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No.: ICC-02/05-03/09
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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

Public

**Public Redacted Version of Defence Reply to the Prosecution Response
To the Defence Request for Termination of Proceedings**

Sources: Defence Team of Abdallah Banda Abakaer Nourain

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

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I. Introduction

1. In the *Response to the Defence "Request for Termination of Proceedings"* ("Response"),¹ the Prosecution justified their earlier submission that [REDACTED]² which in the Prosecution's submission is unaffected by the statements of P-467 and P-471. However, the Prosecution then [REDACTED], but rather simply assert he left the base on a helicopter sometime before the attack.³
2. The distinction is critical to the issues in this case. Evidence suggesting that Captain Bashir left MGS Haskanita before 29 September 2007 is not the same as evidence suggesting that AMIS acted to remove Captain Bashir from MGS Haskanita. It is not disputed that AMIS received complaints from various Movements in the area that Bashir was passing intelligence to the Government of Sudan (GoS)⁴ and that [REDACTED] had independent information confirming the truth of this allegation.⁵ How AMIS responded to clear information that the base was being used as a military asset in support of the GoS' criminal campaign targeting civilians and military campaign targeting the Movements is critical to whether the base personnel protecting Captain Bashir qualified as "peacekeepers" and whether the attack on the base was unlawful.
3. As explained below, the defence for Abdallah Banda Abakaer Nourain ("Defence") submits that, first, the statements of P-467 and P-471 contain clearly exonerating evidence; second, the Prosecution's submission at confirmation that [REDACTED] is untenable in light of these statements and the entirety of the Prosecution's own pre-confirmation investigation; and

¹ ICC-02/05-03/09-506-Conf.

² *Ibid.*, para. 39.

³ *Ibid.*, fn. 48.

⁴ [REDACTED]

⁵ [REDACTED]

finally, the evidence of P-467 and P-471 which directly contradicts this key Prosecution submission and the evidence of a key Prosecution witness should have been disclosed to the Defence prior to confirmation as the evidence falls within the terms of Rule 77 of the Rules of Procedure and Evidence (“Rules”) and Article 67(2) of the Rome Statute (“Statute”).

II. Background

4. On 3 September 2013, the Defence filed the *Request for Termination of Proceedings* (“Request”),⁶ which argued, *inter alia*, that the Prosecution failed in their obligation to disclose the witness statements of P-467 and P-471, which contained potentially exonerating material⁷ that should have been disclosed prior to confirmation and, further, that the Prosecution misled the Pre-Trial Chamber by submitting that [REDACTED].⁸
5. On 24 September 2013, the Prosecution filed the Response. In the Response, the Prosecution denies that it was in possession of statements that established that [REDACTED]⁹ apparently on the basis that [REDACTED]¹⁰ [REDACTED].¹¹ Additionally, in the Response the Prosecution continues to assert that it possessed [REDACTED]¹² which justifies its earlier submission that [REDACTED].
6. On 1 October 2013, the Defence sought leave to reply to the response.¹³

⁶ ICC-02/05-03/09-503-Conf.

⁷ *Ibid.*, paras. 27-29.

⁸ *Ibid.*, para. 31.

⁹ Response, para. 30.

¹⁰ *Ibid.*, para. 36.

¹¹ *Ibid.*, para. 32.

¹² *Ibid.*, paras. 38–39.

¹³ ICC-02/05-03/09-510-Conf (“Application”).

7. On 4 October 2013 by email, Trial Chamber IV granted the Defence leave to reply on the issues identified in paragraphs 14 and 15 of the Application by no later than 11 October 2013.

III. Confidential classification

8. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Defence files this reply confidentially, because it is a reply to a confidential document and because it refers to the contents of a confidential witness statement. A public redacted version of the reply will be filed simultaneously.

IV. The Fundamental Error in the Response

9. The Prosecution's submission at confirmation that [REDACTED] logically contains at least two factual propositions: [REDACTED].
10. Taking the Prosecution evidence at confirmation at face value and leaving aside inconsistencies between witnesses, the Prosecution could fairly have submitted that their evidence showed that Captain Bashir left MGS Haskanita before 29 September 2007. Without the context provided by the statements of witnesses P-467 and P-471, this evidence left the mistaken impression that AMIS had ordered his removal, but this inference is not sustainable once the statements of P-467 and P-471 are considered.
11. The key evidence cited in the Response is that of [REDACTED] P-419.¹⁴ However, P-419 never told the Prosecution that [REDACTED]. Rather, P-419 told the Prosecution that [REDACTED],¹⁵ [REDACTED]¹⁶ [REDACTED].¹⁷

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ [REDACTED]

¹⁷ [REDACTED]

12. Without the statements of P-467 and P-471, both the Defence and the Pre-Trial Chamber would likely understand this evidence to mean that the Sector Command of AMIS had ordered the removal of Bashir through the Sector Command of the GoS. However, once the statements of P-467 and P-471 are considered, it is clear this was not the case. [REDACTED]¹⁸ [REDACTED].¹⁹ [REDACTED].²⁰

13. [REDACTED].²¹ [REDACTED].²² [REDACTED].

