

**Cour
Pénale
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**International
Criminal
Court**



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TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF THE PROSECUTOR v. ABDALLAH BANDA ABAKAER

NOURAIN AND SALEH MOHAMMED JERBO JAMUS

PUBLIC DOCUMENT

Public Redacted Version of “Prosecution’s Second Request for Non-Disclosure of Four Former Witness Statements, or in the Alternative, to Maintain Request for Redactions Previously Sought Pursuant to Rules 51(2) and 81(4) of the Rules of Procedure and Evidence” filed on 9 September 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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I. Introduction

[REDACTED].¹

On 29 July 2011, further to their removal from its list of trial witnesses the Prosecution requested the Chamber to, *inter alia*, authorise the temporary non-disclosure of W-0441's and W-0446's identities, statements, and material until after the Prosecution had concluded its review of their evidence pursuant to Article 67(2) and Rule 77 and [REDACTED]².

As set out previously and reiterated below, the Prosecution believes whatever potentially exonerating evidence or information that would be material to the preparation of the Defence that is contained within the statements has already been disclosed in summaries previously provided. The additional disclosure of identities or other information, which would be disclosed in unredacted statements, could potentially endanger the witnesses themselves and is, in this circumstance, unnecessary. If the Chamber were to conclude that the statements must be disclosed without redactions, the Prosecution requests additional time before disclosure to assess the risks to them from disclosure and need for the provision of protective measures.

II. Background

1. On 9 May 2011, the Prosecution filed an update on the protection status of nine witnesses it intended to rely upon at the trial of *Abdallah Banda Abakaer Nourain*

¹ [REDACTED].

² ICC-02/05-03/09-185-Conf-Exp.

and *Saleh Mohammed Jerbo Jamus* (“the Accused Persons”), [REDACTED].³ On the same day, the Victims and Witnesses’ Unit (“VWU”) filed a report on the security situation of six Prosecution witnesses, including [REDACTED].⁴

2. On 6 June 2011, the Prosecution filed an application (“Redaction Application”) seeking redactions to the statements of, among others, witnesses W-0314, W-0433, W-0441, and W-0466.⁵ That application has not been decided.
3. [REDACTED].⁶
4. [REDACTED].⁷ [REDACTED]⁸; [REDACTED].⁹
5. On 12 July 2011, at the status conference convened by the Chamber, the Prosecution informed that should the trial proceed on the basis of the Agreed Facts¹⁰, it no longer intends to rely upon W-0466, W-0441, W-0433, and W-0314 at trial.¹¹
6. [REDACTED].¹²
7. In its 29 July 2011 filing, the Prosecution requested *inter alia* the authorization of the Chamber to delay the disclosure of W-0441’s and W-0446’s identities,

³ [REDACTED].

⁴ [REDACTED].

⁵ ICC-02/05-03/09-159-Conf-Exp+Conf-Exp-Anxs.

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ ICC-02/05-03/09-148-Conf-AnxA.

¹¹ ICC-02/05-03/09-T-12-ENG, page 6, lines 2 – 4.

¹² [REDACTED].

statements, and material until after the Prosecution had concluded its review of their evidence pursuant to Article 67(2) and Rule 77 [REDACTED].¹³

8. On 5 August 2011, the Prosecution filed an updated list of witnesses it intended to rely upon at trial, where Witnesses 0441, 0466, 0314, and 0433 no longer featured.
9. On 15 August 2011, the Prosecution informed the Chamber that having removed W-0441 and W-0466 from its list of trial witnesses, it was reviewing their evidence to assess whether they are potentially exculpatory and what information contained therein would be material to the preparation of the defence in light of the proposed Rule 69 agreement of facts.¹⁴ In the same logic and with the same purpose, further to their removal from the Prosecution's list of trial witnesses, the Prosecution had also initiated its review of the evidence of W-0433 and W-0314.
10. On 6 September 2011, the Chamber ordered the Prosecution to finalise its review pursuant to Article 67(2) and Rule 77 concerning W-0441, W-0466, W-0314 and W-0433 and to file its conclusions with the Chamber by 9 September¹⁵.

III. Information on the review of statements as potentially exonerating evidence or information that is material to the preparation of the Defence.

