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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

Defence Response to Public Redacted Version of “Prosecution’s request to retain temporary redactions to the identity of a Prosecution’s witness and to delay the disclosure of the identities of the two former Prosecution’s witnesses”, filed on 29 July 2011

Sources: Defence Team of Abdallah Banda Abakaer Nourain
Defence Team of Saleh Mohammed Jerbo Jamus

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

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I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") hereby submit their response to the Public Redacted Version of the "Prosecution's request to retain temporary redactions to the identity of a Prosecution's witness and to delay the disclosure of the identities of the two former Prosecution's witnesses", filed on 29 July 2011 ("Request"), dated 15 August 2011.¹
2. In the Request, the Prosecutor asks the Trial Chamber to authorise him to retain temporary redactions to the identity of witness 0307 in his statement and delay disclosure of his identity and to allow the temporary non-disclosure of the identities, statements and material of witnesses 0441 and 0466, until the Prosecutor has concluded his review of their evidence pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence ("Rules").²
3. The Defence oppose the Prosecution's Request in its entirety and hereby incorporates by reference their submissions contained in their Defence Response to Public Redacted Version of "Prosecution's Request for Non-disclosure of Four Witnesses statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence", filed on 15 July 2011, dated 22 August 2011.³ The Defence submit that the Prosecutor is under an absolute obligation to disclose the statements of witnesses 0441 and 0466 in full, since they constitute Article 67(2) and Rule 77 material. Any delay in the disclosure of the statements and material will affect the preparation of the defence case. Accordingly, the Defence request that the Trial Chamber order the Prosecutor

¹ ICC-02/05-03/09-185-Red, "Request".

² Request, para. 24.

³ ICC-02/05-03/09-201.

to disclose the full witness statements, as well as all information on the identity of these witnesses (“identifying information”).

4. For the same reason, the Defence request that the Prosecutor discloses the identity of witness 0307 to the Defence. The jurisprudence of this Court, while taking into account the subjective concerns of a witness, requires that the alleged danger arising from the disclosure of the identity of a witness must involve an objectively justifiable risk to his safety in order to justify withholding his or her identity. Such an objectively justifiable risk has not been articulated in the case of Witness 0307. As such, his identity should be disclosed to the Defence without delay, in order to avert the manifest unfairness to the Defence preparation that would be occasioned by any further delay.

II. Relevant Procedural Background

5. The Defence refers to the relevant procedural background relating to the three witnesses set out in the Prosecution’s Request. For a more complete background in relation to this litigation, the Defence refer to their filing entitled “Defence Response to ‘Public Redacted Version of Prosecution’s Request for Non-disclosure of Four Witnesses statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence’, filed on 15 July 2011”, dated 22 August 2011.⁴
6. On 8 July 2010, the Prosecutor disclosed to the Defence revised and anonymous summaries of the statements *in lieu* of transcripts of witnesses, including Witness 0307, intended to be relied upon for the purposes of the

⁴ See section “II. Background”.

confirmation hearing.⁵ For similar reasons, on 22 October 2010, the Prosecutor disclosed the summaries of the statements of witnesses 0441 and 0466 to the Defence.⁶

7. On 13 June 2011, the Prosecutor submitted the Prosecution's Revised List of Evidence and Revised List of Witnesses, in light of the Agreement of Facts between the Parties.⁷ According to this amended list of witnesses, the Prosecutor intended to call 16 witnesses to testify at trial,⁸ including witnesses 0307, 0441 and 0466.
8. On 24 June 2011, the Prosecutor filed the Public Redacted Version of the "Prosecution's Application for Redactions Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence",⁹ in which he requested extensive redactions of the statements and transcripts of interviews of nine Prosecution witnesses, following the Trial Chamber's oral order on 19 April 2011 to apply immediately for redactions, including temporary ones, pending protective measures.¹⁰ In his submission, the Prosecutor applied for temporary redactions to the names and other identifying information in the statements of witnesses 0307, 0441 and 0466, which are in transcript form,¹¹ pursuant to Rule 81(4) of the Rules.¹²
9. At the status conference on 12 July 2011, the Prosecution advised that, should the trial proceed on the basis of the agreed facts, it would no longer seek to rely on four witnesses – 0314, 0433, 0441 and 0466.¹³ These four witnesses were

⁵ See Prosecution's Communication of Incriminating Evidence Disclosed to the Defence on 8 July 2010, 9 July 2010, ICC-02/05-03/09-51-Conf-AnxB.

⁶ ICC-02/05-03/09-94.

⁷ ICC-02/05-03/09-162.

⁸ *Ibid.*, Annex C.

