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No.: **ICC-02/05-03/09 OA4**

Date: **15 April 2013**

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Ekaterina Trendafilova

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 the Defence's Appeal against the "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor"

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INTRODUCTION

1. The Defence for Mr Banda and Mr Jerbo (“Appellants”) appealed the Trial Chamber’s decision that rejected its request that the Prosecution disclose wholesale, pursuant to Rule 77, documents that the Prosecution confidentially submitted in support of its application for a warrant of arrest against *Al Bashir* (“Defence Appeal”).
2. The Prosecution requests that the Appeals Chamber reject the Defence Appeal. The Trial Chamber applied the correct legal standard under Rule 77 when assessing whether the requested information was material for the preparation of the defence. The Trial Chamber also did not err when ruling that the requested information was not sufficiently relevant to the live issues in this case and therefore also not material for the preparation of the defence within the terms of Rule 77. The Trial Chamber further did not err by referring in its Decision to considerations of security and expeditiousness, as they do not constitute the basis for the Trial Chamber’s rejection of the Appellants’ request for disclosure.

PROCEDURAL BACKGROUND

3. On 16 May 2011, the Appellants and the Prosecutor submitted to Trial Chamber IV (“Chamber” or “Trial Chamber”) a list of facts agreed upon pursuant to Rule 69 (“Agreed Facts”)¹ and informed the Chamber that that they had further agreed to contest only the following issues at trial (“Contested Issues”):²
 - i. whether the attack on the MGS Haskanita on 29 September 2007 was unlawful;

¹ ICC-02/05-03/09-148-AnxA-Red.

² ICC-02/05-03/09-148, para.3.

- ii. if the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and
 - iii. whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.
4. On 20 October 2011, the Appellants filed the “Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor” (“Defence Request for Disclosure”).³ The Appellants sought, pursuant to Rule 77, the wholesale disclosure of documents that were confidentially submitted by the Prosecution in support of its application for a warrant of arrest against *Omar Hassan Ahmad Al Bashir*, other than statements of victims (“Requested Material”).⁴ The Appellants submitted that documents relating to the existence of a campaign of violence of the Government of Sudan (“GoS”) directed against the civilian population in Darfur are material to the defence preparation for the trial on the three Contested Issues.⁵ The Appellants’ request for disclosure extended to approximately 375 documents (including witness statements), which exceed a total of 5,000 pages.
5. On 10 November 2012, the Prosecution responded to the Defence Request for Disclosure and opposed it (“Prosecution Response”).⁶ The Prosecution submitted that it had reviewed *all* the material in its possession and control, including the Requested Material,⁷ and that it had disclosed to the Appellants all information from the Requested Material that is relevant to the Contested Issues.⁸ In addition, the Prosecution has disclosed or was in the process of disclosing other material in

³ ICC-02/05-03/09-235.

⁴ ICC-02/05-235, paras.1, 4.

⁵ ICC-02/05-03/09-235, para.3.

⁶ ICC-02/05-03/09-251.

⁷ ICC-02/05-03/09-251, para.11.

⁸ The Prosecution had already disclosed 17 documents from the Requested Material to the Appellant. Two documents were disclosed pursuant to Article 67(2) and 15 documents were disclosed pursuant to Rule 76. One of these documents was later re-disclosed pursuant to Rule 77.

its possession or control that is relevant to the Contested Issues.⁹ In fact, the Prosecution had disclosed approximately 136 items of evidence pursuant to Rule 77. The Prosecution also submitted that the GoS campaign of violence in Darfur is not relevant to the Contested Issues, and therefore information that relates to that issue is not disclosable under Rule 77. In light of the above, the Prosecution submitted that the Defence Request for Disclosure was overly broad and failed to show the relevance of the Requested Material to the Contested Issues.¹⁰

