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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 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) *[sic]* and 81(4) of the Rules of Procedure and Evidence” filed on 9 September 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. Defence Counsel for Messrs. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("**Defence**") oppose the Prosecution's Motion¹ and request disclosure of the unredacted statements and identities of witnesses DAR-OTP-WWWW-0314, DAR-OTP-WWWW-0433, DAR-OTP-WWWW-0441, and DAR-OTP-WWWW-0466.²
2. Disclosure of summaries, OTP work product prepared for the limited purpose of confirmation, is not sufficient to discharge the Prosecutor's disclosure obligations laid down in the Rome Statute ("**Statute**") and the Rules of Procedure and Evidence ("**Rules**") during the trial phase of proceedings. Further, the evidence of the four witnesses at issue *in its entirety*, including the witnesses' identities, constitutes Article 67(2) and Rule 77 material. The four witnesses agreed to participate in these proceedings and their evidence was relied upon to confirm the charges against Messrs. Banda and Jerbo. Should these witnesses have any objectively justified concerns regarding their security, such concerns should be addressed by implementation of protective measures and not by infringing the fair trial rights of the accused. Further, in this context of properly implemented protective measures, the balance of fairness favours disclosure regardless of the witnesses' consent. The Defence is, thus, entitled to immediate disclosure of this material in full.

II. BACKGROUND

3. At confirmation in these proceedings, the Prosecution relied upon summaries of the evidence of witnesses 0314, 0433, 0441 and 0466. As established by the

¹ 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) [sic] and 81(4) of the Rules of Procedure and Evidence" filed on 9 September 2011, 20 September 2011, ICC-02/05-03/09-212-Red ("**Motion**").

² In this filing, the Defence will omit the prefix "DAR-OTP-WWWW" when referring to Prosecution witness numbers and refer to them simply by their number only.

Court's jurisprudence, reliance on summaries *at the confirmation hearing* is permitted under Article 61(5) of the Statute.³

4. In respect of witnesses 0314 and 0433, non-disclosure of information relating to their identities as well as that of their family members in the summaries disclosed to the Defence for the purposes of confirmation was authorised in two decisions in the *Abu Garda* case.⁴ In contrast, no specific decisions in any case are currently in place authorising non-disclosure of the identities of witnesses 441 and 0466, notwithstanding the Prosecution's use of their material on an anonymous basis to date.⁵
5. According to the witness list filed by the Prosecution on 5 August 2011, witnesses 0314, 0433, 0441 and 0466 will not be relied upon by the Prosecution at trial.⁶

III. SUBMISSIONS

Relevance of Previous Defence Submissions

6. The Defence note the overlap with previous submissions objecting to the various requests made by the Prosecution to either not disclose or disclose in redacted form the material of current and former Prosecution witnesses,⁷ particularly with regard to witnesses 0441 and 0466.⁸ To avoid repetition, the

³ Decision on the Prosecutor's Application for Extension of Time and authorisation to submit summaries in lieu of transcript redactions, 11 August 2009, ICC-02/05-02/09-49, p. 5.

⁴ *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Prosecutor's Requests for Authorisation for Non-disclosure of Identities of Witnesses DAR-OTP-WWWW-0304, DAR-OTP-WWWW-0305, DAR-OTP-WWWW-0306, DAR-OTP-WWWW-0307, DAR-OTP-WWWW-0312 AND DAR-OTP-WWWW-0314, 31 August 2009, ICC-02/05-02/09-74 & Decision on the Prosecutor's Request for Authorisation for Non-disclosure of Identity of Witnesses DAR-OTP-WWWW-0433, 31 August 2009, ICC-02/05-02/09-77.

⁵ Public Redacted Version of Prosecution's Application for Redactions Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence filed on 6 June 2011, 24 June 2011, ICC-02/05-03/09-159-Red, paras 3-4.

⁶ Prosecution's Updated List of Witnesses, 5 August 2011, ICC-02/05-03/09-189-AnxA (**"Updated List of Witnesses"**).

⁷ 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, 22 August 2011, ICC-02/05-03/09-201 (**"22 August Response"**) & Defence Observations on the Redactions Sought by the Prosecution for Witnesses DAR-OTP-WWWW-0484, DAR-OTP-WWWW-0485, DAR-OTP-WWWW-0486, and DAR-OTP-WWWW-0487, 5 September 2011, ICC-02/05-03/09-207-Conf (**"5 September Response"**).

⁸ 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, 23 August 2011, ICC-02/05-03/09-202 (**"23 August Response"**).