11. In the present submission, the Prosecution informs the Chamber that upon careful analysis of their statements, W-0314, W-0433, W-0441, and W-0466 provide some information of a potentially exonerating nature, and additional information that, broadly construed, might be material to the preparation of the defence.

¹³ [REDACTED].

¹⁴ ICC-02/05-03/09-185-Red, para. 20.

¹⁵ ICC-02/05-03/09-208.

12. The statements of the four witnesses have not been disclosed; rather, the Prosecution was authorized to disclose a summary of their statements. The summaries already include the information contained in the statements that might be potentially exonerating or material to the preparation of the defence.
13. [REDACTED], the Prosecution already informed the Chamber of the inability to disclose the identity of W-0314 and W-0433 [REDACTED].
14. In its 29 July filing, the Prosecution informed the Chamber that W-0441 and W-0466 had in the past expressed some degree of reticence [REDACTED] that their identities were to be disclosed. The Prosecution further indicated that [REDACTED] would subsequently meet the witnesses [REDACTED], the Prosecution informs the Chamber that W-0441 had reiterated to its representatives that he does not consent to the disclosure of his identity in the present circumstances. [REDACTED].
15. Therefore at this time W-0314, W-0433, W-0441 and W-0466 have not consented to having their identities disclosed.
16. [REDACTED].¹⁶
17. In a further attempt to fulfil its disclosure obligations, the Prosecution has again reviewed the information from these witnesses. The Prosecution submits that the Article 67(2) and Rule 77 themes identified in the four witnesses' statements are replicated in all meaningful and material respects in the summaries of the four witnesses disclosed to the Defence and to a significant extent in the evidence of other [REDACTED] witnesses whose statements or summaries have been disclosed to the Defence – [REDACTED] – and who are available to testify at trial

¹⁶ [REDACTED].

and will be questioned by the Defence on those themes. Similar Article 67(2) and Rule 77 information is also contained in other items of evidence already disclosed to the Defence.¹⁷ [REDACTED].

DAR-OTP-WWWW-0314 - *Potentially exonerating evidence/information material to the preparation of the defence*

18. [REDACTED].

19. To enable the Chamber to adequately consider the relevant material relating to this witness, the Prosecution's has appended (i) the transcripts of the witness' interview with highlights to the relevant Article 67(2) and Rule 77 excerpts (Annex A); and (ii) an analytical chart of the relevant Article 67(2) and Rule 77 excerpts (Annex A-1).

DRC-OTP-WWWW-0433

(i) Potentially exonerating evidence/information material to the preparation of the defence

20. [REDACTED].

21. To enable the Chamber to adequately consider the relevant material relating to this witness, the Prosecution has appended (i) the transcripts of the witness' interview with highlights to the relevant Article 67(2) and Rule 77 excerpts (Annex B); and (ii) an analytical chart of the relevant Article 67(2) and Rule 77 excerpts (Annex B-1).

¹⁷ The Prosecution is willing to provide a comprehensive chart of such analogous evidence.

(ii) *Additional Rule 81(4) redactions*

22. [REDACTED], the Prosecution has reexamined the evidence affected by its Redaction Application and identified that further areas need to be redacted pursuant to Rule 81(4) in order to protect the safety of W-0433 should his statement be deemed disclosable under the provision of Article 67(2) and Rule 77.

23. The scope as well as legal and factual justifications of the supplementary redactions that the Prosecution is now seeking are illustrated in a chart that is attached as Annex B-2 to the present application.

DRC-OTP-WWWW-0441 - *Information material to the preparation of the defence*

24. [REDACTED].

25. [REDACTED].

26. [REDACTED].

27. To enable the Chamber to adequately consider the relevant material relating to this witness, the Prosecution's has appended (i) the transcripts of the witness' interview with highlights to the relevant Article 67(2) and Rule 77 excerpts (Annex C); and (ii) an analytical chart of the relevant Article 67(2) and Rule 77 excerpts (Annex C-1).