6. On 23 January 2013, the Trial Chamber issued its decision, rejecting the Defence Request for Disclosure (“Decision”).¹¹
7. On 29 January 2013, the Appellants filed an application for leave to appeal the Decision (“Request for Leave”),¹² which the Chamber partly granted on 21 March 2013 (“Leave Decision”).¹³ The Chamber certified the following issue for appeal: “whether the Trial Chamber erred in its application of Rule 77 by (a) interpreting the scope of the Contested Issues too narrowly for the purposes of the Defence Request for Disclosure and/or (b) considering the Defence Request for Disclosure disproportionate in the light of the expeditiousness and security concerns”.¹⁴
8. On 2 April 2013, the Appellants filed its “Document in Support of Appeal against Trial Chamber IV’s ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’” (“Appeal Brief”).¹⁵

⁹ ICC-02/05-03/09-251, para.5, 11-15, 27. The Chamber provided the Prosecution with a deadline of 2 May 2013 to disclose all relevant material pursuant to Rules 76 and 77 and Article 67(2) (ICC-02/05-03/09-455, paras.20, 25).

¹⁰ Prosecution Response, para.16; see also paras.17-34.

¹¹ ICC-02/05-03/09-443.

¹² ICC-02/05-03/09-447.

¹³ ICC-02/05-03/09-457.

¹⁴ Leave Decision, para.21.

¹⁵ ICC-02/05-03/09-459.

ARGUMENTS

I. The Trial Chamber did not err in its interpretation and application of Rule 77

9. The Appellants argue that the Chamber erred in its application of Rule 77 by interpreting the scope of the contested issue too narrowly for the purposes of the Defence Request for Disclosure. In support of its submission, the Appellants raise two sets of arguments, namely a) that the Chamber erred in its interpretation of Rule 77;¹⁶ and b) that the Chamber erred in determining whether the material requested under Rule 77 would constitute relevant evidence.¹⁷

A) The interpretation of Rule 77

(i) The scope of the term “material”

10. Contrary to the contention of the Appellants, the Trial Chamber did not take “too narrow a view of whether the requested evidence was material to the preparation of the defence on the contested issues”.¹⁸ The Appeals Chamber has held that information is disclosable under Rule 77 as being “material to the preparation to the defence” only if it is “*relevant* for the preparation of the defence”.¹⁹ Accordingly, the Trial Chamber was correct when assessing materiality in light of a “link between the contested issues and the items of evidence sought to be disclosed”,²⁰ as well as the question whether the information sought could be of “significance”²¹ or “relevance”²² to the factual issues in the case.

11. It is true that the Appeals Chamber ruled that the term “‘material to the preparation of the defence’ must be interpreted broadly”,²³ and clarified that this includes “objects which, while not directly linked to exonerating or incriminating

¹⁶ Appeal Brief, paras.11-19.

¹⁷ Appeal Brief, paras.20-30.

¹⁸ Appeal Brief, para.15.

¹⁹ ICC-01/04-01/06-1433 OA11, para.77 (emphasis added). The Appeals Chamber has recently confirmed this ruling: see ICC-01/04-01/06-3017 A5 A6, para.10.

²⁰ Decision, para.18.

²¹ Decision, paras.18, 22.

²² Decision, paras.18, 21.

²³ ICC-01/04-01/06-1433 OA11, para.78.

evidence, may otherwise be material to the preparation of the defence”.²⁴ The Trial Chamber largely reiterated these findings of the Appeals Chamber in its Decision.²⁵

12. However, a broad interpretation of “materiality” does not mean that there are no limits to the concept. To the contrary, the Appeals Chamber itself required a concrete link between the information sought under Rule 77 and the issues in the relevant case. In its reasoning, the Appeals Chamber endorsed a decision from the ICTY in *Delalić et al.*, according to which the “requested evidence must be ‘significantly helpful to an *understanding* of important inculpatory or exculpatory evidence’”²⁶ That ICTY decision further quoted U.S. case law, which held that for information to be material to the preparation of the defence, “more than [an] abstract logical relationship to the issue” must be established.²⁷ Information is “material” if there “is a strong indication that [...] it will ‘play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.’”²⁸ Reliance on this case law is particularly appropriate in this context, as the wording of Rule 77 and the related rule applicable at the ICTY²⁹ are based on Rule 16(a)(1)(c) of the United States’ Federal Rules of Criminal Procedure.³⁰ Both Trial Chamber I of this Court³¹ and a

²⁴ ICC-01/04-01/06-1433 OA11, para.77 ; see also ICC-01/04-01/06-2624, para.16; ICC-01/04-01/06-3017 A5 A6, para.10.

