

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public

Public Redacted Version of "Defence Response to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party"

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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Other

I. Introduction

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") respectfully request that the Trial Chamber reject the Prosecution's Proposed Protocol.¹ The request to implement a protocol is unnecessary and comes at too late a stage in proceedings to be able to give effect to its apparent purpose, the protection of non-public information and witnesses. The reality is that the Defence have long been in receipt of non-public information and have used it in the limited investigations they have been able to conduct to date. Combined with the absence of any practical justification for the establishment of a protocol, to the Defence's knowledge, no legal justification for the establishment of a protocol has been provided by the Prosecution.²
2. In addition, the Prosecution's Proposed Protocol will prejudice the fair trial rights of Mr. Banda and Mr. Jerbo.³ The protocol is unduly burdensome, creating the potential for considerable delays and additional costs in the context of already severely compromised Defence investigations, and fails to provide for the unique circumstances of the case. A protocol will, thus, not only further burden the Defence, but also the Trial Chamber with unnecessary and ineffective measures to protect non-public information and witnesses.
3. However, should the Trial Chamber deem a protocol necessary and appropriate, the Defence request that the Chamber order all parties and participants to comply with the procedures set out in the proposed protocol annexed hereto ("Defence's Proposed Protocol").⁴ In contrast to the Prosecution's Proposed Protocol, the Defence's Proposed Protocol complements the parties' and

¹ Prosecution's Submission of a Draft Protocol in the Handling of Non-Public Information and Contact of a Party With Witnesses of the Opposing Party, and Prosecution's Update on Expert Witness, 27 August 2012, ICC-02/05-03/09-389-Conf ("Prosecution's Submission") and related Annex, ICC-02/05-03/09-389-Conf-AnxA ("Prosecution's Proposed Protocol").

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³ See, e.g., Article 67(1)(c) of the Rome Statute ("Statute") – the right to be tried without undue delay.

⁴ The Defence's Proposed Protocol is provided in public Annex A.

participant's existing professional obligations and ensures the proper protection of non-public information in the context of efficient and workable investigations.

II. Procedural Background

4. Non-public information was first disclosed to the Defence in this case over two years ago, namely on 8 July 2010.⁵ Since that date, disclosure of non-public information has been made by the Prosecution on a regular basis, the most recent substantive disclosure packages being received on 17 September 2012.⁶
5. During the confidential *ex parte* status conference held on 12 July 2012 with the Prosecution and the Registry, the Prosecution proposed that a protocol, to be agreed with the Defence, be put in place which would permit the disclosure of certain witnesses' identities.⁷
6. On Friday, 17 August 2012, at 15:32 hours, the Prosecution contacted the Defence by email to commence *inter partes* discussions regarding the development of a "non-disclosure protocol".⁸ A draft protocol prepared by the Prosecution was attached to the email.
7. [REDACTED]
8. On 23 August 2012, the Prosecution responded by email to the Defence's proposal advising that "the issues of divergence are such that it is preferable for the parties to make separate submissions on this issue".¹⁰

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

⁶ Trial INCRIM package 34, Trial PEXO package 7, Trial Rule 77 package 9.

⁷ [REDACTED]
⁸ See email from Mr. Sachdeva titled "Draft Non-Disclosure Protocol", sent on 17 August 2012 at 15:32 provided in confidential Annex B.

⁹ See email from Ms. Katulu titled "Re: Draft Non-Disclosure Protocol", sent on 23 August 2012 at 12:51 provided in confidential Annex B.

9. On 24 August 2012, in the context of the apparent *inter partes* discussions, the Defence made an enquiry by email regarding the Prosecution's own handling of non-public information in order to better understand the Prosecution's approach.¹¹ The specific enquiry is discussed below.¹² No response to this enquiry has been received from the Prosecution by the Defence to date.

III. Submissions

a. Lack of meaningful *inter partes* discussions

10. [REDACTED]
[REDACTED]¹³ the process has been marked by a lack of any meaningful effort by the Prosecution to engage with the Defence.
11. First, as Monday, 20 August 2012, was an ICC holiday, the Defence were left with effectively four full working days in advance of the 27 August 2012 filing deadline to review the draft protocol, conduct the necessary research and internal discussion and finally attempt to agree a joint protocol dealing with important matters directly affecting Defence investigations. If *inter partes* discussions are to be meaningful, a period longer than four days is required. Nevertheless, the Defence endeavoured to work within the time frame and to provide the Prosecution with an explanation of the approach taken in the amended draft.
12. Second, it transpires that the draft protocol provided by the Prosecution as the basis for the *inter partes* discussions with the Defence is considerably different to the one which is now before the Chamber. Fifteen of the forty-two provisions

¹⁰ See email from Mr. Sachdeva titled "Re: Draft Non-Disclosure Protocol", sent on 23 August 2012 at 16:28 provided in confidential Annex B.

