

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 14 April 2011

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernandez de Gurmendi

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

With Confidential Annexes "A" and "B"

**Prosecution's Response to the Trial Chamber's Request for Written Submissions
on Issues to be Addressed During the Status Conference on 19 April 2011**

Source: Office of the Prosecutor

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

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Detention Section

**Victims Participation and Reparations
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Other

Background

1. On 30 March 2011, Trial Chamber IV ("Trial Chamber") ordered that a status conference be held on 19 April 2011 at 14.30.¹
2. The Office of the Prosecutor ("Prosecution"), the defence of Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence"), as well as the participants and the Registry, were subsequently notified by the Trial Chamber of a preliminary agenda, and instructed to file written submissions in response by 16.00 on 14 April 2011.²
3. The Prosecution hereby files its written submissions in response to the Trial Chamber's instructions. The Prosecution informs the Trial Chamber, however, that there are ongoing conversations with the Defence that could affect the shape of the trial and the responses that are set out below. Should the discussions result in a change, the Chamber shall be immediately notified.

I. AGREEMENT BETWEEN THE PARTIES AS TO THE FACTS

4. There are currently no agreements between the parties as to the facts pursuant to Rule 69 of the Rules of Procedure and Evidence ("Rules"). Should there be any change in circumstances regarding agreed facts, the Prosecution and the Defence will promptly notify the Trial Chamber.

¹ Order scheduling a status conference, 30 March 2011, ICC-02/05-03/09-127, paragraph 1.

² Email communication between the Legal Adviser to the Trial Division and the parties, participants and the Registry dated 4 April 2011, at 12.24.

II. DISCLOSURE BY THE PROSECUTION AND RELATED ISSUES

- 1) *Timing of disclosure of outstanding incriminating evidence (evidence which the prosecution intends to rely on at trial); indication of whether the investigation is still ongoing; indication of time needed to effect final disclosure, including of full witness statements; language of disclosure*

a) Timing of Disclosure of Outstanding Incriminating Evidence

5. The Prosecution disclosed the bulk of the incriminating evidence that it intends to rely on at the trial to the Defence at the confirmation stage. As will be discussed further below, the full statements of **nine** witnesses³ remain undisclosed due to witness protection issues relating to those witnesses. The timing, therefore, of any disclosure of the full statements of these witnesses is largely dependent on when effective protective measures sufficient to allay any fears for their safety are in place. The Prosecution will continue to liaise with the Victims and Witnesses Unit (“VWU”) and to update the Trial Chamber in this regard. In any event, it is anticipated that the issues related to the protective measures for these witnesses will be resolved by the end of July 2011, following which the Prosecution will apply to the Trial Chamber for redactions to their statements and then disclose them.

6. Additionally, the Prosecution intends to re-interview six of these nine witnesses,⁴ and then disclose their further statements to be disclosed to the Defence. It is anticipated that these re-interviews will be completed by the end of July 2011. The Prosecution should be in a position to disclose the statements resulting from these re-interviews as soon as they have been transcribed and the necessary applications for redactions have been sought and granted.

³ DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312, DAR-OTP-WWWW-0314, DAR-OTP-WWWW-0433, DAR-OTP-WWWW-0441 and DAR-OTP-WWWW-0466.

⁴ DAR-OTP-WWWW-0441, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312, DAR-OTP-WWWW-0304 DAR-OTP-WWWW-0466 and DAR-OTP-WWWW-0305

7. Finally, the Prosecution also intends to interview 6 new witnesses, including an expert witness. Their statements/expert report would also need to be disclosed to the Defence. It is anticipated that the statement/report of any expert will also be ready by the end of July 2011, while the other 5 witnesses would have been interviewed by the end of August 2011.

b) Indication of whether the investigation is still ongoing

8. The Prosecution's investigation is still ongoing to the extent that it proposes to re-interview six Prosecution witnesses, and potentially, to interview 6 additional witnesses – including an expert witness.

c) Indication of time needed to effect final disclosure, including of full witness statements

9. The Prosecution already disclosed the full statements of **13** witnesses to the Defence prior to the Confirmation hearing. The Prosecution intends to rely on **12** of these witnesses at the trial. The witness that it no longer intends to rely on is DAR-OTP-WWWW-0447. As related above, the Prosecution did not disclose the full statements of nine other witnesses at the confirmation stage, but instead submitted summaries. At the present time, the Prosecution still intends to rely on these nine witnesses at the trial, as well as the 12 witnesses whose full statements have been disclosed, bringing the current total number of Prosecution trial witnesses to **21**. Effectively therefore, full statements of the nine witnesses for whom summaries were initially used are yet to be disclosed to the Defence. Since the witness protection issues that precluded the Prosecution from disclosing the nine witnesses' full statements at the confirmation stage still subsist, the Prosecution is unable to disclose their full statements until such time as adequate protective measures are in place. The Prosecution will continue to liaise with the VWU and will update the Trial Chamber on any developments in this regard.