²⁵ Decision, paras.12, 14.

²⁶ ICC-01/04-01/06-1433 OA11, para.81 (emphasis in the Appeals Chamber’s judgment), relying on *Prosecutor v. Delalic et al.*, Decision on the Motion by the Accused Zejnil Delalic for the Disclosure of Evidence, 26 September 1996 (“*Delalic* Decision”), para.7.

²⁷ See, e.g. *United States v. Ross*, 511 F.2d 757, 762 (U.S. Ct. App. 5th Cir.), cert. denied 423 U.S. 836 (U.S. Supreme Court 1975).

²⁸ *United States v. Jackson*, 850 F. Supp. 1481, 1503 (U.S. Dist. Ct. D. Kan. 1994), quoting *United States v. Lloyd*, 992 F.2d 348, 351 (U.S. Ct. App. D.C. Cir. 1993).

²⁹ ICTY, Rule 66(B) of the Rules of Procedure and Evidence.

³⁰ Rule 16(a)(1)(c) of the United States’ Federal Rules of Criminal Procedure provides as follows: “Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant’s defence or are intended for use by the government as evidence in chief at the trial, or were obtained from or belonged to the defendant.”

³¹ ICC-01/04-01/06-2624, para.17.

Trial Chamber of the Special Court for Sierra Leone³² have also endorsed the materiality test expressed in the *Delalic* Decision.

13. Based on the above interpretation of the materiality test, the Trial Chamber did not err when it rejected the Defence Request for Disclosure because the Requested Material was “if at all, only remotely linked to the contested issues”.³³
14. The Appellants further argue that the Trial Chamber erred in law by restricting the scope of information which is material to the preparation of the defence. According to the Appellants, the Chamber failed to take into consideration that the Requested Material could contain contextual evidence,³⁴ evidence relevant to the character and motivation of Mr. Banda and Mr. Jerbo,³⁵ or evidence that could relate to mitigation³⁶ or to facts other than the Contested Issues.³⁷ The Prosecution submits that the Trial Chamber did not err in law by concluding that the factual issues referred to above were not significantly helpful to an understanding of the three Contested Issues.³⁸ If the Appellants were right, then all information that broadly falls within any of the above categories would, as a matter of law, need to be considered as information that is material for the preparation of the defence. This interpretation is contrary to the Appeals Chamber’s materiality test set out above, according to which information must, at a minimum be “significantly helpful to an understanding of important inculpatory or exculpatory evidence”.³⁹ General contextual information, information relevant to the character and motivation of the Appellants or other information that relates to mitigation does not necessarily meet this threshold. The Prosecution does not contend that information falling into these categories can never be material to the preparation

³² *Prosecutor v. Sesay et al.*, Sesay – Decision on Defence Motion for Disclosure Pursuant to Rules 66 and 68 of the Rules, SCSL-04-15-T, 9 July 2004, para.26, footnote 23.

³³ Decision, para.24.

³⁴ Defence Appeal, para.16.

³⁵ Defence Appeal, para.17.

³⁶ Defence Appeal, para.18.

³⁷ Defence Appeal, para.19.

³⁸ Whether the Trial Chamber in this case erred in fact by excluding these matters from the scope of Rule 77 will be discussed below and must be assessed under a different standard of review.

³⁹ ICC-01/04-01/06-1433 OA11, para.81.

of the defence. However, that determination must be made on a case-by-case basis applying the materiality test described above and it must be based on more than a bare assertion of materiality. In addition, the Prosecution submits that the question of whether information that relates to facts other than the Contested Issues is disclosable⁴⁰ is not properly before the Appeals Chamber, since it goes beyond the scope of the issue for which the Trial Chamber authorized leave to appeal - namely, whether the Trial Chamber “interpret[ed] the scope of the Contested Issues to narrowly”.⁴¹ As a result, the arguments advanced in relation to this question must be disregarded.

