a *general right* by the defence to inspection and disclosure of *all material* submitted in the Al Bashir case would be disproportionate"⁴¹ and that "[a]t *this stage*, it is sufficient that the prosecution ...has reviewed the Al Bashir Material... and it has disclosed all potentially exculpatory evidence in its possession or information material

³⁹ ICC-02/05-03/09-447, para.31.

⁴⁰ ICC-02/05-03/09-447, para.32.

⁴¹ ICC-02/05-03/09-443, para.24 [emphasis added].

to the preparation of the defence”.⁴² It is clear from the general nature of this finding that the Trial Chamber has not made a definitive ruling on the relevance or admissibility of any particular item of evidence for the purposes of the trial.

36. Since the Impugned Decision has not limited the scope of the defence nor the types of evidence that will be considered relevant, probative and admissible, it will also not have an impact on Defence case strategy. For example, if the Defence had been planning to lead an item of evidence analogous to the Al Bashir Material during the trial, it can still seek to do so, and can brief the Trial Chamber on the relevance / admissibility of that item during the trial.

C. The Issue does not significantly affect the outcome of the trial

37. The Defence argues that the Issue would affect the outcome of the case because it has a bearing on the scope of the facts to be discussed and the type of evidence which will be used to substantiate them at trial. According to the Defence, the Impugned Decision signals that certain evidence will not be put before the Court, and hence not available for the Court to consider as part of its truth seeking functions.⁴³

38. Again, as noted above, this argument is based on a mischaracterization of the Impugned Decision. It did not decide the scope of the trial, nor the types of evidence that will be led and admitted during trial. The principal finding of the Trial Chamber in the Impugned Decision is merely that a general right by the Defence to inspection and disclosure of *all* material submitted in the Al Bashir case would be disproportionate.

⁴² ICC-02/05-03/09-443, para.24.

⁴³ ICC-02/05-03/09-447, para.33-34.

39. Hence, contrary to the claims of the Defence, the Impugned Decision will not necessarily exclude relevant evidence at trial. For example, should the Defence wish to lead an item of evidence analogous to the Al Bashir Materials, it can use the evidence already disclosed to it, or obtain evidence that is readily available from the public domain and lead the same during the trial, or request disclosure again from the Prosecution, based on a better articulated argument of materiality at that future point.

D. An immediate resolution by the Appeals Chamber of the Issue will not materially advance the proceedings

40. The Defence argues that if leave to appeal is denied, it will have to start investigating evidence, which would otherwise have been covered by the Prosecution's disclosure.⁴⁴ As already noted in the context of the expeditious conduct of the proceedings, this is not a persuasive argument. As noted by the Chamber, there is sufficient material already disclosed to the Defence and in the public domain available to the Defence to provide evidence of the context in which the alleged attack in Darfur occurred. Should the Defence wish to lead evidence of this nature, lengthy investigations will not be necessary.

41. The Defence also claims that if these documents are disclosed and the Defence relies upon them, the Prosecution "...can hardly allege that they are unreliable since the Prosecution themselves have previously relied on them".⁴⁵ As a result, the parties "...may be able to enter into additional agreed

⁴⁴ ICC-02/05-03/09-447, para.36.

⁴⁵ ICC-02/05-03/09-447, para.37.

facts, which would materially advance the proceedings by further narrowing the scope of the trial”.⁴⁶

42. This is a purely speculative argument. The fact that the Prosecution relied upon certain evidence in a different case, to establish different facts, and to meet a much lower evidentiary threshold does not make such evidence relevant to the case against Mr. Banda and Mr. Jerbo. Nor does it necessarily have an impact on whether the Prosecution will enter into an agreement as to facts.

43. The Defence claims that the Issue concerns the relevance and admissibility of a substantial body of material. The Defence submits that immediate resolution of this issue will define the proper scope of this trial and hence materially advance proceedings.⁴⁷

44. This argument is not persuasive. As noted above, the Chamber has not made a definitive ruling on the scope of the trial. The Chamber has only held that that a general right by the Defence to inspection/disclosure of all evidence submitted in support of the Al Bashir arrest warrant would be disproportionate. The Defence is still free to lead any evidence it wishes during the trial, and argue the relevance and admissibility of such evidence at that time. Hence, an immediate resolution of the Issue is not required at the moment. Nor will it materially advance the proceedings.

⁴⁶ ICC-02/05-03/09-447, para.37.

⁴⁷ ICC-02/05-03/09-447, para.38.

IV. Relief sought

45. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Application.



Fatou Bensouda
Prosecutor

Dated this 4th day of February 2013
At The Hague, The Netherlands