14. [REDACTED].²³ This provides a further indication that AMIS never formally removed Captain Bashir from MGS Haskanita.

15. In addition, P-471 also states that [REDACTED].²⁴ [REDACTED] criminal campaign that the intelligence provided by Captain Bashir facilitated.

16. The only remaining evidence relied on by the Prosecution in support of the submission that AMIS readily agreed to remove Bashir is witness evidence stating that Captain Bashir left by helicopter prior to the attack.²⁵ This does not come close to being [REDACTED] – because it only supports the submission that Captain Bashir left MGS Haskanita, but not the further submission that he was removed by AMIS. In the Prosecution's own investigation, [REDACTED].²⁶ [REDACTED].²⁷ [REDACTED].²⁸ Thus, the evidence from the Prosecutor's own investigation could not possibly be considered to have supported the submission that [REDACTED]. Rather,

¹⁸ [REDACTED]

¹⁹ [REDACTED]

²⁰ [REDACTED]

²¹ [REDACTED]

²² [REDACTED]

²³ [REDACTED]

²⁴ [REDACTED]

²⁵ Response, para. 28.

²⁶ [REDACTED]

²⁷ [REDACTED]

²⁸ [REDACTED]

AMIS took no action despite awareness that Captain Bashir was assisting the GoS bombing campaign victimizing civilians in the area from the MGS Haskanita base.

17. The distinction between Captain Bashir being removed by AMIS and being sent off the base by the GoS or leaving of his own volition is not a mere technicality. Properly understood, it raises issues, which go to the heart of the confirmation decision and the contested issues. First, at confirmation it was accepted that impartiality is one of the three requisite elements making up the definition of a peacekeeping mission.²⁹ In order to maintain its impartiality, a peacekeeping mission must not allow any party to gain a definite military advantage from its operations. In this case, AMIS were faced with an individual using his position within their ranks to supply intelligence to one party to the conflict, effectively providing such advantage. In order to maintain its impartiality, AMIS ought to have taken steps to prevent that party from gaining a military advantage from the force's presence. Instead, the evidence suggests that AMIS did nothing to remove or restrict Captain Bashir and he left the base only on the instruction of his own party, apparently free to return any time the GoS wished to take advantage of his access to the base.

18. Second, at confirmation the issue of whether MGS Haskanita was a legitimate military target was explored in the light of the Prosecution evidence, which overwhelmingly suggested that Captain Bashir was supplying targeting information to the GoS. The fact that Captain Bashir was removed by the GoS sometime after hearing of the original complaints strongly suggests that the Government had a replacement source of intelligence within MGS Haskanita,

²⁹ ICC-02/05-03/09-121-Conf-Corr, para. 63.

either overtly, [REDACTED],³⁰ or covertly.³¹ It is not reasonable to assume that Captain Bashir was acting on his own initiative; his actions were evidently coordinated with GoS ground and air forces. No army would have voluntarily removed such a source without providing for his replacement. In these circumstances, the fact that Captain Bashir was removed by the GoS suggests that there was no reason for the Movements to believe that MGS Haskanita had ceased to be a legitimate military target.

19. The statements of P-467 and P-471 are clearly exonerating evidence. [REDACTED]. None of the evidence cited in the Response shows that the removal of Captain Bashir was ordered by AMIS. Rather, viewed in the context of the withheld statements of P-467 and P-471, any mistaken inference that AMIS ordered Bashir's removal is untenable.

20. By withholding this exonerating evidence, the Prosecution, whether intentionally or not, misled the Pre-Trial Chamber as to the results of its investigation. The Defence was unable to challenge the misstatement and ensure the Pre-Trial Chamber had a full and accurate understanding of the evidence because these critical statements were never disclosed. This is the very harm that Article 67(2) of the Statute and Rule 77 of the Rules are designed to prevent. The Defence maintains that the only appropriate remedy at this stage of proceedings is to terminate proceedings against Mr. Banda.

V. Relief Requested

21. For the reasons set out above and in the Request, the Defence respectfully requests that the Trial Chamber grant the Request.

³⁰ [REDACTED]

³¹ [REDACTED]

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain

Dated this 11th day of October 2013

At The Hague, The Netherlands

Dated this 11th day of October 2013

At Phnom Penh, Cambodia