15. The Appellants further attempt to draw an analogy between the case at hand and the facts in the *Lubanga* case.⁴² This comparison fails, as in the *Lubanga* case, the Appeals Chamber found an error of law because the Trial Chamber had limited the materiality test to information that was “directly linked to exonerating or incriminating evidence”, and had excluded information that was “otherwise [...] material to the preparation of the defence”⁴³ (i.e. information that was “significantly helpful to an *understanding* of important inculpatory or exculpatory evidence”).⁴⁴ In this case however, nothing in the Decision indicates that the Chamber took such a narrow approach or deviated from the materiality test endorsed by the Appeals Chamber.

16. The Trial Chamber also did not rule on materiality by prejudging the validity of the Appellants’ arguments.⁴⁵ It merely decided whether, *prima facie*, the Requested Material is relevant to any of the live issues in this case. In so doing, the Chamber had a duty to entertain the Appellants’ arguments to the extent that they are

⁴⁰ See in particular Appeal Brief, paras.18-19.

⁴¹ The Trial Chamber explicitly restricted the scope of the issue for which it authorized leave to appeal. It excluded from that issue the question whether the Trial Chamber erred in its application of Rule 77 when evaluating the Defence 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” (See Request for Leave, paras.3 and 20; Leave Decision, para.21).

⁴² Appeal Brief, paras.12, 16.

⁴³ ICC-01/04-01/06-1433, para.77

⁴⁴ ICC-01/04-01/06-1433, para.81.

⁴⁵ Defence Appeal, para.14.

relevant to determine materiality. There is no rule that requires that all arguments by the party seeking disclosure must be accepted at face value. It is legitimate for the Chamber to reject arguments that are wholly unsupported or unconvincing, especially bearing in mind the Appellants' burden to establish materiality.⁴⁶

17. The Appellants further argue that the Trial Chamber applied a threshold higher than *prima facie* to determine relevance.⁴⁷ This argument is unsupported. While the Trial Chamber correctly required the Appellants to demonstrate that the Requested Material is relevant to the Contested Issues, nothing in the Decision suggests that the Trial Chamber adopted an unduly high standard to establish that link.

(ii) *The right to remain silent*

18. In addition, the approach taken by the Trial Chamber does not violate the Appellants' right to remain silent as argued by the Appellants.⁴⁸ Conscious of this right, the Trial Chamber found that the Prosecution's duty under Rule 77 is not linked to "any requirement that an accused provide advance revelation of his or her defences".⁴⁹ However, in a case like the present one where there is disagreement between the Prosecution and the Appellants on whether certain information is disclosable, the Trial Chamber correctly placed the burden on the Appellants to make "a sufficient showing of materiality, within the meaning of Rule 77".⁵⁰ The Appellant can freely decide how best to meet this burden, but they cannot legitimately claim to be exempted from it because of the right to remain silent. Trial Chamber I has previously ruled that "under the Rome Statute framework it is envisaged that an accused's right to a fair trial is not necessarily

⁴⁶ See para.18 below.

⁴⁷ Defence Appeal, paras.20-21.

⁴⁸ Appeal Brief, para.21.

⁴⁹ Decision, para.14. The Trial Chamber followed the submission of the Appellant (see ICC-02/05-03/09-264, para.14).

⁵⁰ Decision, para.15; Defence Appeal, para.21. On the legal basis for the defence burden to establish, *prima facie*, materiality, see ICC-01/04-01/06-1433 OA11, para.82; ICC-01/05-01/08-632, paras.21, 26; *Prosecutor v. Karadzic*, IT-95-5/18-T, Decision on Motion to Compel Inspection of Items Material to the Sarajevo Defence Case, 8 February 2012, para. 8 and authorities in footnote 19.

compromised by the imposition on him or her of an obligation to reveal in advance and in appropriate circumstances, details of the defences and the evidence to be presented, and the issues that are to arise”.⁵¹ It is appropriate to require the defence to reveal its lines of defence for instance when the accused decides to advance a positive case (thereby waiving his right to silence),⁵² or when the defence examines a witness who may have relevant information on a specific topic.⁵³ Similarly, it is appropriate to require the defence, when asking disclosure under Rule 77 to reveal sufficient information if that is necessary to make a showing of materiality. The defence has no duty to disclose its lines of defence to that end. However, if it decides not to do so, the defence may fail to meet its burden to show materiality. The Chamber and the Prosecution are not be required to accept an unsubstantiated claim by the defence that information is relevant; nor must they guess what the lines of defence or the basis for the defence’s silence might be.

