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TRIAL CHAMBER IV

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

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF

THE PROSECUTOR v.

ABDALLAH BANDA ABAKAER NOURAIN

Public document

Public redacted version of “Prosecution’s Reply to the Defence Observations on the Annexes to Prosecution filing ICC-02/05-03/09-517-Red (REDACTED)”, ICC-02/05-03/09-542-Conf, 13 February 2014

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I. Introduction

1. As directed by Trial Chamber IV (“Trial Chamber”), the Prosecution hereby replies to the Defence Observations on the Annexes to Prosecution filing ICC-02/05-03/09-517-Red (“Defence Observations”).¹

2. The Appeals Chamber has clarified how Rule 77 is to be applied to the documents at issue in the relevant pleadings² (“Bashir Material”). However, the Appeals Chamber did not make a finding on the materiality of the Bashir Material. Hence, the prior findings of the Trial Chamber regarding the Bashir Material that were confined solely to the issue of materiality continue to be valid.

3. Regarding information in the Bashir Material on breaches of peace agreements by the Sudanese government (“GoS”), the prior, conclusive, findings of the Trial Chamber continue to be valid under the new procedure for Rule 77 analysis.

4. Regarding information in the Bashir Material on the GoS campaign in Darfur, the Trial Chamber did not make a definitive finding on materiality and took into consideration factors that were generally irrelevant or irrelevant at that stage of Rule 77 analysis. However, even when such considerations are removed from the equation, the Defence submissions linking the various categories of relevance to the GoS campaign in Darfur do not meet the requirements of Rule 77 materiality.

¹ [REDACTED].

² ICC-02/05-03/09-251, [REDACTED], ICC-02/05-03/09-531.

5. Therefore, under the two-stage test for Rule 77, as set out by the Appeals Chamber, the Bashir Material should not be disclosed because it is not material to the preparation of the Defence.

II. Procedural Background

6. On 20 October 2011, the Defence submitted its “Defence Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”³ (“Defence Request for Disclosure”). 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”⁴ (“Bashir Material Decision”), rejecting the Defence Request for Disclosure.
7. The Defence sought⁵, and obtained⁶, leave to appeal the Bashir Material Decision. On 28 August 2013 the Appeals Chamber issued its judgement regarding the same (“Appeals Judgement”).⁷
8. Pursuant to an order of the Trial Chamber,⁸ the Prosecution submitted an analysis of the Bashir Material.⁹ The Defence submitted the Defence Observations in response to the same.
9. On 16 January 2014, the Prosecution requested leave to reply to the Defence Observations.¹⁰ The Prosecution requested leave to reply regarding the categories of Rule 77 materiality¹¹ and the approach taken by the Appeals Chamber towards the scope of materiality adopted by Trial Chamber.¹²

³ ICC-02/05-03/09-235.

⁴ ICC-02/05-03/09-443.

⁵ ICC-02/05-03/09-447.

⁶ ICC-02/05-03/09-457.

⁷ ICC-02/05-03/09-501, OA4.

⁸ ICC-02/05-03/09-507.

⁹ [REDACTED].

¹⁰ ICC-02/05-03/09-531.

¹¹ ICC-02/05-03/09-531, paras. 2,4-5.

¹² ICC-02/05-03/09-531, paras. 2, 6-7.

10. On 10 February 2014, the Trial Chamber found that the Defence Observations raise legal and factual issues to which the Prosecution should be given the opportunity to reply.¹³ The Trial Chamber found, in particular, that it would be of assistance to receive an additional submission on whether: (i) the five categories of information identified by the Defence reflect information which is *prima facie* material to the preparation of the Defence; and, if so, (ii) whether the Bashir Material, according to the Prosecution, falls within these five categories.¹⁴

III. Submission as Confidential

11. The Prosecution submits this filing as “Confidential” pursuant to Regulation 23*bis* because it makes references to documents that are currently classified as confidential. A public redacted version will be filed shortly.

IV. Submissions

12. In the Defence Observations, the Defence refers to five categories of Rule 77 materiality¹⁵:

- **Category (1):** Character and motives of Mr. Banda and contextual evidence relevant to the conflict in Darfur;
- **Category (2):** Whether AMIS was a peacekeeping mission in accordance with UN Charter;
- **Category (3):** Whether the attack on the MGS Haskanita was unlawful;
- **Category (4):** Whether Mr. Banda was aware of the factual circumstances that established the unlawful nature of the attack; and

¹³ ICC-02/05-03/09-540, para.9.

¹⁴ ICC-02/05-03/09-540, para.9.

¹⁵ Defence Observations, para.8.

- **Category (5):** Defence investigations and trial preparations.