DRC-OTP-WWWW-0466 - *Potentially exonerating evidence/information material to the preparation of the defence*

28. [REDACTED], the witness was interviewed by the OTP [REDACTED]. [REDACTED]. Subsequently, in the context of the confirmation hearing proceedings in the *Banda* and *Jerbo* case, the witness appeared on the

Prosecution's list of incriminatory evidence and his statement was disclosed to the Defence and the Accused persons in summary form. [REDACTED] was also considered to be material to the preparation of the Defense.

29. [REDACTED].

30. [REDACTED].

31. [REDACTED].

32. [REDACTED].

33. The Prosecution has also again reviewed the [REDACTED] statement for the purpose of determining whether they contain potentially exculpatory information or material to the preparation of the defence and has concluded that only two sketches [REDACTED] drawn by the witness would fall within the Rule 77 category.

34. [REDACTED].

35. To enable the Chamber to adequately consider all the relevant material relating to this witness, including his second unsigned statement, the Prosecution's has appended (i) the transcripts of the witness' interview with highlights to the relevant Article 67(2) and Rule 77 excerpts (Annex D); and (ii) an analytical chart of the relevant Article 67(2) and Rule 77 excerpts (Annex D-1).

VI. Updated Information on the status of the four witnesses concerned

DAR-OTP-WWWW-0441 and DAR-OTP-WWWW-0466

36. [REDACTED]¹⁸ [REDACTED]¹⁹. [REDACTED]²⁰, the Prosecution believes it may be of assistance to the Chamber to note that W-0441 and W-0466 have expressed in the past serious concerns [REDACTED] were their identities to be disclosed to the Defence and Accused persons in the present proceedings²¹. [REDACTED].²² Both witnesses firmly refused to consent [REDACTED] to any disclosure of their identities, [REDACTED]. The Defence was duly informed of the witnesses' respective answers.

37. W-0441 remained of the same opinion vis-à-vis disclosure when consulted again by the Prosecution on 25 August and 7 and 8 September 2011.

DAR-OTP-WWWW-0314 and DAR-OTP-WWWW-0433

38. [REDACTED].²³ [REDACTED].

39. On 16 June, [REDACTED], the Prosecution was able to consult W-0314 regarding whether he was willing to be interviewed by them. The witness declined, expressing concerns about his security [REDACTED].

40. For these foregoing reasons, the Prosecution maintains that [REDACTED] W-0314's and W-0433 [REDACTED] consent, the Prosecution is unable to disclose their statements and identities to the Defence. Should the Chamber find that the anonymity of these two witnesses should be lifted and their statements disclosed in unredacted form, [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ ICC-02/05-03/09-185-Conf-Exp, paragraph 21.

²² [REDACTED].

²³ [REDACTED].

41. [REDACTED].

VI. *Ex Parte* Filing

42. The Prosecution submits this request and its annexes “Confidential, Ex Parte, available to the Prosecutor and the Victims and Witnesses Unit Only” because they relate to material that is currently classified as confidential and *ex parte*. A public redacted version of this application or a public note will be filed should the Trial Chamber so require.

Relief Sought

43. For the reason set forth above, the Prosecution respectfully requests the Trial Chamber :

- (i) to authorise the non-disclosure of the statements and witness material relating DAR-OTP-WWWW-0314, DAR-OTP-WWWW-0433, DAR-OTP-WWWW-0441, and DAR-OTP-WWWW-0466;
- (ii) In the event that the Trial Chamber considers that the statements and witness material relating to witnesses DAR-OTP-WWWW-0314 and DAR-OTP-WWWW-0433 should be disclosed: (a) to authorize their disclosure with the redactions sought by the Prosecution in its Redaction Application as further supplemented in paragraphs 22 and 23 above; or in the event the Trial Chamber considers that their statements and material should be disclosed without redactions (b) to authorize their disclosure [REDACTED];
- (iii) In the event that the Trial Chamber considers that the statements and witness material relating to witnesses DAR-OTP-WWWW-0441 and

DAR-OTP-WWWW-0466 should be disclosed: (a) to authorize their disclosure with the redactions sought by the Prosecution in its Redaction Application; or alternatively in the event the Trial Chamber considers that their statements and material should be disclosed without redactions (b) to authorize their disclosure [REDACTED].

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', with a stylized, flowing script.

Luis Moreno-Ocampo
Prosecutor

Dated this 20th day of September 2011
At The Hague, The Netherlands