19. To be clear, the burden under Rule 77 is on the Prosecution and not on the Appellants and the Appellants’ entitlement under Rule 77 is generally not linked to revelation of specific lines of defence.⁵⁴ However, in order for the Prosecution to meet its disclosure burden and for the Chamber to exercise its control function, it has to be reasonably foreseeable to the Prosecution and to the Chamber that certain information is “material” to the preparation of the defence. If it is not so due to the limited information available to the Prosecution and the Chamber, then the Appellants, who are holding back lines of defence, cannot claim that the Prosecution has violated its disclosure obligation. The Appeals Chamber has ruled that “the Prosecutor’s ordinarily unfettered duty to disclose must necessarily be based, *inter alia*, on the Prosecutor’s understanding of the case as a

⁵¹ ICC-01/04-01/06-1235-Corr-Anx1, para.31.

⁵² ICC-01/04-01/06-1433 OA11, para.44; see also ICC-01/04-01/06-1313, para.13.

⁵³ See ruling of Judge Fulford that the Defence must put its case to a witness in order to give him a chance to take position. This is necessary for the Chamber to decide whether the argument of the defence has any merits (ICC-01/04-01/06-T-337-ENG p.47, l.4-11).

⁵⁴ ICC-01/04-01/06-1433, paras.36, 50; see Appeal Brief, para.21.

whole, including what is known or anticipated about possible defence(s).”⁵⁵ The Appeals Chamber also stated in general terms that if the defence “had unjustifiably and unreasonably held back the revelation of a line of defence or issue in circumstances that made it impossible for the Court to ensure the protection of the exculpatory witnesses, it may conceivably be possible for the accused to receive a fair trial notwithstanding the non-disclosure of certain limited material”.⁵⁶ In so doing, the Appeals Chamber implicitly accepted that under certain circumstances, the defence, in order to receive full disclosure, might need to reveal its lines of defence.

B) Whether the Requested Material falls within the scope of Rule 77

20. The Appellants argue that the Chamber erred in determining that the Requested Material does not meet the materiality threshold under Rule 77.⁵⁷ While the Appellants qualify this alleged error as an error of law,⁵⁸ the Prosecution submits that it should more appropriately be qualified as a procedural error or an error of fact. The issue here is not whether the Trial Chamber identified and applied the correct legal standard, but *how* it exercised its discretion when deciding on whether the Requested Material meets the threshold of Rule 77. According to the applicable standard of review, the Appeals Chamber must defer to the discretionary decision of the Trial Chamber. It may intervene only in case of a clear error, namely where the Appeals Chamber cannot discern how the Trial Chamber's conclusion could have reasonably been reached from the evidence before it⁵⁹ or where the Trial Chamber's exercise of discretion amounts to an abuse of discretion.⁶⁰

⁵⁵ ICC-01/04-01/06-1433, para.36.

⁵⁶ ICC-01/04-01/06-1433, para.54.

⁵⁷ Appeal Brief, para.20.

⁵⁸ Appeal Brief, para.20.

⁵⁹ In the event of an error of fact (see: ICC-01/04-01/10-283 OA, para.17).

⁶⁰ In the event of an procedural error (see ICC-01/09-01/11-336 OA, para.15; ICC-01/09-02/11-342 OA, para.15).

21. In support of their arguments, the Appellants substantially reiterate the submissions included in the Defence Request for Disclosure.⁶¹ The Appeals Chamber has previously held that the nature of an appeal is corrective and “not a rehearsing of the original request [...]”.⁶² While the Appellants’ submissions express a disagreement with the Decision, they fail to make a specific link between the arguments advanced in the appeal and the upcoming determination of the Appeals Chamber on the issues raised on appeal.⁶³ The Appellants’ arguments in this respect should therefore be rejected. The Prosecution will nevertheless demonstrate that the Trial Chamber did not commit a reversible error in the exercise of its discretion when finding that the Requested Material is not relevant to the Contested Issues. In so doing, the Prosecution must unavoidably also repeat some of the arguments that it had already advanced in the Prosecution Response.

