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**International
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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

Public

**Public redacted version of “Defence Observations on the Annexes to Prosecution
filing ICC-02/05-03/09-517-Red”**

Sources: Defence Team of Abdallah Banda Abakaer Nourain

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

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Other

I. Introduction

1. In accordance with the Trial Chamber's direction of 5 December 2013,¹ the defence for Abdallah Banda Abakaer Nourain ("Defence") respectfully submits its observations on the confidential redacted versions of Annexes A, B and C² (hereinafter referred to as "Annex A", Annex B" and "Annex C" respectively) to the public redacted version of the *"Prosecution's Submission of Information pursuant to the Trial Chamber's order of 25 September 2013" filed on 21 October 2013* ("OTP Submissions").³
2. The Defence submits this filing and annexes on a confidential basis pursuant to Regulation 23bis of the Regulations of the Court because they refer to information and filings classified as "confidential" as well as confidential defence evidence. A public redacted version will be filed in the record.

II. Observations

3. The Defence's observations on Annex A are set out in confidential annex 1 hereto ("Defence Annex"). The Defence's observations are so limited because the material included in Annex A was the focus of the Defence's original request ("Original Request").⁴ However, as the Trial Chamber will note, due to the extent of the redactions applied by the Prosecution in Annex A, in some instances, the Defence has been unable to comment on the *prima facie* materiality of the relevant items to the preparation of the defence in this case and, thus, this assessment will have to be performed solely by the Trial Chamber. Further, the extent of the redactions applied by the Prosecution to Annex C also means it is impossible for the Defence to provide any meaningful observations on the content of this annex.

¹ ICC-02/05-03/09-526, para. 14(b).

² ICC-02/05-03/09-517-Conf-AnxA-Red, ICC-02/05-03/09-517-Conf-AnxB-Red and ICC-02/05-03/09-517-Conf-AnxC-Red filed on 25 November 2013.

³ ICC-02/05-03/09-517-Red.

⁴ ICC-02/05-03/09-235.

4. In addition to the observations contained in the Defence Annex, the Defence highlights the following five points.
5. *First*, in reviewing the materiality of the requested documents, it is vital to apply the correct legal standard. In this regard, the Defence notes with concern the Prosecution's continued error in respect of the standard to be applied to disclosure under Rule 77 of the Rules of Procedure and Evidence ("Rules").⁵ On three occasions in the OTP Submissions the Prosecution erroneously asserts that the information requested by the Defence "is not relevant to the three contested issues in this case and is not disclosable pursuant to Articles 67(2) or Rule 77".⁶
6. The correct standard was articulated by the Appeals Chamber in this case when it held that, in respect of stage one of the Rule 77 test, all that the Defence is required to show is that the requested information is *prima facie* material to the preparation of the defence.⁷ The Appeals Chamber also recalled its previous judgment in the *Lubanga* case that "the term 'material to the preparation of the defence' must be interpreted broadly".⁸ The test is not relevance to the contested issues; it is *prima facie* materiality to the preparation of the defence. This conclusion is further supported by the Appeals Chamber's observations that:

*a low burden [is placed] on the defence. It is emphasised that rule 77 concerns material that the defence is entitled to have disclosed to it in order to prepare its defence. It may be that information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a prima facie assessment.*⁹

⁵ The Defence notes that the Trial Chamber has also referred to the wrong legal test in email correspondence. See email titled "Prosecution's Submission ICC-02/05-03/09-516-Conf-Exp" from the Trial Chamber's legal officer dated 18 November 2013 and received at 12:17 pm which requests that the Defence explain "why each document sought...would be relevant as well as material to the contested issues in the case" (emphasis added). See also ICC-02/05-03/09-526, para. 4 where the error is repeated.

⁶ OTP Submissions, paras. 3, 12 and 32 (emphasis added).

⁷ ICC-02/05-03/09-501, paras. 35, 39 and 42.

⁸ ICC-02/05-03/09-501, para. 38 citing to ICC-01/04-01/06-1433, para. 78.

⁹ ICC-02/05-03/09-501, para. 42 (emphasis added).