¹¹ See email from Ms. Katulu titled "Re: Draft Non-Disclosure Protocol", sent on 24 August 2012 at 11:11 provided in confidential Annex B.

¹² See paragraph 23 below.

¹³ [REDACTED]
[REDACTED]

contained in the Prosecution's Proposed Protocol are new and, thus, did not feature in any form in the draft originally considered by the Defence.¹⁴

13. Third, only the Prosecution's version of the proposed protocol was shared with the Victims and Witnesses Unit ("VWU").¹⁵ Therefore, no attempt was made to elicit VWU's views on the sufficiency of the Defence draft. This is further indication that the Prosecution effort at *inter partes* discussions were conducted simply as a matter of form.¹⁶

14. Finally, as discussed further below, the Prosecution have made no effort to explain their approach at any stage and have failed to respond to Defence enquiries on the matter.

b. The Prosecution's Proposed Protocol is unnecessary

15. The Defence's primary objection to the Prosecution's Proposed Protocol is that it is unnecessary. First, the Defence are subject to strict professional obligations of confidentiality arising from the Code of Professional Conduct for counsel ("Code").¹⁷ These obligations have been, and will continue to be, discharged at all times. In so far as the Prosecution's Proposed Protocol covers the same subject matter as the Code, the Code plainly has primacy.¹⁸ Second, these obligations have effectively and efficiently protected the handling of all non-public information by the Defence in this case to date. Were this not so, the Defence presume that the Prosecution, Registry, Pre-Trial Chamber or this Chamber would have taken appropriate action to address any legitimate concerns. Instead,

¹⁴ The new provisions are paragraphs 13, 14, 18, 24-33, 39 and 40 of the Prosecution's Proposed Protocol.

¹⁵ Prosecution's Submission, para. 4.

¹⁶ This is unfortunate in light of the Prosecution's obligation to fairly present arguments. This omission erodes the utility and efficacy of an *inter partes* process when the prosecuting authority withholds information contrary to its position when holding discussions with an independent entity like the VWU. In these circumstances, the fact that the VWU has provided input to the Prosecution's Proposed Protocol should not be viewed as a unilateral stamp of approval by the VWU. The decision on whether a protocol is appropriate and necessary and the contents thereof remains with the Trial Chamber.

¹⁷ See, e.g., Article 8 (Respect for professional secrecy and confidentiality) of the Code. In addition, counsel are subject to their own strict domestic codes of ethics or professional responsibility.

¹⁸ Article 4 (Primacy of the Code of Professional Conduct for counsel) of the Code.

for more than two years, the parties have been in receipt of non-public information and have conducted investigations including witness interviews. In sum, the Defence submit that no cause has been shown nor any justification advanced as to why the regime governing the handling of non-public information in this case needs to be changed at this stage in proceedings.

16. Further, the Prosecution's Proposed Protocol goes beyond the disclosure of non-public information and deals with contact by one party with witnesses of the opposing party. Again, this is unnecessary because the parties agreed procedures for same in January, 2011 which the Defence have been rigorously following.¹⁹

17. The Prosecution's Submission is glaringly deficient in offering any legal or factual basis for the need for the Prosecution's Proposed Protocol. Instead, bare reliance is placed on the practice of other Trial Chamber's in other cases.²⁰ This is simply not good enough. As a matter of law, Trial Chamber decisions at the ICC do not create binding precedents on other Trial Chambers.²¹ As a matter of fact, protocols must be designed for the "specific circumstances" of each case.²² Mr. Banda and Mr. Jerbo should not be bound by the concessions made by a defence team in another case facing different circumstances. If a party's existing internal procedures regarding the handling of non-public information are to be changed and new ones implemented, then good reason should be offered for doing so. Simply following what has happened in other cases without some critical analysis regarding the appropriateness or otherwise of such an approach is clearly devoid of merit and a waste of time and resources.