22. In determining whether the Trial Chamber erred in its finding that the Requested Material must not be disclosed, the Appeals Chamber should take into consideration the narrow scope of the Contested Issues, as well as the extensive list of Agreed Facts. It should further bear in mind that the Prosecution has already disclosed a significant amount of information that far exceeds the narrow confines of the Contested Issues and that in the course of its disclosure reviews, it has consistently invited the input from the Appellants to define the relevant search criteria.⁶⁴ Trial Chamber I has previously ruled that these factors are relevant to determine whether the disclosure of certain information under Rule 77 is justified.⁶⁵

⁶¹ Compare Appeal Brief, paras.23-25 and 28-30 with arguments included in ICC-02/05-03/09-235, paras.20-35.

⁶² ICC-01/04-01/06-824 OA7, para.71.

⁶³ ICC-01/04-01/06-824 OA7, para.71.

⁶⁴ Prosecution Response, paras.11-15, 27

⁶⁵ ICC-01/04-01/06-2147, paras.22-24.

- (i) *The Requested Material is not relevant to question of whether the attack on MGS Haskanita was unlawful*

23. The Appellants argue that the Requested Material is relevant “because intelligence leaking from MGS Haskanita to the GoS was supporting the latter’s campaign of violence in the local area”.⁶⁶ The Prosecution submits that all information in its possession or control regarding intelligence leaking from MGS Haskanita has already been disclosed to the Appellants.⁶⁷ The Requested Material does not refer to such intelligence leaking.

24. The Appellants further submit that the MGS Haskanita was a legitimate military target because intelligence leaking from MGS Haskanita to the GoS was allegedly supporting the latter’s campaign in the local area.⁶⁸ However, evidence of the GoS campaign in Darfur broadly, or specifically in Haskanita, would only be relevant if it showed some involvement of the African Union Mission in Sudan (“AMIS”) or its personnel.⁶⁹ Only in that case would the issues arise of whether AMIS personnel and objects at the MGS Haskanita were protected from attack and whether the attack against AMIS personnel or objects was justified by military necessity.⁷⁰ As submitted in the Prosecution Response, the Prosecution has already disclosed all information in its possession and control that contains information pertaining to AMIS’s alleged involvement in the GoS campaign.⁷¹

25. The Appellants also submit that the Requested Material is relevant to determine whether the attack was proportionate, and therefore lawful, because it shows that

⁶⁶ Appeal Brief, para.23.

⁶⁷ See Statement of Witness DAR-OTP-P-0439, DAR-OTP-0175-0002, Statement of Witness DAR-OTP-P-0446, DAR-OTP-0169-0808, Statement of Witness DAR-OTP-P-0417, DAR-OTP-0165-0424, Statement of Witness DAR-OTP-P-0355, DAR-OTP-0165-0352, Statement of Witness DAR-OTP-P-0419, DAR-OTP-0165-0489, and Statement of the Witness DAR-OTP-P-0447, DAR-OTP-0169-1160.

⁶⁸ Appeal Brief, para.23.

⁶⁹ 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.

⁷⁰ See also Prosecution Response, para.27.

⁷¹ Prosecution Response, para.27; see also paras.11-15. With the authorization of the Chamber, some of this information that was obtained pursuant to Article 54(3)(e) was disclosed by way of a combination of narrative summaries of the original documents, admissions of fact, and alternative evidence (see ICC-02/05-03/09-407-Red).

the intelligence leaking from the base was supporting the GoS military operations.⁷² The Prosecution submits that the only information which is relevant in this regard pertains to the leaking of the information from the MGS Haskanita, which the Prosecution has already disclosed to the Defence.⁷³ Contrary to the contention of the Appellants, information relating to a pattern of bombing, attacking and destroying towns and villages in Darfur generally, is irrelevant to the issue of proportionality of the attack on the MGS Haskanita. It was not unreasonable for the Chamber to accept this position.

