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**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 Application for: (1) an Order to the Prosecutor to file a public redacted version of the Prosecutor’s ‘Update on Security Situation of Certain Individuals attributed to ‘Second Category of Redactions’, pursuant to the Decision of 12 September 2012’, filed on 24 September 2012, and (2) an Order to the Prosecutor to provide further information to the Defence with respect to applications concerning redactions”

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") respectfully apply to the Trial Chamber for an order to the Office of the Prosecutor ("OTP") to provide the Defence with a confidential redacted version of the "Public Redacted Version of "Update on Security Situation of Certain Individuals attributed to "Second Category of Redactions", pursuant to the Decision of 12 September 2012", filed on 24 September 2012" ("OTP Security Update"),¹ which must:
 - a. identify the redactions which the OTP has failed to lift, notwithstanding the decision of the Trial Chamber authorising such redactions to be lifted because "the underlying reasons for the redactions no longer exist";² and
 - b. include all relevant security information and information relevant to the preparation of the defence case.
2. In addition, the Defence request that the Trial Chamber order the OTP to provide the Defence with further information on the specific justifications for applying or maintaining all redactions in pending, present and future applications.
3. This application³ is necessary because the public redacted filings on redactions provided by the OTP to date are wholly inadequate. The blanket redactions applied by the OTP prevent the Defence from making informed submissions not only in relation to the redactions themselves, but also to rebut any allegations directly impugning the integrity of the Defence team

¹ Public Redacted Version of "Update on Security Situation of Certain Individuals attributed to "Second Category of Redactions", pursuant to the Decision of 12 September 2012", filed on 24 September 2012", 19 October 2012, ICC-02/05-03/09-397-Red. While the filing is dated 19 October 2012, it was notified to the Defence on 22 October 2012.

² Decision on the prosecution's applications for lifting the redactions on material related to Witnesses 315, 442 and 486 pursuant to Regulation 42 of the Regulations of the Court, 12 September 2012, ICC-02/05-03/09-392 ("Decision"), para. 10.

³ This filing is classified as "confidential" because it refers to confidential information within confidential filings.

and Mr. Banda and Mr. Jerbo. The approach taken by the OTP is in violation of the principle of publicity of the proceedings⁴ and the fundamental principle of equality of arms. Additionally, the failure to provide *any* information on the alleged danger posed by the Defence and/or the accused, infringes the principle of *audi alteram partem*, which provides for the right of a party to be made aware of and given the opportunity to meet any case against such party on an equal footing with the accuser. In short, a confidential filing properly and fairly redacted would strike the correct balance.⁵

II. Procedural Background

4. As evidenced by this procedural background, the redaction process applied so far is heavily reliant on *ex parte* applications and decisions.⁶ This *ex parte* process has been the subject of repeated objections by the Defence because it relegates Defence participation to the side-lines.
5. On 11 January 2012, the OTP filed a public redacted application to redact information relating to the personal security, dignity and privacy of witnesses or other persons, specifically the images of individuals in photographs provided by witness P-0315, from material which was required to be disclosed to the Defence.⁷
6. On 11 January 2012, a second public redacted application was filed by the OTP to redact, *inter alia*, the “names and identifying information of innocent

⁴ Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410 (“Stay Decision”), para. 1.

⁵ See submissions below regarding the inadequacy of confidential redacted filings provided by the OTP on 24 September 2012.

⁶ For example, redacted versions of decisions issued by this Trial Chamber on 18 April 2012, 2 May 2012 and 21 June 2012 have not been filed in the case record. However, reference has been made to these three decisions in other filings.