13. The Prosecution addresses the five categories below.

Categories (1)-(4)

14. The Defence has previously asserted its position regarding these four categories in its Request for Disclosure.¹⁶ The general argument underlying the Defence Request for Disclosure is that evidence relating to the “the context of the Darfur conflict”,¹⁷ and the Government of Sudan’s (“GoS”) “campaign of violence” in Darfur,¹⁸ is material for the preparation of the Defence, in relation to all four categories. Essentially, the Defence argues that the Bashir Material must fall within categories (1)-(4) since:

- **Breach of peace agreements.** The Defence claims that the Bashir Material will assist it in regard to whether AMIS was a peacekeeping mission in accordance with UN Charter.¹⁹ It is argued that this is the case since “[a]t no time was there any [...] peace [...] to keep” as “required”, according to the Defence, under the jurisprudence on the definition of a “peacekeeping mission”.²⁰ The Defence claims that each peace agreement relied on by the Prosecution to establish “the consent of the parties” to the conflict to AMIS acting as “peacekeepers”, was breached by the GoS.²¹
- **The GoS campaign.** The Defence claims that the Bashir Material will assist it in regard to why Mr. Banda has “taken up armed struggle”,²²

¹⁶ Defence Observations, para.8.

¹⁷ Defence Request for Disclosure, para. 10.

¹⁸ Defence Request for Disclosure, paras. 11-12.

¹⁹ ICC-02/05-03/09-235, paras.20-25

²⁰ Defence Observations, para.10 (b).

²¹ Defence Observations, para.10 (c).

²² ICC-02/05-03/09-235, para.17.

why the attack on MGS Haskanita was lawful²³ and how Mr. Banda was aware of the same.²⁴ The Defence claims that these arguments relate to the fact that the GoS military campaign against the rebel groups was linked to crimes against civilians; in particular, bombing campaigns targeting civilians.²⁵ The Defence adds that intelligence activities aiding the GoS military campaign in Darfur in 2007 effectively assisted crimes against civilians.²⁶

15. The Trial Chamber dealt dispositively with the above arguments in the Bashir Material Decision. It is important to note that although the Appeals Chamber has now clarified how Rule 77 is to be applied, it has not ruled on the materiality of the Bashir Material.

16. The Appeals Chamber did not reject the Trial Chamber's findings on materiality, in which the Trial Chamber correctly focussed the question of materiality to the three contested issues.²⁷ Rather, the Appeals Chamber set out a new procedure for Rule 77 analysis which separates the assessment of materiality (first stage) from assessment of restrictions on disclosure (second stage).²⁸ It did not set out a new scope for Rule 77 materiality. Nor did the Appeals Chamber take a position on what the conclusion of the Trial Chamber would have been if its sole focus in relation to the first stage of Rule 77 analysis had been upon the question of whether the information sought was material.²⁹ The Prosecution notes additionally in this context that

²³ ICC-02/05-03/09-235, para.26-32.

²⁴ ICC-02/05-03/09-235, para.34-35.

²⁵ Defence Observations, para.10 (d).

²⁶ Defence Observations, para.10 (e).

²⁷ ICC-02/05-03/09-443, paras. 18, 20- 22, 24.

²⁸ ICC-02/05-03/09-501, para.1. The issue that was certified for appeal by the Trial Chamber in the context of materiality was limited to the contested issues - i.e., "[W]hether 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...". See ICC-02/05-03/09-457, para.21.(emphasis added).

²⁹ Appeals Judgment, para.46.

the Trial Chamber's findings on materiality do not contravene the threshold of *prima facie* materiality set by the Appeals Chamber.³⁰

17. Hence, the prior findings of the Trial Chamber regarding the Bashir Material that were confined to materiality alone are largely undisturbed by the Appeals Judgment and continue to be valid under the new procedure for Rule 77 analysis. These findings are discussed below.

Breach of Peace agreements

18. In the Bashir Material Decision, the Trial Chamber carefully considered the Defence's arguments regarding material relating to the violation of peace agreements.³¹

19. The Trial Chamber noted that that the Defence claimed:

*"...that such material may be of relevance to the third contested issue at trial, namely whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations ("UN"). The defence also intends to use such material in order to demonstrate that the genuine intention of the Government of Sudan to destroy certain ethnic groups in Darfur rather than to abide by the agreements and that the presence of AMIS was a tactic of the Government of Sudan to hinder any effective international intervention. The defence contends that this material may also be of relevance to the mens rea of the accused."*³²

20. The Trial Chamber held:

"In this respect, the Chamber takes note of the factors which the Pre-Trial Chamber considered when making its findings on this contested issue: "there are substantial grounds to believe that AMIS (...) was established under the auspices of the African Union, a regional agency within the meaning of Article 52 of the UN Charter with a mandate to maintain peace and security and (a) was deployed with the consent of the parties to the conflict active at the time of

³⁰ See, for example, ICC-02/05-03/09-443, para.14. The Trial Chamber recalled that the Prosecution's inspection obligations under Rule 77 must be interpreted broadly and that the obligation is not linked to any requirement that an accused provide advance revelation of his or her defences in order to receive full disclosure.