(ii) *The Requested Material is not relevant to whether Banda and Jerbo were aware of the factual circumstances that established the unlawful nature of the attack*

26. The Appellants argue that the Requested Material is likely to show that any commander familiar with the pattern of GoS military operations would be aware that the ultimate target of the GoS military operations was the civilian population in the Haskanita area and that any force providing intelligence to GoS operations was putting this population at very serious risk.⁷⁴ In doing so, the Appellants are speculating about the content of the Requested Material. Such a claim is insufficient to meet the Appellants' burden to show *prima facie* that the Requested Materials relevant to the Contested Issues and therefore disclosable under Rule 77. Moreover, the Prosecution submits that general material relating to the GoS military operations against the civilian population in Darfur is not relevant to the awareness of the accused persons. Any information relating to the alleged provision of intelligence by AMIS to the GoS which would potentially put the population at risk has already been disclosed to the Appellants.⁷⁵

27. The Appellants also claim that the Requested Material is likely to explain or corroborate why the accused persons would not believe that AMIS was a

⁷² Appeal Brief, para.23.

⁷³ Prosecution Response, para.27; see also paras.11-15.

⁷⁴ Appeal Brief, para.24.

⁷⁵ Prosecution Response, para.27; see also paras.11-15.

“peacekeeping mission” acting “in accordance with the UN Charter”.⁷⁶ The Appellants do not explain how or why this would be the case. Once again, the Appellants are speculating, without any basis, about the possible content of the Requested Material. Moreover, if the Requested Material did indeed contain such information as alleged by the Appellants, the Prosecution would already have disclosed it to the Appellants.

(iii) *The Requested Material is not relevant to whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations*

28. The Appellants argue that the Chamber erred by relying on the Pre-Trial Chamber’s definition of a peacekeeping mission,⁷⁷ rather than assessing whether the Requested Material would be relevant to “any possible legal definition of the term”.⁷⁸ The Prosecution notes that the Appellants have at no point challenged the legal definition of a peacekeeping mission adopted by the Pre-Trial Chamber, and they did not advance arguments on an alternative definition of the term.⁷⁹ Although the Appellants are free to do so at a later stage, the Trial Chamber did not err by conducting its assessment of the materiality of the Requested Material in light of the existing jurisprudence in this case. The Prosecution recalls that the materiality test under Rule 77 requires that it is reasonably foreseeable that certain information is material to the preparation of the defence. Therefore, the Chamber was not required in its Decision to speculate about possible alternative legal definitions of a peacekeeping mission.

29. In the Defence Request for Disclosure,⁸⁰ the Appellants advanced a number of questions that in their view relate to whether AMIS was a peacekeeping mission. However, these submissions have no legal support and therefore the Chamber correctly relied on the Pre-Trial Chamber’s definition of the term and found those

⁷⁶ Appeal Brief, para.24.

⁷⁷ See Decision, para.17, quoting ICC-02/05-03/09-121-Corr-Red, para.63.

⁷⁸ Appeal Brief, para.25.

⁷⁹ Appeal Brief, para.25.

⁸⁰ Defence Request for Disclosure, para.25.

additional submissions to be irrelevant to the question whether the Requested Material is disclosable under Rule 77.⁸¹

30. In particular, the Appellants claim that the Requested Material is expected to show that the GoS's consent for AMIS to deploy was negated by the GoS's breaches of agreements with the revolutionary movement.⁸² However, the Prosecution recalls that Pre-Trial Chamber I in this case held that the facts that the conflict in Darfur was ongoing and that the GoS breached agreements with the revolutionary movements, does by no means negate that AMIS was deployed with the consent of the parties to the conflict.⁸³ In light of that finding, it was not unreasonable for the Trial Chamber to conclude that the Requested Material is not sufficiently relevant to whether AMIS was a peacekeeping mission. Moreover, violations of a peace agreement or the continuation of violence can also legally not have any bearing on the status of a peacekeeping mission.⁸⁴ Otherwise any acts of violence or breaches of agreements between the parties to the conflict would automatically negate the protected status of a peacekeeping mission. Similarly, the Appellants' contention that the status of a peacekeeping mission is contingent on its ability to protect civilians⁸⁵ is not supported by the law and it would lead to the unreasonable result that a peacekeeping mission would lose protected status if, due to resource deficiencies and other realities on the ground, it would be unable to effectively protect civilians. No Trial Chamber could reasonably be expected to follow these arguments, much less so in light of the vague submissions before it.⁸⁶