⁷ Public Redacted Version of Prosecution’s Application for Redactions Pursuant to Rule 81(4) of the Rules of Procedure and Evidence and Request for the Lifting of Certain Redactions Authorised Pursuant to Rule 81(4), filed on 21 December 2011, 11 January 2012, ICC-02/05-03/09-269-Red.

third parties” which appear in the transcript of the re-interview of Witness P-0442.⁸

7. On 18 January 2012, the Defence submitted observations on both applications.⁹ In its observations the Defence repeated its request for greater transparency in the redaction process.¹⁰ In relation to P-0315’s material, the Defence opposed the proposed redactions to the photographs on the basis, *inter alia*, that the redactions were not justified and rendered the photographs useless for investigative purposes.¹¹ In relation to P-0442’s material, the Defence opposed the redactions sought, in part because there was no objective risk to justify the imposition of the redactions and because the redactions are prejudicial to the rights of the Defence. The Defence particularly challenged the justification for redacting the identity of two individuals: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] 12

8. On 21 June 2012, [REDACTED]

[REDACTED] 13 [REDACTED]
[REDACTED]

⁸ 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 29 December 2011, 11 January 2012, ICC-02/05-03/09-272-Red, para. 7.

⁹ Defence Observations on the Public Redacted Version of Prosecution’s Application for redactions pursuant to Rule 81(4) of the Rules of Procedure and Evidence and Request for the lifting of certain redactions authorised pursuant to Rule 81(4), filed on 21 December 2011, 18 January 2012, ICC-02/05-03/09-279-Conf, (“P-0315 Observations”); and Defence Observations on the “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 21 December 2011, 18 January 2012, ICC-02/05-03/09-278-Conf, (“P-0442 Observations”).

¹⁰ P-0315 Observations, paras. 8, 26; and P-0442 Observations, paras. 2, 3, 7, 13, 16. *See also* Defence Observations on the Redactions Sought by the Prosecution for Witnesses DA R-OTP-WWWW-0484, DA R-OTP-WWWW-0485, DA R-OTP-WWWW-0486, and DA R-OTP-WWWW-0487, 5 September 2011, ICC-02/05-03/09-207-Conf, paras. 30-34.

¹¹ *See, e.g.*, P-0315 Observations, para. 3.

¹² P-0442 Observations, para. 9.

¹³ [REDACTED]
[REDACTED]

[REDACTED] 14 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 15

9. On 21 June 2012, the Defence understood the Trial Chamber issued a second decision on an *ex parte* basis concerning the redactions to the photographs provided by P-0315 in which the Chamber again asked the OTP to submit updated information on third party individuals.¹⁶ No redacted version of this decision has been provided to the Defence.
10. On 2 August 2012, the OTP filed two public notes,¹⁷ the substantive paragraphs of which simply indicated that, in earlier *ex parte* filings, the OTP had “provided to Trial Chamber IV further information on the security risks faced by the third parties” referred to in the witness material of P-0315 and P-0442.¹⁸
11. On 10 August 2012, the Defence requested a confidential redacted version of the underlying filings referred to in the two public notes.¹⁹ The Defence argued that the failure to provide such a version not only denied it access to information relevant to live issues in the case, but that it also denied it the opportunity to make submissions about the underlying issue: whether the redactions were justified.²⁰ The Defence also argued that the legal basis for filing *ex parte* had not been properly notified to the Defence.²¹

¹⁴ *Ibid.*, para. 21.

¹⁵ *Ibid.*, para. 22.

¹⁶ See Decision, para. 4 (referring to Decision on the Prosecution’s Application for Redactions and Request for the Lifting of Redactions to Photographs Annexed to Witness 315’s Statements, 21 June 2012, ICC-02/05-03/09-353-Conf-Exp).

¹⁷ Public Note on Prosecution Filing ICC-02/05-03/09-364-Conf-Exp, 2 August 2012, ICC-02/05-03/09-371; Public Note on Prosecution Filing ICC-02/05-03/09-365-Conf-Exp, 2 August 2012, ICC-02/05-03/09-372.

¹⁸ ICC-02/05-03/09-371, para. 2; and ICC-02/05-03/09-372, para. 2.

¹⁹ Defence Response to the “Public Note on Prosecution Filing ICC-02/05-03/09-364-Conf-Exp” and the “Public Note on Prosecution Filing ICC-02/05-03/09-365-Conf-Exp”, 10 August 2012, ICC-02/05-03/09-380-Conf (“Defence Response to Public Notes”).

²⁰ *Ibid.*, para. 2.