⁹ ICC-02/05-03/09-159-Red. The confidential and *ex parte* version was filed on 6 June 2011.

¹⁰ See ICC-02/05-03/09-T-12-ENG, p. 28, line 21 to p. 29, line 24.

¹¹ *Ibid.*, fn 4.

¹² *Ibid.*, paras. 16 and 17. The Defence note that due to the redactions applied to the Prosecution's Application, the Defence is not in a position to conclude whether other redactions to the statements of the four witnesses have also been sought by the Prosecution pursuant to Rule 81(2) of the Rules.

¹³ ICC-02/05-03/09-T-12-ENG, p. 5, line 19 to p. 6, line 4.

not listed in the Updated List of Witnesses filed on 5 August 2011. The list contains 15 witnesses¹⁴

10. On 29 July 2011, as stated in paragraph 2 above, the Prosecutor requested the Trial Chamber to authorise him temporarily not to disclose the identity of Witness 0307 and to allow the temporary non-disclosure of the identities, statements and material of witnesses 0441 and 0466, until the Prosecutor has concluded the review of their evidence pursuant to Article 67(2) and Rule 77.¹⁵
11. For the avoidance of doubt, the Defence provide the Trial Chamber with an overview of the materials that the Prosecution has disclosed to it to date. In relation to transcripts, the Defence have received from the Prosecution only two statements in transcript form, the statements of witnesses 0307 and 0442. In respect of signed witness statements, the Defence have received from the Prosecution signed witness statements for all 6 AMIS witnesses, for all 5 third party witnesses and for Witness 0439. In respect of summaries of transcripts, the Defence have received summaries of transcripts in relation to 8 rebel witnesses.¹⁶ Finally, the Defence understand that the Prosecution have recently interviewed four witnesses 0484, 0485, 0486 and 0487, but disclosure of their statements has not yet been provided.
12. On 6 June 2011, the Defence sent a request to the Prosecutor, in which it asked the Prosecutor to contact 8 Prosecution witnesses, including witnesses 0441 and 466, and ask whether they are agreeable to being interviewed by the Defence.¹⁷ On 30 June 2011, the Prosecutor informed the Defence that witnesses 0307 and 0441 have indicated that they are, at this time, not agreeable to be interviewed by the Defence.¹⁸ On 12 July 2011, the Prosecutor

¹⁴ See ICC-02/05-03/09-189, Annex A.

¹⁵ Request, para. 24.

¹⁶ Witnesses 0304, 0305, 0306, 0441, 0466, 0312, 0314, and 0433.

¹⁷ Letter "Interview of Prosecution witnesses", 6 June 2011, ref. D-AB/2011/14; D-SJ/2011/14.

¹⁸ Letter "Interview of Prosecution witnesses, 30 June 2011, ref. 110630/LMO.

informed the Defence that Witness 0466 has refused to be interviewed by the Defence.¹⁹

III. Applicable Law

13. Article 67(2) provides that:

“In addition to any other disclosure provided for in the Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.”

14. Rule 77 provides in part that:

“The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence [...].”

15. Rule 81(4) provides in part that:

“The Chamber [...] shall [...] take the necessary steps to ensure the confidentiality of information [...] to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial”

16. The Appeals Chamber in *Katanga* established with respect to requests for non-disclosure of identity to the Defence on the basis of the safety concerns of

¹⁹ Letter “Interview of Prosecution witnesses, 12 July 2011, ref. 1107012/LMO.

witnesses pursuant to Rule 81(4) that "the alleged danger must involve an objectively justifiable risk to the safety of the person concerned".²⁰

IV. The Prosecutor Is Obligated to Disclose this Material

Witness 0307

17. The Prosecutor accepts that he is under an obligation to disclose the identity of 0307. However, he asks the Trial Chamber "to maintain the current set of redactions applied to the identity and the interview records of W-0307 and delay the lifting of his anonymity until after [REDACTED] is concluded."²¹
18. The heavy redactions applied to the Prosecution's Request limit the scope of the Defence's Response. The Prosecutor justifies his request for the temporary non-disclosure of the identity of Witness 0307 on the basis of Witness 0307's "subjective concerns"²² regarding "the risk associated with the disclosure".²³ However, as the Appeals Chamber in *Katanga* pointed out, concerns regarding the risk to the safety of a witness must be objectively justified²⁴ in order to warrant non-disclosure. The Defence submit that "scepticism about the effectiveness [REDACTED] protective measures to counter-balance the risk of disclosure"²⁵ does not appear to amount to an "objectively justifiable risk".
19. Moreover, the Defence disagree with the Prosecutor's assertion that the non-disclosure of the identity of Witness 0307 is not prejudicial to the Defence.²⁶ In order to effectively prepare its defence case, it is imperative that the Defence are informed as soon as practicable of the identity of the witnesses relied upon by the Prosecutor at trial. In these circumstances, any further delay in the

²⁰ ICC-01/04-01/07-475, para. 71(a).