d) language of disclosure

10. Rule 76 of the Rules requires the Prosecution to disclose to the Accused persons, in a language which they fully understand and speak, the statements of all Prosecution witnesses. The Prosecution recalls that at their initial appearance, both Accused persons confirmed that Zaghawa is the language that they fully understand and speak. Although it appears that Mr Banda has some understanding and knowledge of Arabic, Mr Jerbo's understanding of Arabic is minimal. Therefore any disclosure pursuant to Rule 76 would have to be in Zaghawa. This has a number of practical implications:

- i. Zaghawa is not a written language;
- ii. The Zaghawa vocabulary is limited to no more than 5,000 words, rendering it difficult to translate certain words and concepts from languages of the Court such as English, French and Arabic into Zaghawa;
- iii. Consequently, the relevant material would first have to be transliterated and then read on to audio tapes in Zaghawa;
- iv. Other practical difficulties may also arise in translating annotations that are contained in certain witness related materials such as maps and sketches on to audio tape.
- v. The current page-count of material that needs to be disclosed pursuant to Rule 76 is approximately 3700 pages. This includes the full witness statements, as well as the Document Containing the Charges and the updated List of Evidence. Discussions with the Language Services Unit of the Office of the Prosecutor indicate that this process will take approximately 30 months if three translators were to work on the material on full-time basis.

2) Volume of outstanding evidence to be disclosed: indication of the number of witnesses, number of items on which the prosecution intends to rely on at trial

11. As related above, the full statements of nine Prosecution witnesses remain to be disclosed to the Defence. Seven of these statements were obtained in transcript form, with the resultant effect that they are very detailed. The total page-count of these nine statements is approximately **1730** pages. As related above, the re-interviews of six Prosecution witnesses and the interview of the expert witness are likely to generate further evidence to be disclosed to the Defence, although the Prosecution is currently unable to precisely indicate the volume that this will generate.

12. The Prosecution currently intends to rely on **27** witnesses⁵. The non-witness related items of evidence that the Prosecution intends to rely upon at trial does not differ significantly from that which it already relied on at the pre-trial stage. There are approximately **242** items in this category.

3) *Indication of workable deadline for filing of updated list of prosecution evidence*

13. The Prosecution does not expect the Prosecution List of Evidence (“LoE”) that it intends to rely on at the trial of the Accused persons to differ substantially from the LoE that was disclosed at the Confirmation stage. Updates to the list will involve (a) the exclusion of all references to witness DAR-OTP-WWWW-0447, on whose statement the Prosecution no longer seeks to rely, and the substitution of other references therefor; (b) inclusion of references to the full statements (in lieu of the references in the current LoE to *summaries*) of those witnesses that the Prosecution referred to in paragraphs 5 and 9 above. As soon as it is in a position to disclose the *full* statements, the Prosecution intends to update the LoE by replacing references to summaries with corresponding references to the full statements; and (c) the addition of references to the anticipated statements from re-interviews of Prosecution witnesses and any new witnesses, including the expert witness.

⁵ Including the expert witness and 5 new witnesses.

14. In the first instance, the Prosecution would be in a position to file an updated LoE reflecting the updates referred to in (a) above by 30 June 2011. As regards the anticipated re-interviews of six witnesses and the identification and instruction of an expert, the Prosecution will update the LoE as and when those events occur.

4) Estimated length of prosecution presentation of evidence (number of hours)

15. The Prosecution currently estimates that it will require no more than 170 hours to ask questions of the witnesses that it has identified in this filing. It is difficult, however, to provide specific information on the estimated length of time that the Prosecution will require to present its evidence. The Prosecution notes that numerous practical issues such as the simultaneous translation from one or two languages of the Court into Zaghawa for the Accused persons and incidental submissions by counsel in the course of a witness's testimony may well have a bearing on the length of time that a witness takes to testify. The fact that some of the Prosecution witnesses also intend to testify in Fur, a language which like Zaghawa is also unwritten and limited in vocabulary, may also have a bearing on the length of their testimonies. Accordingly, the Prosecution asks that the Trial Chamber takes these factors into consideration when determining any time to be allotted for the presentation of its evidence.

5) Are there any outstanding issues in relation to redactions (does the prosecution intend to file applications for authorization to apply redactions, or for the lifting of redactions authorized pursuant to Rule 81(4))?