¹⁹ See letter from the Prosecutor to Lead Defence Counsel, Mr. Karim A. A. Khan, dated 20 January 2011 provided in confidential Annex C.

²⁰ Prosecution's Submission, para. 6.

²¹ *Prosecutor v. Lubanga*, Decision on the Status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 5 ("[the] statutory and regulatory framework [of the Court] undoubtedly establishes the unfettered authority of the Trial Chamber to rule on procedural matters and the admissibility and relevance of evidence, subject always to any contrary decision of the Appeals Chamber").

²² *Prosecutor v. Muthaura et al.*, Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-02/11-469, para. 5.

18. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]²³ Again, this is without legal or factual foundation. The Prosecution cannot substitute such foundation with vague and unsubstantiated submissions regarding security threats, as seems to be the current tactic in relation to redactions. Given the Defence's existing professional obligations, disclosure of all information to which the Defence are entitled can, and should, take place immediately.

c. The Prosecution's Proposed Protocol fails to provide for the unique circumstances of this case

19. As the Chamber is well aware, the Defence are subject to serious constraints which mean that most Defence investigations are conducted over the telephone. Added to this, is the fact that many individuals with whom the Defence speak are illiterate. In this context, the absolute obligation contained in paragraph 9 of the Prosecution's Proposed Protocol to obtain written and signed undertakings is clearly unworkable. The Defence submit that adequate protection is already provided by existing obligations which require the Defence only to disclose non-public information when necessary for the preparation and presentation of their case and to advise the recipient of the information's confidential nature. Such a warning is considered adequate in paragraph 19 of the Prosecution's Proposed Protocol; there is no reason for different regimes applying to different types of non-public information.

²³ [REDACTED]
[REDACTED]

d. The Prosecution's Proposed Protocol is unduly burdensome

20. Many of the provisions in the Prosecution's Proposed Protocol are unduly burdensome and are being imposed at a stage in proceedings when internal working procedures have already been established. Given that such procedures have proved effective to date, the burden imposed is not outweighed by any alleged benefit.
21. Further, these burdens affect Mr. Banda's and Mr. Jerbo's right to be tried "without undue delay"²⁴ as the unduly onerous procedures laid down in the Prosecution's Proposed Protocol will inevitably delay the start of trial.
22. Paragraphs 7, 8 and 11 of the Prosecution's Proposed Protocol illustrate this point for reasons that are detailed below.
23. Notwithstanding the fact that this case has been going on for over two years, paragraph 7 of the Prosecution's Proposed Protocol would require the parties to commence maintaining a disclosure log. It is not clear: (i) whether this log should be retrospectively implemented; (ii) why a log needs to be maintained at this stage in proceedings; and (iii) to what extent the obligation overlaps with requirement to keep a record set out in paragraph 8 of the Prosecution's Proposed Protocol. Indeed, if there is a confidentiality breach, it is doubtful that the log would be of any real use. An investigation would have to be carried out in respect of all persons who could have had access to the non-public information and would in reality include people not on any party's log, such as ICC employees in the IT department who have access to all emails sent over the ICC network, etc. In order to better understand the purpose underlying this provision, the Defence enquired whether the Prosecution have themselves been keeping a detailed log of the persons or entities receiving non-public information or documents for the purposes of the presentation and preparation of their case,

²⁴ Article 67(1)(c) of the Statute.

and if so, when this log was started. However, no response has been received to date. It is important that a response to this enquiry is obtained as, if there was a confidentiality breach and there was no record of persons to whom the Prosecution has given access to non-public information, any “log” would be incomplete and any investigation of such breach unfairly focused on the Defence.

24. Paragraph 8 of the Prosecution’s Proposed Protocol can be criticised on the same basis as paragraph 7. In addition, however, the final sentence of paragraph 8 must be rejected as being too vague and too onerous as it begs the following questions. How is a party or participant to “supervise any access”? Given that the paragraph begins with non-public information being made known to a member of the public, is such supervision still required when so in the hands of the relevant member of the public? If so, how is such an onerous obligation to be discharged? Rather than impose such an unworkable obligation, the solution is to simply continue protecting non-public information through existing confidentiality obligations which include advising members of the public to whom non-public information is properly disclosed of its confidential nature.