Defence adopt by reference these previous submissions in response to the Motion.⁹ Further, the Defence submit the following additional arguments.

Prosecution's approach to disclosure of witness 0484's material supports the Defence's position

7. The Prosecution's argument that disclosure of summaries alone is sufficient to discharge its disclosure obligations¹⁰ is contradicted by its own recent approach to disclosure of the statement of witness 0484.¹¹ Pursuant to Article 67(2) and Rule 77, the Prosecution disclosed a lightly redacted version of this witness' statement to the Defence which includes the witness' name. The fact that this statement was disclosed almost in its entirety establishes that the Prosecution believe that such an approach is required in order to provide the Defence with the material to which it is entitled.¹²

The identities of the former witnesses constitute Article 67(2) material

8. The international jurisprudence supports the Defence position that the identity of former Prosecution witnesses can constitute exculpatory material.¹³ Indeed, the identities of former Prosecution witnesses were disclosed in circumstances similar to the present in the *Bagosora* case at the ICTR.¹⁴ In *Bagosora*, the Trial Chamber noted that the three witnesses whose identities

⁹ See: (i) Section IV of the 22 August Response arguing that the Prosecution is obliged to disclose the actual underlying material in order to discharge its disclosure obligations under Article 67(2) and Rule 77 and not summaries prepared solely for the purposes of confirmation; (ii) Section V of the 22 August Response submitting that disclosure of former Prosecution witnesses' statements in full, including identifying information, is required since all the material contained therein constitutes Article 67(2) and Rule 77 material; (iii) paragraphs 16 and 18 of the 23 August Response regarding the need for an objectively justifiable risk in order to grant non-disclosure requests based on safety concerns; and (iv) paragraph 19 of the 5 September Response arguing that the fair trial rights of the accused must prevail over the issue of consent of the affected witnesses.

¹⁰ Motion, p. 3 & paras 11 & 17.

¹¹ Like witnesses 0314, 0433, 0441 & 0466, witness 0484 will not be replied on at trial by the Prosecution (see Updated List of Witnesses).

¹² See 5 September Response, para. 24.

¹³ E.g. *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, 10 December 2003; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Motion for Disclosure under Rule 68, 1 March 2004 ("**First Bagosora Decision**"); and *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Disclosure of Identity of Prosecution Informant, 24 May 2006 ("**Second Bagosora Decision**"). See also *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Nzuwonemeye Request for Disclosure of Identifying Information of Witness XXO and Authorisation to Interview Him, 31 October 2005, para. 4 in which the identity of a Prosecution witness in another case was held to constitute exculpatory material.

¹⁴ See First *Bagosora* Decision.

were sought by the Defence described “to a significant extent, the same series of events described by the witness statement of Witness OC [who remained a Prosecution witness] and, therefore, could be used to test ... accuracy and credibility of Witness OC’s testimony.”¹⁵ The Chamber held that “the identity of these three witnesses is inextricably connected with the substance of the statements. The importance of any discrepancies in the statements may depend, for example, on the nature of the relationships between the different witnesses to the events.”¹⁶ The same applies in this case.

Protective measures rather than non-disclosure

9. Due to the *ex parte* nature of the filings, the Defence has not been informed of the basis on which the Prosecution argue that disclosure, even to the Defence team, could “*potentially* endanger the witnesses.”¹⁷ Leaving aside the Defence’s serious concerns regarding its ability to effectively scrutinise the reasons for redactions including those which evidently concern the risk posed by disclosure to the Defence,¹⁸ the Defence note that the Motion does contemplate the option of unredacted disclosure provided adequate time is given to assess the risks and provide for protective measures.¹⁹ This option is very obviously the least intrusive measure to ensuring a fair trial while at the same time protecting any objectively justified safety concerns of witnesses.

¹⁵ *Ibid*, para. 5.

¹⁶ *Ibid*, para. 6 citing to the ICTY decision in the *Blaskić* case, Decision on the Defence Motion for ‘Sanctions for Prosecutor’s Repeated Violations of Rule 68 of the Rules of Procedure and Evidence’ (TC), 29 April 1998, para. 16 (“an established extraction of the said evidence from its context would not, in principle, be conducive to a full understanding of the text nor permit one to measure its full scope”). See also Second *Bagosora* Decision, para. 5 (“The Chamber is of the view that Witness AIU’s identity is “inextricably connected with the substance of the statements”. The statement cannot be properly understood without knowing the author’s ability to observe the events he describes; his possible biases or point of view; or the consistency of his account with any other statements he may have given. Providing the author’s identity does not merely assist the Defence to carry out further investigations, but is essential to the content of the statement itself. Accordingly, the identity of Witness AIU, and any portions of the statement redacted to protect the witness’s identity, must be considered to be exculpatory within the meaning of Rule 68 (A)” (footnotes omitted)).