³¹ ICC-02/05-03/09-443, para.16.

³² ICC-02/05-03/09-443, para.16.

*the agreements; (b) was impartial in its dealings with all parties to the conflict and (c) its personnel were not allowed to use force except in self-defence”.*³³

21. The Trial Chamber determined:

*“... in this particular instance, the defence has failed to make a sufficient showing of materiality, within the meaning of Rule 77, and in particular, it has not demonstrated the link between the contested issue and the items of evidence sought to be disclosed by the prosecution. Indeed, it has not demonstrated how the alleged violations of peace agreements by the Government of Sudan could be of significance to any of the three factors identified by the Pre-Trial Chamber. Nor 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”.*³⁴

22. These findings were not contradicted by the Appeals Chamber. On the contrary, the Appeals Chamber stated that it:

*“...recognises that the finding in the Impugned Decision that Mr Banda and Mr Jerbo had failed to make a sufficient showing of materiality in relation to its request for information relating to the alleged violations of peace agreements by the Government of Sudan was rejected on the basis of materiality alone (and not on the basis that to grant the request for this information would be disproportionate).”*³⁵

23. In light of the above findings, both first instance and appellate, it is clear that no new/further analysis by the Trial Chamber is either required or justified regarding the relevance of violations of peace agreements. This analysis of materiality by the Trial Chamber in the Bashir Material Decision is valid and may be applied without change.

The GoS campaign

24. In the Bashir Material Decision, the Trial Chamber also examined in detail the Defence’s arguments regarding material relating to the GoS campaign of violence in Darfur.

³³ ICC-02/05-03/09-443, para.17.

³⁴ ICC-02/05-03/09-443, para.18.

³⁵ ICC-02/05-03/09-501, para.48 (emphasis added).

25. The Trial Chamber recalled with approval its previous finding:

*"[a]s a general proposition, a broad view of what was happening in Darfur, the alleged existence of a violence campaign perpetrated by the GoS against the civilian population in Haskanita and Darfur generally, and the effect the GoS' military offensive had on the civilian population in the area do not readily appear to the Chamber to fall within the scope of the issues that the Chamber will review during the trial."*³⁶

26. The Trial Chamber found:

*"[that the] significance of the existence 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."*³⁷

27. The Trial Chamber held:

*"...it is sufficient that the prosecution, as submitted, has reviewed the Requested Material for the purpose of disclosure and it has disclosed all potentially exculpatory evidence in its possession or information material to the preparation of the defence, directly impacting the lawfulness of the attack and impartiality of AMIS."*³⁸

28. The Appeals Chamber held in this context that 1) the Trial Chamber did not make a definitive finding about whether the information sought was material to the preparation of the Defence³⁹; and 2) in rejecting the Request for Disclosure as disproportionate, the Trial Chamber considered factors that are either irrelevant, or relevant only once it has been determined that information is in principle subject to disclosure (namely potential restrictions on disclosure pursuant to the Statute and Rules 81 and 82).⁴⁰

29. However, even when extraneous considerations are removed from the analysis, including those of security and expeditiousness, the Defence's arguments that the Bashir Material (and references within the material to the

³⁶ ICC-02/05-03/09-443, para.20.

³⁷ ICC-02/05-03/09-443, para.24.

³⁸ Bashir Material Decision, para.24.

³⁹ Appeals Judgement, para.37.

⁴⁰ Appeals Judgement, para.37.

GoS campaign in Darfur) will assist it regarding why the attack on MGS Haskanita was lawful,⁴¹ how Mr. Banda was aware of the same,⁴² and Mr. Banda's character and motives,⁴³ do not meet the requirements of Rule 77 materiality.