16. To varying degrees, the Prosecution will seek redactions to the full statements of the nine witnesses that are yet to be disclosed to the Defence pursuant to Rule 81(4). The Prosecution anticipates that it will also be seeking Rule 81(4) redactions to

the statements generated as a result of re-interviewing the six witnesses referred to in paragraphs 6 and 8 above.⁶

17. The Prosecution will review the redactions already granted by the Pre-Trial Chamber pursuant to Rule 81(4) to determine whether any of them require lifting, and to make the necessary applications by the end of June 2011.

6) Are there any outstanding issues relating to Article 54(3)(e) of the Statute (whether concerning incriminating, potentially exculpatory evidence under Article 67(2) of the Statute, or Rule 77 material)?

18. The Prosecution continues to work on finalising arrangements with the information provider to secure the lifting of restrictions imposed pursuant to Article 54(3)(e) on eight documents which contain material that may be potentially exonerating or fall under Rule 77 to ensure that the relevant material is available for disclosure. The information provider has already indicated that, in principle, it is agreeable to the disclosure of a narrative summary containing the relevant information on the condition that the summary would be kept confidential by the Defence and used only in closed session.

7) Update on the disclosure of potentially exculpatory evidence under Article 67(2) of the Statute, and Rule 77 material

19. Except for eight documents which are subject to Article 54(3)(e) restrictions - mentioned above in paragraph 17, the Prosecution has disclosed all of the potentially exculpatory evidence under Article 67(2) and Rule 77 material at the Confirmation stage of this case. Additionally, the Prosecution is in possession of two physical

⁶ In this regards, the Prosecution informs the Chamber that in the *Abu Garda* Case, Pre-Trial Chamber I had previously granted the Prosecution's request for the authorization for the non-disclosure of the identity of the 7 witnesses in the summaries of their full statements, pursuant to Rule 81(4) (see ICC-02/05-02/09-74 and ICC-02/05-02/09-77)."

items of evidence related to a witness whose statement has not yet been disclosed. Upon disclosure of the statement relevant statement and the witness's identity, these items will be available for inspection by the Defence.

III. ISSUES CONCERNING WITNESSES

- 1) *Are there any outstanding or anticipated issues concerning witness protection (including any outstanding issues on the disclosure of identities of witnesses the prosecution intends to call, in particular whether any referrals of prosecution witnesses to the protection program are still pending)?*

20. As related above, the Prosecution was unable to rely on the full statements or disclose the identities of nine Prosecution witnesses⁷ at the Confirmation stage due to outstanding protection issues. Those protection issues still exist, and the Prosecution continues to work with the VWU to resolve them. The Prosecution will make the necessary filings or request an *ex parte* status conference to update the Trial Chamber on the security situation of each witness, should the need arise.

21. There are currently no outstanding referrals to the ICC protection program. However, the Prosecution is awaiting VWU's response on referrals to the VWU for general advice in respect of protective measures for three witnesses – DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305 and DAR-OTP-WWWW-0307.

- 2) *Are there any issues concerning expert witnesses (including whether the prosecution intends to rely on expert witnesses; submissions on possibility of using joint instructions; deadline for disclosure of reports)?*

⁷ DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312, DAR-OTP-WWWW-0314, DAR-OTP-WWWW-0433, DAR-OTP-WWWW-0441 and DAR-OTP-WWWW-0466

22. The Prosecution anticipates that it will instruct an expert witness to testify at the trial. The Prosecution favours, to the extent possible, the joint instruction of a single expert and is mindful of the jurisprudence of the Court in this regard.⁸ It is anticipated that the report of any such expert should be available by the end of July 2011.

IV. PREPARATION OF THE DEFENCE

[To be addressed by the Defence]

V. VICTIMS ISSUES

[To be addressed by the Registry]

VI. LANGUAGE OF THE TRIAL

- 1) *Languages spoken by the witnesses the prosecution intends to call
(preliminary indication of language of testimony and of workable deadline to
file final information)*

23. The Prosecution has attached to this filing as Confidential Annex “A” a list of the Identification numbers of its potential witnesses, together with an indication of language in which they are expected to testify.

VII. TRIAL DATE

- 1) *Submissions on the earliest date by which the parties and legal
representatives will be ready for the trial to commence*

⁸ ICC-01/04-01/06-1069

24. From the Prosecution's point of view, the issues concerning translation of material to be disclosed to the Defence pursuant to Rule 76 (see paragraph 10 above) will have an impact on when the trial will be ready to commence.

VIII.

[See Confidential Annex "B"]



Luis Moreno-Ocampo
Prosecutor

Dated this 14th day of April 2011

At The Hague, The Netherlands