25. However, the clearest example of the unworkable and unduly onerous nature of the Prosecution’s regime is provided in paragraph 11 of the Prosecution’s Proposed Protocol. This provision carves out photographs and makes them subject to a separate disclosure procedure involving the leave of the Trial Chamber. This provision is objectionable for a number of reasons.

26. First, a workable protocol should be coherent and consistent, in so far as possible. Making different types of non-public information subject to different disclosure processes clearly works against such aims. Second, no explanation is advanced as to why photographs should be treated differently. All non-public information should be treated with the appropriate caution and subject to strict protections as already occurs. Third, the involvement of the Trial Chamber will unduly burden

the same, inevitably lead to delays and potentially additional expense. Given the asymmetric disclosure obligations placed on the Prosecution and the Defence by the Statute and Rules, this burden will obviously mostly affect the Defence in the conduct of Defence investigations.

27. It is instructive to consider briefly just how such a provision might work in practice. Photographs are often shown to witnesses during a mission. The necessity of showing a photograph to a witness might not have been identified in advance, but arise during the course of an interview when it emerges unexpectedly that a witness has, or might have, knowledge about a particular person or event. If the Defence were required to follow the Prosecution's Proposed Protocol, the photograph would very likely not be shown during that mission. Instead, an application would have to be made to the Trial Chamber and the photograph only shown once a positive decision was rendered. A decision may not be reached during the time frame of the mission. Further, a situation might arise where multiple applications were being made. The inefficiency of and inability to make this provision workable in practice is clear.

28. Fourth, the reality is that the parties, notably the Prosecution, have been conducting investigations to date which have included the use of photographs without the leave of the Trial Chamber. The Prosecution provide no explanation as to why they should be allowed to show photographs without the leave of the Trial Chamber, but the Defence must file an application and wait for a ruling before conducting such a basic investigative step. As stated above, given the fact that the existing practices of the parties have been used without incident to date, there is no good reason to change now, at this advanced stage of proceedings.

29. In addition, the words "directly and specifically" in paragraphs 2 and 17 of the Prosecution's Proposed Protocol add an unnecessary and unduly onerous layer to the obligation. The test should simply be based on necessity.

e. Other comments

30. Further flaws in the Prosecution's Proposed Protocol are noted below and underline that it should be rejected. While the Defence submit that no additional regulations are required to govern disclosure, should the Trial Chamber determine that a protocol is appropriate and necessary, then the Defence request that the Defence's Proposed Protocol be adopted instead.

31. The Prosecution's Proposed Protocol fails at the outset to clearly outline its proposed purpose, its intended subjects and to use clear and consistent definitions throughout.²⁵ For example, the material which the Prosecution's Proposed Protocol is intended to cover – non-public information – should be properly defined by reference to the way in which it has been characterised by the parties, participants or Trial Chamber rather than by reference to public knowledge.²⁶ Otherwise, it is unclear how exactly public knowledge is to be measured. Equally, the terms “party” and “participant” should be clearly defined, which terms can then be used to inform the definition of “public”.

32. Paragraph 10 of the Prosecution's Proposed Protocol also lacks precision as the identity of the “relevant person” to whom non-public information is to be returned is not specified. Paragraph 7 of the Defence's Proposed Protocol remedies this defect and provides the required precision.

33. Several of the provisions of the Prosecution's Proposed Protocol are duplicative of existing provisions.²⁷

²⁵ Compare the “Introduction” provided at paragraphs 1 to 3 of the Defence's Proposed Protocol with paragraphs 1 to 6 of the Prosecution's Proposed Protocol.

²⁶ Compare the definition provided at paragraph 1(a) of the Defence's Proposed Protocol with that provided at paragraph 3 of the Prosecution's Proposed Protocol.

²⁷ Paragraph 15 of the Prosecution's Proposed Protocol effectively repeats paragraphs 13, 14 and 16. The Defence's Proposed Protocol offers no less protection as it effectively incorporates the terms of paragraphs 13, 14 and 16 at paragraphs 5, 10 and 11. Also, paragraph 24 of the Prosecution's Proposed Protocol overlaps with paragraphs 18, 19, 22 and 23. Again, the protections provided in paragraphs 18, 19, 22 and 23 are effectively included in paragraphs 13, 14, 17 and 18 of the Defence's Proposed Protocol.