30. The Prosecution reiterates in the context of Mr. Banda's character and motives (Category 1), the lawfulness of the attack on MGS Haskanita (Category 3) and Mr. Banda's awareness of the factual circumstances that established the unlawful nature of the attack (Category 4), that:

- Evidence of the GoS campaign in Darfur broadly, or even just in Haskanita, would only be relevant if it showed some involvement of AMIS (e.g. AMIS personnel taking a direct part in hostilities, or an AMIS object making an effective contribution to the military action of a party). Any such evidence has already been disclosed.⁴⁴
- Evidence that relates to the GoS campaign where there is no mention of AMIS' involvement is not material, since it has no bearing on the issue of whether AMIS personnel and objects at the MGS Haskanita were protected from attack.⁴⁵
- If evidence regarding motive were relevant, notwithstanding the narrowed issues in this case, it would be limited to why Mr. Banda attacked the personnel and objects of MGS Haskanita (and not the GoS in general). Any such evidence has already been disclosed.⁴⁶

31. Hence, although the Trial Chamber did not make a definitive finding on materiality regarding information in the Bashir Material on the GoS campaign and took into consideration extraneous factors, even when such considerations are removed from the equation, the Defence submissions

⁴¹ ICC-02/05-03/09-235, para.26-32.

⁴² ICC-02/05-03/09-235, para.34-35.

⁴³ ICC-02/05-03/09-235, para.17.

⁴⁴ ICC-02/05-03/09-251, paras.27-30.

⁴⁵ ICC-02/05-03/09-251, para.27.

⁴⁶ ICC-02/05-03/09-251, para.40.

linking the various categories of relevance to the GoS campaign in Darfur do not meet the requirements of Rule 77 materiality.

Prior Disclosure to the Defence and Re-classification of documents

32. As held by the Appeals Chamber, prior disclosure of documents⁴⁷ and the re-classification of documents,⁴⁸ are additional relevant factors to be considered when assessing materiality.

33. In the context of prior disclosure to the Defence, the Appeals Chamber held:

“in deciding whether the information sought continues to be material to the preparation of the defence, the Chamber may also take into account whether the defence has already received relevant documents from the Prosecutor.”⁴⁹

34. The Appeals Chamber also highlighted that, as noted in the Bashir Material Decision:

“69 items of evidence relating to the background of the Darfur conflict had already been disclosed to the defence; and that, in the Prosecutor’s Response, the Prosecutor, in effect, disclosed the existence of 12 other publicly available reports about the context of the conflict.”⁵⁰

35. The Appeals Chamber further stated that the Trial Chamber:

“could have considered, in light of the disclosure of the aforementioned documents, whether part or all of the information sought indeed remained material to the preparation of the defence.”⁵¹

36. As instructed by the Appeals Chamber⁵² and the Trial Chamber,⁵³[REDACTED].⁵⁴ This has “reduced the amount of information that was in dispute between the parties”⁵⁵ as envisioned by the Appeals

⁴⁷ [REDACTED].

⁴⁸ ICC-02/05-03/09-507, para. 2(a).

⁴⁹ ICC-02/05-03/09-501, para.40.

⁵⁰ ICC-02/05-03/09-501, para.41.

⁵¹ ICC-02/05-03/09-501, para.41.

⁵² ICC-02/05-03/09-501, paras.43-44.

⁵³ ICC-02/05-03/09-507, para. 2(a).

⁵⁴ [REDACTED].

⁵⁵ ICC-02/05-03/09-501, para.44.

Chamber, and is a further indication that the remainder of the Bashir Material is not material to the preparation of the Defence.

Security concerns

37. Finally, even if the Trial Chamber should find some aspect of the GoS campaign to be material to the preparation of the Defence, as part of the first stage of its Rule 77 analysis, the security concerns highlighted by the Prosecution in its prior submissions⁵⁶ would weigh against disclosure under the second stage of the Rule 77 analysis.

Category (5): “Defence investigations and trial preparations”

38. In the Defence Observations, the Defence introduces for the first time in this prolonged litigation an entirely new category of alleged Rule 77 materiality. This new category, which is not linked to any of the contested issues in the case, is entitled “Defence investigations and trial preparations.”⁵⁷ As conceded by the Defence,⁵⁸ this is a category that has never previously featured in Defence submissions.

39. Such a category of purported relevance, which is so broad as to be of virtually no utility, does not meet the *prima facie* threshold of materiality. The new category is a tautology which, if accepted, would allow the Defence to argue the materiality of any information merely by labelling it as necessary for Defence investigations / preparation. In essence, this new category represents an effort by the Defence to avoid the requirement of establishing materiality through forensic analysis by simply marking items as “material”.

⁵⁶ ICC-02/05-03/09-251, para.2, [REDACTED].

⁵⁷ Defence Observations, para.8.

⁵⁸ Defence Observations, para.8.

40. Hence, this category does not properly reflect information which is *prima facie* material to the preparation of the Defence

V. Conclusion

41. In light of the above, the material requested by the Defence is not relevant to any of the three contested issues and is not otherwise material to the preparation of the Defence.

42. For all the above stated reasons, the Prosecution requests the Trial Chamber to reject the Defence Request for Disclosure.



Fatou Bensouda
Prosecutor

Dated this 19th day of February 2014

At The Hague, The Netherlands