²¹ Request, para. 19.

²² Request, para. 3.

²³ Request, para. 17.

²⁴ ICC-01/04-01/07-475, para. 71(a).

²⁵ Request, para. 17.

²⁶ See Request, 19.

disclosure of the identity of these witnesses will prejudice the Defence's preparation given the advanced stage of these proceedings. In the particular circumstances of this case, the requested disclosure becomes all the more compelling given the documented difficulties encountered by the Defence, of which the Trial Chamber is already seized.²⁷ As such, the Defence request that the Trial Chamber order the Prosecutor to disclose to the Defence the identity of Witness 0307.

Witnesses 0441 and 0466

20. The Defence submit that the Prosecutor labours under an absolute obligation²⁸ to disclose the statements of witnesses 0441 and 0466, including identifying information, since the Defence consider that they constitute Article 67(2) and Rule 77 material relevant to the preparation of their case.

21. The Prosecutor's Request is unreasonable when viewed in light of the duration of these proceedings. Over a period of five months after this Trial Chamber was constituted on 16 March 2011 and four months after the first status conference was held on 19 April 2011, the Prosecutor has still not concluded the analysis of the statements and material for witnesses 0441 and 0466 in respect of Article 67(2) and Rule 77 material. Article 67(2) requires the Prosecutor to disclose the relevant evidence to the Defence "as soon as practicable". As such, the Prosecutor is not only under an obligation to identify exculpatory evidence, but to disclose the same expeditiously. The Prosecutor has failed to do so with regards to witnesses 0441 and 0466. This failure is fundamental and the Defence submit it is in breach of the

²⁷ See ICC-02/05-03/09-145 and ICC-02/05-03/09-146.

²⁸ The Defence refers to its submissions in "Defence Response to Public Redacted Version of "Prosecution's Request for Non-disclosure of Four Witnesses statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence", filed on 15 July 2011", filed on 22 August 2011, regarding the absolute obligation of the Prosecutor to disclose statements of witnesses in full, including for witnesses who will no longer be relied upon at trial by the Prosecutor, the obligation to disclose the identity of the witnesses, the inadequacy of summaries, and the significance of the reliance on these witnesses at confirmation for the issue of disclosure. See in particular sections IV and V, ICC-02/05-03/09-201.

Prosecutor's obligations under the Statute. Any other conclusion or interpretation would be inconsistent with the provisions of Article 67(2).

22. The evidence contained in these statements is considered by the Defence to be potentially exculpatory in nature and material for the preparation of the defence case. For this reason, any delay in the disclosure of the statements and the identity of these two witnesses is prejudicial to the Defence. In these circumstances, the Defence request the immediate disclosure of the statements and all identifying information of witnesses 0441 and 0446 in order to proceed with the preparation of its case.

23. The Defence observe that there is an emerging trend of requests of similar nature by the Prosecutor which require multiple responses from the Defence.²⁹ Such an approach does not bode well for the fair conduct of these proceedings, because it would not lead to finality for litigation on these issues. For this and the reasons stated above, the Defence restate their position that they request full disclosure of the statements of all witnesses, including those witnesses that the Prosecutor no longer intends to rely upon at trial that constitute potentially exculpatory and Rule 77 material. In these circumstances, the Defence request that the Chamber issue an authoritative ruling to this effect to bring an end to the multiple requests and thereby provide guidance for the treatment of similar requests in the future.

²⁹ See e.g. ICC-02/05-03/09-183-Red.

Relief Requested

For the reasons set out above, the Defence respectfully request the Trial Chamber to:

- (a) order the Prosecutor to disclose to the Defence the identity of Witness 0307;
- (b) order the Prosecutor to fully disclose to the Defence the interview transcripts of witnesses 0441 and 0466, including identifying information; and
- (c) issue an authoritative ruling on the obligation of the Prosecutor to fully disclose all statements of witnesses, including those on whom the Prosecutor no longer intends to rely upon at trial which contain exculpatory evidence and / or information material to the preparation of the defence.

Respectfully Submitted,



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Lead Counsel



Mr. Nicholas Koumjian
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Dated this 23rd Day of August 2011
At Nairobi, Kenya

Dated this 23rd Day of August 2011
At Dhaka, Bangladesh