34. An additional criticism of paragraph 24 of the Prosecution's Proposed Protocol is that an absolute obligation to inform the VWU Head of Protection of all confidentiality breaches is not merited. Not all non-public information is witness related and may concern other sensitive matters such as governmental information. Therefore, to inform the VWU Head of Protection of all breaches of the protocol is obviously inappropriate and irrelevant and should be rejected as such.

35. In respect of those provisions intended to cover participants, as well as parties, consistent reference should be made to same throughout the relevant provisions.²⁸

36. Paragraph 21 of the Prosecution's Proposed Protocol should be qualified by the knowledge requirement ("knowingly") which is included at paragraph 16 of the Defence's Proposed Protocol. Paragraph 21 should also include the exception made in paragraph 16. As no questions can ever knowingly be asked regarding the location of ICCPP witnesses or others whose locations have been protected by the Chamber, the Defence submit a specific exception should be made which would allow for such enquiries in limited circumstances and only with the Chamber's approval.

37. Paragraphs 26 to 33 of the Prosecution's Proposed Protocol did not feature in the original draft provided to the Defence for review on 17 August 2012. These paragraphs are essentially statements of best practice which are transformed into a prescriptive regime by their inclusion in a protocol. [REDACTED]

[REDACTED]. The Defence underline that all interviews have been properly and professionally conducted to date. However, the procedures which the Defence follow when approaching and

²⁸ See, e.g., paragraphs 19, 22 and 23 of the Prosecution's Proposed Protocol.

handling Defence witnesses are a matter properly for its own internal regulation and management, particularly at this stage of proceedings. This is particularly so when the terms of Article 6(1) of the Code are noted – “Counsel shall act honourably, independently and freely”.

38. Given the existing agreement between the Defence and the Prosecution regarding the interview of an opposing party’s witness referred to above, paragraphs 34 to 41 of the Prosecution’s Proposed Protocol are unnecessary. In so far as they are to be included in a protocol, then the provisions should mirror those of the existing agreement in so far as possible.²⁹ Further, the Defence submit that it is not unreasonable to request a “comprehensive and well-organised written record in narrative form of the interview” in accordance with paragraph 24 of the Defence’s Proposed Protocol.³⁰

39. Finally, as the Prosecution’s Proposed Protocol is substantially different to the draft originally provided by the Prosecution on 17 August 2012, the Defence have reviewed the new provisions and incorporated into the Defence’s Proposed Protocol those which are neither duplicative of existing provisions nor unnecessary.³¹

IV. Request for Receipt of this Filing as Confidential

40. In accordance with Regulation 23*bis*(2) of the Regulations of the Court, the Defence have classified this filing as “*confidential*”.³² A public redacted version of the filing will be filed in early course.

²⁹ Note the Defence’s Proposed Protocol has been amended to include paragraph 39 of the Prosecution’s Proposed Protocol, a provision which did not feature in the original draft provided to the Defence. However, paragraph 40 of the Prosecution’s Proposed Protocol has not been included given that it is duplicative of the terms of paragraph 19 of the Defence’s Proposed Protocol.

³⁰ Compare with the bare provision of paragraph 41 of the Prosecution’s Proposed Protocol.

³¹ Therefore, paragraphs 13, 14, 18 and 39 of the Prosecution’s Proposed Protocol have been included in the Defence’s Proposed Protocol as paragraphs 5, 10, 13 and 23 subject to minor modifications to ensure consistent use of terminology and that they are workable in practice. However, the Defence can only agree to follow the Code of Conduct for Investigators referred to in paragraph 14 of the Prosecution’s Proposed Protocol and paragraph 10 of the Defence’s Proposed Protocol once it has been provided with and reviewed same.

³² See Prosecution’s Submission, para. 9.

V. Request for Relief

For the reasons stated above, the Defence therefore respectfully request the Trial Chamber to reject the Prosecution's Proposed Protocol.

In the alternative, should the Chamber deem it appropriate and necessary to supplement the Code and the Prosecution's own internal investigation procedures, the Defence respectfully request the Chamber to order the adoption of the Defence's Proposed Protocol.

Respectfully Submitted,



Mr. Karim A. A. Khan QC

Lead Counsel

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Mr. Nicholas Koumjian

Co-Lead Counsel

Dated this 18th day of September 2012

At Nairobi, Kenya

Dated this 18th day of September 2012

At The Hague, The Netherlands