²¹ *Ibid.*

12. On 12 September 2012, the Trial Chamber issued the Decision. In the Decision, the Trial Chamber: (i) granted the OTP's request to maintain redactions to the individuals identified in the photographs provided by P-0315 but to revert back to the Chamber on the security situation of these individuals by 24 September 2012 ("Second Category of Redactions"); (ii) granted the OTP's request to lift certain redactions to the images or identifying information of third parties in the witness material relating to Witnesses 315, 442 and 486 ("First Category of Redactions"); and (iii) ordered the OTP to file in the record of the case confidential redacted versions of the two underlying filings referred to in the two public notes.²²

13. On 24 September 2012, pursuant to the Decision, the OTP filed confidential redacted versions of the filings submitted on 5 July 2012, and referred to in the 2 August 2012 public notes, providing further information on the security risks faced by third parties who appear in the photographs of P-0315²³ and the re-interview transcripts of P-0442.²⁴ Both filings were heavily redacted, providing skeletal information. Neither provided the information requested by the Defence in the Defence Response to Public Notes, namely all relevant security information and information relevant to the preparation of the defence case.²⁵

14. On 22 October 2012, pursuant to the Decision, the OTP filed the OTP Security Update, providing further information on the security risks faced by third

²² Decision, paras. 13(a), 13(b), 13(d).

²³ Confidential Redacted Version of "Prosecution's Provision of Security Related Information Regarding Third Parties in Photographs Annexed to Witness DAR-OTP-P-0315's Statement and Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court", filed on 5 July 2012, 24 September 2012, ICC-02/05-03/09-365-Conf-Red.

²⁴ Confidential Redacted Version of "Prosecution's Provision of Security Related Information Regarding Third Parties in Witness DAR-OTP-P-0442's Re-interview Transcripts and Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court", filed on 5 July 2012, 24 September 2012, ICC-02/05-03/09-364-Conf-Red ("P-0442 Re-interview Redaction Filing").

²⁵ Defence Response to Public Notes, paras. 1, 26.

parties who appear in the photographs provided by P-0315.²⁶ In the update, the OTP also provided a "clarification".²⁷ The OTP noted that the Trial Chamber "appears" to have authorised the lifting of the First Category of Redactions, but argued that it had sought to maintain these redactions and so has not yet lifted them.²⁸ The First Category of Redactions concerns the material for three witnesses - P-0315, P-0442 and P-0486.²⁹ The OTP Security Update is heavily redacted and does not provide any information on the redactions which the OTP has failed to lift, or any information on the objective and subjective risks faced by the third parties who appear in P-0315's photographs.

III. Applicable Law

15. As recently observed by this Trial Chamber, the principle of public proceedings is enshrined in Articles 64(7) and 67(1) of the Rome Statute.³⁰

16. In determining applications for non-disclosure of identifying information of victims, witnesses, their family members and other persons at risk on account of the activities of the Court, this Trial Chamber has considered the following factors: (i) the danger caused by disclosure of their identity and whether non-disclosure could reduce that danger; (ii) the "necessity" of non-disclosure in the sense that less intrusive protective measures are not available; and (iii) proportionality of non-disclosure in view of the prejudice caused thereby to the rights of the accused and a fair and impartial trial.³¹

²⁶ OTP Security Update, Introduction. The Defence notes that the OTP Security Update was filed on 24 September 2012. The public redacted version was filed on 22 October 2012. Given the straightforward nature of preparing a public redacted filing, the Defence is unclear why it took the OTP one month to file the public version.

²⁷ *Ibid.*, paras. 7-9.

²⁸ *Ibid.*, para. 9.

²⁹ Decision, para. 13(b).

³⁰ Stay Decision, para. 1.

³¹ Decision on the prosecution's application for redactions ICC-02/05-03/09-206-Conf-Exp, 16 December 2011, ICC-02/05-03/09-266-Conf, para. 7.

17. Further, the danger caused by disclosure must involve an objectively justifiable risk to the safety of the person concerned and must arise from disclosing the particular information to the defence, as opposed to the information to the public at large.³²

18. In *Katanga*, the Appeals Chamber ruled that “the Defence [should be given] the greatest possible opportunity to make submissions on the issues involved” when dealing with applications for redactions.³³

IV. Submissions

Request for confidential version of the OTP Security Update, properly and fairly redacted

19. The Defence submit that a confidential version of the OTP Security Update, properly and fairly redacted, should be filed in the court record. From the perspective of disclosure to the Defence, as opposed to the public at large, the redactions to the public update are excessive, disproportionate and prejudicial to the fair trial rights of Mr. Banda and Mr. Jerbo for the following reasons.