7. Accordingly, and based on the foregoing, materiality must be assessed by reference to whether each document sought would be *prima facie* material to the preparation of the defence in this case.
8. *Second*, the Defence has identified *prima facie* materiality to the preparation of the defence using the following broad categories all of which save category (5) are based on arguments fully developed in prior Defence submissions:¹⁰

Category (1): Character and motives of Mr. Banda and contextual evidence relevant to the conflict in Darfur;¹¹

Category (2): Whether AMIS was a peacekeeping mission in accordance with UN Charter;¹²

Category (3): Whether the attack on the MGS Haskanita was unlawful;¹³

Category (4): Whether Mr. Banda was aware of the factual circumstances that established the unlawful nature of the attack;¹⁴ and

Category (5): Defence investigations and trial preparations.

9. Given that the submissions contained in the Original Request were made on a predictive basis¹⁵ and prior to receipt of any detailed information regarding the nature of the *Al Bashir* Material,¹⁶ the Defence was not aware that the materials also contained information relevant to the serious difficulties it faces in respect of the conduct of investigations and preparation for trial caused by the fact that the Government of Sudan ("GoS") not only refuses to cooperate with the Court but

¹⁰ The Defence does not repeat the arguments and information which it submits falls within these broad categories in this filing. However, the relevant paragraphs of the Original Request are identified for each category and the Defence respectfully directs the Trial Chamber to these submissions.

¹¹ Original Request, paras. 13(a), 16-19.

¹² Original Request, paras. 13(b), 20-25.

¹³ Original Request, paras. 13(c), 26-32.

¹⁴ Original Request, paras. 13(d), 33-35.

¹⁵ Original Request, para. 13 ("Based on the public version of the *Al Bashir* Application, it is reasonable to believe that materials submitted confidentially with the *Al Bashir* Application will provide...").

¹⁶ As defined in ICC-02/05-03/09-507, para. 2(a).

has made any cooperation with the Court a criminal offense.¹⁷ However, according to the information provided in Annex A, it appears that the Prosecution is in possession of such information and accordingly the Defence requests disclosure of this information which is *prima facie* relevant to preparation of the defence.¹⁸

10. *Third*, the Defence observes that it cannot respond to any specific Prosecution arguments regarding materiality because, save in respect of one document, there are no arguments to respond to.¹⁹ It is regrettable that the Prosecution makes no attempt to analyse each individual document by reference to the correct legal standard for disclosure but, rather, simply states in one bald sentence that “the Prosecution reiterates that the information requested by the Defence is not relevant to the three contested issues in this case and is not disclosable pursuant to Article 67(2) or Rule 77”.²⁰ However, it is noteworthy that nowhere in this filing or in any previous filings has the Prosecution denied that the *Al Bashir* Material contains evidence of the following matters:

- a. Throughout the history of AMIS, the GoS was engaged in a campaign of genocide and crimes against humanity directed against the civilian population in Darfur, including, of course, in the Haskanita area in 2007.
- b. At no time was there any effective peace or even tentative peace to keep. Specifically, fighting was never halted and not even a fragile peace existed, as required by the one international criminal judgment which has dealt with the definition of a “peacekeeping mission”.²¹

¹⁷ See, e.g., the Defence arguments made in ICC-02/05-03/09-274 (“Stay Request”).

¹⁸ See the decision on the Stay Request in which the Trial Chamber held that “the defendant’s complaint will be kept in mind in the course of the trial. At trial, the Chamber, the parties and the participants will be in a position to better assess the evidence adduced to see whether the complaints about fair trial are founded.” See ICC-02/05-03/09-410, para. 159.

¹⁹ In respect of item 177, the Prosecution states that there is “no link with the Defence Request”. Apart from this bald assertion, no further argument is made.

²⁰ OTP Submissions, para. 3. See also paras. 12 and 32.

²¹ See *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009, para. 224.

- c. Each and every peace or ceasefire agreement relied on by the Prosecution in this case to establish “the consent of the parties” to the conflict to AMIS acting as “peacekeepers” was materially breached by the GoS. Indeed, it is submitted that the GoS engaged in a deliberate pattern of signing peace agreements it never intended to comply with.
- d. The GoS’s military campaign against the revolutionary movements was inextricably linked to crimes against civilians – in particular, bombing campaigns targeting civilians. Moreover, areas inhabited by civilian populations were typically bombed by the GoS before being attacked by ground forces which, in turn, would raze the village or town and inflict violence on civilians unable to flee the attack. This is exactly the pattern of attack that the Prosecution’s own evidence shows was being aided by personnel that were part of the AMIS mission at the MGS Haskanita (Captain Bashir, like all movement or government representatives on AMIS bases, was part of the AMIS mission and shielded by the AMIS protection force). The link between intelligence activities aiding the GoS and the above described crimes is even more relevant given the recently disclosed evidence that AMIS knew of the intelligence activities of Captain Bashir and decided to do nothing about it.²²
- e. Any intelligence activities aiding the GoS’s military campaign in Darfur in 2007 effectively assisted crimes against civilians. Given this fact presumably established by the *Al-Bashir* Material, it would be untenable to argue that a base being used to aid GoS attacks on civilians is entitled to the protection given to civilian objects (including, in certain circumstances, peacekeeping installations) in armed conflicts.