¹⁷ Motion, p. 3.

¹⁸ See 5 September Response, paras 30-34 on this issue.

¹⁹ Motion, p. 3 (“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”) and para. 43(ii) & (iii).

10. Of concern, however, is that no proper assessment of the risks posed by disclosure appears to have been made by the Prosecution.²⁰ The Prosecution appears to be content to refuse disclosure on the basis of the witnesses' own refusal to consent to disclosure to the Defence,²¹ witness 0466's "reticence",²² and witnesses 0441 and 0466's "past serious concerns".²³ The Defence acknowledges that due to the redacted nature of the Motion it does not have a full appreciation of the witnesses' concerns nor the approach which the Prosecution and the Victims and Witnesses' Unit are pursuing.²⁴ Nevertheless, it must be assumed that the Court's protective measures programme was specifically designed to deal with issues such as the one at hand and in order to safeguard the fair trial rights of the accused from unnecessary infringement due to witnesses' security concerns whether or not well founded.

11. In this regard, the Defence notes that protective measures as opposed to non-disclosure have been used to properly balance the competing interests of witnesses and parties at other tribunals. For example, in the First *Bagosora* Decision, the Trial Chamber specifically noted the witness protection orders in place for the affected witnesses.²⁵

12. For the avoidance of doubt, the Defence understands that three of the four witnesses – 0314, 0441 and 0466 – do not consent to be interviewed by the Defence. The Defence would never seek to make unauthorised contact with such witnesses. Nevertheless, these witnesses' material and identities are still

²⁰ *Ibid* ("... the Prosecution requests additional time before disclosure to assess the risks to them from disclosure ...").

²¹ *Ibid*, paras 14, 15, 39 & 40.

²² *Ibid*, para. 14.

²³ *Ibid*, paras 36-37.

²⁴ The Defence notes the Prosecution's statement that it is unable to disclose the identity of witnesses 0314 and 0433, although the redactions mean the reason for this inability is not known (Motion, para. 13).

²⁵ *Bagosora* Decision, para. 7.

important to the Defence's investigations and to the preparation of the Defence case and must be disclosed.²⁶

IV. CONCLUSION

13. In short, summaries are not a panacea for all ills.²⁷ Disclosure of summaries which are the derivative work-product of the Prosecution, have been prepared without knowledge of the exact contours of the Defence case, have been shown in other instances to be incomplete²⁸ and which were prepared for the limited purpose of confirmation, cannot be used now to sidestep the strict disclosure obligations to which the Prosecutor is subject. Summaries are always secondary and are never as reliable or complete as the original source. The argument that such summaries can also remain anonymous is doubly objectionable.

14. Moreover, the fair trial rights of the accused cannot be held to ransom by the prevarication of witnesses. All four witnesses agreed that their evidence could be relied on to confirm the charges against the accused. Disclosure of material which is exculpatory and material to the preparation of the Defence cannot be prevented simply by a witness' refusal to consent to disclosure, especially in the context of a Court which has an efficient and effective Victims and Witnesses Unit specifically geared to deal with witnesses' security concerns. There are no facts in the redacted version of the Prosecutor's Motion received by the Defence that even attempt to state objective reasons to justify the security concerns of these witnesses that would allow the Defence to respond. Certainly, it should be possible to state in general terms the objective security concerns of these witnesses.

²⁶ See Second *Bagosora* Decision, para. 5 ("Providing the author's identity does not merely assist the Defence to carry out further investigations, but is essential to the content of the statement itself").

²⁷ The Defence note that the Prosecution seek to rely on the summaries prepared for confirmation to discharge its Rule 76(3) obligations (see the most recent filing on this point - Corrigendum of Prosecution's Application for Leave to Appeal the "Reasons for the Order on translation of witness statements (ICC-02/0503/05-11) [sic] and additional instructions on translation", ICC-02/05-03/09-218-Corr, 19 September 2011) and also its disclosure obligations.

²⁸ See 22 August Response, para. 36.

V. RELIEF REQUESTED

15. Accordingly, the Defence request the Trial Chamber to order full and immediate disclosure of the statements and identities of witnesses 0314, 0433, 0441 and 0466.

Respectfully Submitted,



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Dated this 27th Day of September 2011
At The Hague, The Netherlands

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