20. First, without a confidential redacted version, the Defence is denied the opportunity to effectively test and to make meaningful submissions on whether the redactions are justified. As outlined above, the jurisprudence of this court is clear that redactions must be objectively and subjectively justified. The explicit purpose of the OTP Security Update is to provide the Chamber with these justifications via the provision of further information on the security risks faced by third parties who appear in the photographs provided by P-0315. But the public redacted version of the update does not

³² Decision on the prosecution's application for redactions ICC-02/05-03/09-206-Conf-Exp, 16 December 2011, ICC-02/05-03/09-266-Conf, para. 7.

³³ See *Prosecutor v. Katanga and Ngudjolo*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2007, ICC-01/04-01/07-475, para. 73(b). See also ICC-01/04-01/07-819-tENG, para 10; *Prosecutor v. Lubanga*, Order on prosecution's application for redactions pursuant to Rule 81(2) filed on 14 February 2008, 15 February 2008, ICC-01/04-01/06-1172, para. 2.

disclose the nature or extent of these risks in *any* detail. The result is that the Defence cannot make meaningful submissions on the key issue: whether the redactions are objectively or subjectively justified.

21. Further, the OTP has not revealed which redactions in the material of P-0315, P-0442 and P-0486 are the subject of the “clarification” and which the OTP have unilaterally decided not to lift despite the terms of the Decision. There is no reason why such basic information, which amounts to page and line numbers of witness statements, cannot be provided to the Defence.³⁴ The Defence submits that the only reason for not revealing which redactions are disputed is that it provides the OTP with a tactical advantage. Identification of the disputed redactions would assist the Defence to target its submissions at those redactions which it needs to focus on. By contrast, concealing which redactions are disputed once again reduces the Defence to making general, rather than specific, submissions. This obviously reduces the effectiveness of the Defence’s advocacy.

22. Second, no reason is given as to why the information in the OTP Security Update cannot be provided to the Defence (as opposed to the public as a whole). It beggars belief that absolutely no information can be provided to the Defence regarding the objective and subjective justifications for the redactions without placing the relevant individuals at risk. In fact, the only information that should be withheld from the Defence is information that reveals the identity of the relevant individuals, as this is the information that the OTP submits should be protected.

23. Third, the public redacted version does not allow the Defence to properly and fairly address and rebut the information which must be before the Chamber

³⁴ The Defence are already in possession of the redacted material. Identifying which redactions are disputed would not reveal the underlying information and, thus, would not place the individual at any risk whatsoever.

concerning the alleged risks arising from the disclosure of information to the Defence. As noted above, the principle of *audi alteram partem* dictates that the Defence should be made aware of and given the opportunity to respond to the allegations made against them. As the Defence have previously submitted, the Defence are not aware that any witness or potential witness has been threatened by either Mr. Banda or Mr. Jerbo or any person linked to them.

24. Fourth, keeping information about security risks from the Defence is prejudicial to the rights of Mr. Banda and Mr. Jerbo because those security issues are themselves relevant to live issues in this case. If the “security risks” relate to divisions between the revolutionary movements, the information about those divisions is likely to be relevant to the motivation of those Prosecution witnesses who are from the movements. Moreover, because the request for a temporary stay was denied,³⁵ the Defence may ultimately need to argue at trial that it has been prevented from leading vital evidence regarding key issues because of security concerns which prevent the Defence from talking to individuals within Darfur, or bringing such individuals to the seat of the Court. The OTP’s submissions on security risks are likely to be directly relevant to these concerns.