²² See Defence submissions in ICC-02/05-03/09-503-Conf.

11. In addition, the Defence has previously pointed out that, during confirmation, the Prosecution argued that, [REDACTED].²³ The Prosecution has never responded in any filing to the Defence observation that it would be impossible for a Trial Chamber to judge [REDACTED] without considering that the GoS's military attacks inevitably targeted and placed at risk civilians in the area targeted – as the information contained in the *Al Bashir* Material presumably evidences. In this case, the town of Haskanita and the thousands of civilians in the Haskanita area were the objects of the attack aided by the intelligence information originating from the MGS Haskanita base.
12. *Fourth*, the Defence notes that some documents in Annex A are subject to Article 54(3)(e) restrictions. In respect of these documents, if the Trial Chamber determines that these documents would have had to be disclosed to the Defence had they not been obtained under Article 54(3)(e) of the Rome Statute (“Statute”), the Defence requests that the Prosecution be ordered to seek the consent of the information provider to disclosure.²⁴ If an information provider does not consent to disclosure, the Defence submits that the Chamber will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of Mr. Banda are protected and that the trial is fair, in spite of the non-disclosure of the information.²⁵ In this regard, the provision of analogous information as a counter-balancing measure represents the very last resort.²⁶ Nevertheless, the Defence recalls its concession in the Original Request that it does not “request disclosure of any statements of victims from the *Al Bashir* Application and [agrees] that all names and identifying

²³ See, e.g., ICC-02/05-03/09-112-Conf-AnxA, para. 91.

²⁴ ICC-01/04-01/06-1486, para. 48.

²⁵ *Ibid.*

²⁶ ICC-02/05-02/09-T-6-ENG, p. 23, lines 15-22.

information of other witnesses who have expressed security concerns should be redacted...before being given to the Defence".²⁷

13. *Fifth*, the Defence advises that the information contained in Annex A reveals that some of its outstanding disclosure requests dating from 2011 may have been stymied by the Prosecution's approach to disclosure of the *Al Bashir* Material. On 19 July 2011, the Defence requested disclosure pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of, *inter alia*, the following information:

[REDACTED].²⁸

14. The Defence has sought a response to the above request on numerous occasions²⁹ but no substantive response, including a refusal to disclose, has been provided by the Prosecution to date. However, item 147 of Annex A reveals that the Prosecution is in possession of [REDACTED]. The Defence request covered [REDACTED] and, thus, the material described in item 147 clearly falls within the scope of this request. From the limited information provided in Annex A, it is difficult to determine whether the information identified comprises all the material [REDACTED]³⁰ or only the information obtained [REDACTED] which was subsequently relied upon as part of the *Al Bashir* Application.³¹ The Defence submits that it is a matter of serious concern that it has taken two separate requests³² and over two and a half years to be given bare confirmation that the Prosecution is in possession of material [REDACTED]. Yet despite these specific requests, the Prosecution's position is that the Defence is not entitled to disclosure. The significant prejudice to Defence investigations and trial preparations by such an untenable position is clear, particularly in this case where investigative opportunities are severely constrained.

²⁷ Original Request, para. 4 (footnote omitted).

²⁸ See Annex A to the Defence's disclosure request dated 19 July 2011 provided in annex 2 hereto.

²⁹ The last occasion on which the Defence requested an update was 5 August 2013.

³⁰ As outlined in the 19 July 2011 disclosure request, the Defence understands that [REDACTED].

³¹ As defined in the Original Request, para. 1.

³² The 19 July 2011 disclosure request and the Original Request.

III. Relief Requested

15. The Defence respectfully requests disclosure of:

- a. all the items identified in the Defence Annex as *prima facie* material to the preparation of the defence; and
- b. such other items which the Defence has not been able to consider due to lack of information but which the Trial Chamber considers are *prima facie* material to the preparation of the defence.

Respectfully Submitted,



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Lead Counsel
for Abdallah Banda Abakaer Nourain

Dated this 10th day of January 2014

At The Hague, Netherlands