⁸¹ Decision, para.18; Appeal Brief, para.26. Contrary to the contention of the Appellant, the Trial Chamber did not overlook its submissions to that effect: see Decision, footnotes 8 and 45, which refer, among others, to the submissions contained at para.25 of the Defence Request for Disclosure.

⁸² See, Appeal Brief, para.28.

⁸³ ICC-02/05-03/09-121-Corr-Red, paras.24, 63.

⁸⁴ Appeal Brief, para.29.

⁸⁵ Appeal Brief, para.30.

⁸⁶ Defence Request for Disclosure, para.25.

II. The Trial Chamber did not err in holding that the Defence Request was disproportionate to concerns of security and expeditiousness

31. The Appellants argue that the Chamber erred by considering factors such as the burden that the disclosure of the Requested Material would place on the Prosecution and the resulting effect on the expediency of the trial when determining that the materials are not disclosable.⁸⁷

32. The Appellants mischaracterize the Decision. It is true that the Trial Chamber “[took] note” of the Prosecution’s concerns that the Requested Material, if disclosed would require substantial redactions, which is unduly burdensome to the Prosecution, the Registry and the Chamber and which may lead to an unjustified impact on the expeditiousness of the trial. It also referred to considerations of security and expeditiousness when finding that “a general right by the defence to inspection and disclosure of all material submitted in the *Al Bashir* case would be disproportionate”.⁸⁸ However, these additional observations were not determinative for the Chamber to reject the Defence Motion.

33. The Chamber correctly dismissed the Defence Request based on its assessment whether the Requested Material is material for the preparation of the defence. When deciding on whether the Requested Materials are disclosable under Rule 77, the Trial Chamber found that the Appellants have “failed to make a sufficient showing of materiality”⁸⁹ and that the Requested Materials are not “of significance”⁹⁰ or “relevance”⁹¹ to the Contested Issues. It found that the Requested Material is “if at all, only remotely linked to the contested issues”,⁹² and on that basis correctly concluded that the Requested Material is not disclosable under Rule 77.⁹³ In addition, the above observations of the Chamber

⁸⁷ Appeal Brief, para.31 ; see also paras.32-39.

⁸⁸ Decision, para.24.

⁸⁹ Decision, para.18.

⁹⁰ Decision, paras.18, 22.

⁹¹ Decision, paras.18, 20-21.

⁹² Decision, para.24.

⁹³ Decision, para.27.

do not specifically relate to the Requested Material, but to the disclosability of “all material submitted in the *Al Bashir* case”.⁹⁴

34. Even if, *arguendo*, the Appeals Chamber finds that the Trial Chamber erred by referring in its Decision to considerations of security and expeditiousness, this ground of appeal must nevertheless be rejected as the alleged error does not materially affect the Decision.⁹⁵ The Chamber clearly stated that the sole issue before it was to “determine whether the defence made a sufficient showing of materiality, within the meaning of Rule 77”.⁹⁶ It also found that inspection should only be allowed “where the conditions set out in that rule, including the requirement of ‘materiality’, are met”.⁹⁷ Having concluded in this case that the Requested Material is not material to the preparation for the defence, the Chamber had no choice but to reject the Defence Request.

CONCLUSION

35. For the reasons set out above, the Prosecution requests that the Appeals Chamber reject the Defence Appeal.



Fatou Bensouda, Prosecutor

Dated this 15th day of April 2013

At The Hague, The Netherlands

⁹⁴ Decision, para.24.

⁹⁵ Article 83(2); ICC-02/04-01/05-408 OA3, para.80; ICC-01/05-01/08-962OA3, paras.102.

⁹⁶ Decision, para.15.

⁹⁷ Decision, para.15.