25. In line with the above-mentioned *Katanga* jurisprudence, the Defence, therefore, respectfully request that the OTP be ordered to prepare a confidential redacted version of the OTP Security Update. This approach is consistent with the approach proposed by the OTP in other cases. Thus, in response to an application by the *Muthaura* Defence team in the Kenya situation, the OTP filed “three versions of its response, with varying

³⁵ Stay Decision.

confidentiality designations”³⁶ which included a confidential version, with limited redactions, available to the defence.³⁷

26. However, given the inadequacy of the confidential redacted version of the OTP's 5 July 2012 filing,³⁸ which the OTP Security Update is supposed to be an update/clarification of, the Defence request that the OTP be ordered to apply proper and fair redactions, only redacting information which could lead to the identification of the individuals involved. This would protect the sensitivity of the material by not revealing it to the public and allow the Defence access to information sufficient for it to properly test the basis for redactions and information relevant to the defence case.

Request for greater transparency in the redaction process

27. As the Trial Chamber is aware, the issue of greater transparency in the redaction process is a recurring request in Defence submissions.³⁹ The Defence will not repeat but rely on its previous submissions but the arguments contained therein still remain valid.

28. In addition, the need for greater transparency and meaningful Defence involvement is highlighted by the recent lifting of redactions to the names of individuals referred to in the interview transcripts of P-0442. One of the names revealed was [REDACTED]

[REDACTED]

[REDACTED]⁴⁰ [REDACTED] name was redacted in July 2010 as part of the category of information revealing the “names and identifying information

³⁶ *Prosecutor v. Muthaura and Kenyatta*, Public Redacted Version of the Prosecution Response to “Defence Application for (1) An Order prohibiting the Prosecution from contacting potential Defence witnesses without following the procedural safeguards stipulated in other cases before the ICC and (2) An Order to the Prosecution to disclose information on all contacts between the Prosecution and potential Defence witnesses”, 18 June 2012, ICC-01/09-02/11-437-Red2, para. 4.

³⁷ *Ibid.*, para 6.

³⁸ P-0442 Re-interview Redaction Filing.

³⁹ See *supra* footnote 9.

⁴⁰ P-0442 Re-interview Redaction Filing, para. 8.

relating to *innocent third parties* who, without being witnesses or otherwise related to the case, might be wrongly perceived as cooperating with the Prosecutor and/or the Court”.⁴¹

29. The Defence submit that greater transparency and Defence involvement in the redaction process would have allowed the Defence to test these redactions at an earlier stage. First, no information is given as to why disclosure of [REDACTED] name to the Defence would have posed any risk to [REDACTED]. The Defence recall that [REDACTED] is a high profile individual, who is resident in [REDACTED] and whose involvement in Darfur was well known and, indeed, [REDACTED]. Second, alternative measures short of redaction should be used where available and feasible in the circumstances.⁴² If the concern was simply that [REDACTED] “might be wrongly perceived as cooperating with the Prosecutor and/or the Court” then the alternative, less restrictive measure was simply to inform the Defence [REDACTED] was not so cooperating, as has been done in the recent disclosure letters provided to the Defence as part of the lifting of redactions to the names of [REDACTED]

30. Regrettably, this is not an isolated example. In fact, the interview transcripts of P-0442 contained several other examples where it is unclear why less restrictive measures were not imposed.⁴³ As a result of these concerns, the Defence submit that it is now necessary for the OTP to provide further information about the specific justifications for the redactions sought pursuant to Rules 81(2) and 81(4) to enable the Defence to engage in a meaningful way with those justifications.

⁴¹ *Ibid.*, para. 3.

⁴² See paragraph 16 above.

⁴³ *Ibid.*, para. 8.

Relief Requested

For the reasons set out above, the Defence respectfully request that the Trial Chamber order the OTP to file a confidential version of the OTP Security Update, properly and fairly redacted, which should:

- a. identify the redactions which the OTP has failed to lift, notwithstanding the Decision; and
- b. include all relevant security information and information relevant to the preparation of the defence case.

In relation to all pending, present and future requests for redactions, the Defence request that the Prosecution be ordered to provide further information as to the specific justifications for the redactions sought pursuant to Rules 81(2) and 81(4) to enable the Defence to respond substantially and effectively to those reasons.

Respectfully Submitted,



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Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 9th day of November 2012
At Nairobi, Kenya

Dated this 9th day of November 2012
At The Hague, The Netherlands