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TRIAL CHAMBER IV

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

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF

THE PROSECUTOR v.

ABDALLAH BANDA ABAKAER NOURAIN

**Public redacted version of the Prosecution application to amend its lists of
witnesses and evidence**

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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Introduction

1. Pursuant to Article 69(3) and Regulation 35(2), the Prosecution seeks leave to add: (i) five witnesses to its list of trial witnesses; and (ii) nine witness statements, their annexes and related documents to its list of evidence. The Prosecution also gives notice that one witness – P-0442 – is no longer willing to testify live and will not be called by the Prosecution as a *viva voce* witness.
2. The witnesses whom the Prosecution seeks to add are:
 - P-0441 [REDACTED] whom the Prosecution relied upon as a witness at the confirmation stage. Among other matters, P-0441 provides evidence relevant to the contested issue of the Accused's knowledge of the unlawfulness of the attack on MGS Haskanita. In particular, P-0441 provides evidence regarding a 29 September 2007 meeting to plan the attack attended by the Accused and other rebel commanders, the Accused's [REDACTED].
 - P-0449 [REDACTED] MGS Haskanita during the period covered by the charges. Among other matters, P-0449 provides evidence of warnings about an impending attack received from local staff prior to 29 September 2007, the statement of a rebel attacker that the rebels attacked MGS Haskanita "because the Government of Sudan is bombing us and AMIS is doing nothing", the collaboration of local staff with the attackers, and the attackers' theft of PAE property during the attack.
 - P-0455 [REDACTED] during the period covered by the charges. Among other matters, P-0445 provides evidence that Captain Bashir, whose alleged activities while in MGS Haskanita the Defence has made a cornerstone of its case, was removed from the camp prior to the attack and was not replaced.

- P-0460 [REDACTED] during the period covered by the charges. P-0460 explains that Bashir left the camp well before the attack and that in early September, Haskanita locals threatened to attack MGS Haskanita unless AMIS took affirmative steps to protect them from Government of Sudan (“GoS”) bombings.
- P-0511 [REDACTED] during the period covered by the charges. Consistent with the accounts of P-0455 and P-0460, P-0511 provides evidence that Bashir was removed from the camp before the attack and was not replaced, and also that the attackers looted property during the attack.

3. The documents the Prosecution seeks to add are:

- The witness statements and related documents of the five witnesses identified above; and
- Additional statements and related documents from witnesses already on the Prosecution trial witness list – one statement from each of P-0355 and P-0419 and two statements from P-0446.

4. The proposed additions are warranted on two legal bases.

5. *First*, the additions of P-0441 and P-0449 are required for reasons “outside [the Prosecution’s] control”, within the meaning of Regulation 35(2). P-0441’s addition is required due to P-0442’s withdrawal as a witness. P-0442 provided evidence regarding the unlawful motive for the attack and the state of mind of the attackers, and his withdrawal requires the Prosecution to tender alternative evidence, which P-0441 provides. The addition of P-0449 was also outside the Prosecution’s control because he was unwilling to cooperate with the Court until after the witness list deadline expired, which meant that the Prosecution was unable to include him on the list at that time.

6. *Second*, while Regulation 35(2) is not satisfied with respect to P-0455, P-0460, P-0511 or the re-interview statements of P-0355, P-0419 and P-0446, their addition is nevertheless justified under Article 69(3) because their evidence will assist the Chamber to determine the truth. They provide significant evidence on the contested issues and will assist the Chamber in resolving them. In particular, the additional evidence speaks to the critical question of what motivated the Accused and his co-perpetrators to attack MGS Haskanita. It will assist the Chamber to determine whether the attack was lawful, as the Defence suggests, or whether it was an unlawful attack motivated by a desire to steal property and destroy a peacekeeping force unable to stop GoS attacks, as the Prosecution contends. Put simply, the evidence goes to the heart of the case and will better enable the Chamber to adjudicate it.
7. The Prosecution acknowledges that the proposed additions would require additional Defence preparations and does not object to the Defence being granted extra preparation time, either before the commencement of trial, or by the Prosecution calling the relevant witnesses towards the end of its case. Either way, the additional preparation time required is not likely to be great. One of the five witnesses the Prosecution seeks to add – P-0441 – is well-known to the Defence, having been relied upon by the Prosecution at the confirmation stage. The other four provide concise, uncomplicated evidence that is unlikely to require lengthy Defence preparation or investigations. The statements from the re-interviews of existing witnesses either provide information requested by the Defence (in the case of P-0355) or clarify ambiguities in earlier statements (in the case of P-0419 and P-0446).
8. The items the Prosecution seeks to add are listed in Annex 1. The Prosecution acknowledges that it is requesting a meaningful addition at an advanced stage and that it would have been preferable for the items to have been

identified earlier. However, each item will assist the Chamber to understand what happened in Haskanita in September 2007, to resolve the three contested issues, and to arrive at a just verdict. For this reason, and because any prejudice to the Defence can be remedied through additional preparation time, the Chamber should authorise the addition of the materials.

Confidentiality

9. This filing is designated “confidential” because it identifies current and proposed Prosecution witnesses, which, if disseminated publicly, would undermine any in-court protective measures the Chamber may grant. Annexes A to H are designated confidential, *ex parte* because they contain materials disclosed to the Defence in redacted form. Providing the Defence access to the annexes would defeat the purpose of the redactions. To enable the Defence to respond to this application, the *ex parte* annexes are identified by ERN, so that the Defence can refer to the redacted materials.

Procedural history

10. On 13 June 2011, the Prosecution filed a revised list of trial witnesses, which included P-0441 and 15 others.¹ The Prosecution filed an updated list of 15 trial witnesses on 5 August 2011, which did not include P-0441.²
11. On 6 March 2013, the Chamber set 2 May 2013 as the final deadline for the submission of the Prosecution’s updated lists of witnesses and evidence.³ The Prosecution filed its updated list of evidence on 2 May 2013 and advised the Chamber that its witness list was the same as that filed on 5 August 2011.⁴

Submissions

¹ ICC-02/05-03/09-162-Conf-AnxC.

² ICC-02/05-03/09-189-AnxA.

³ ICC-02/05-03/09-455, para 19.

⁴ ICC-02/05-03/09-469, para 6; ICC-02/05-03/09-469-Conf-AnxA.

A. The Chamber may permit the addition of evidence if: (i) Regulation 35(2) is satisfied; or (ii) the additional evidence will assist the Chamber to determine the truth and will not cause undue prejudice to the Defence.

12. In *Katanga*, the Trial Chamber granted a Prosecution request to add a witness after the expiration of the witness list deadline.⁵ Although the Trial Chamber found that the application did not satisfy the requirements of Regulation 35(2),⁶ it authorised the Prosecution to add the witness pursuant to Articles 64 and 69(3).⁷ In reaching that conclusion, the Chamber assessed whether “the new material is of such a nature that it will contribute to a better understanding of the case and the establishment of the truth” and whether adding the material would “jeopardise the Defence’s right to have adequate time in order to prepare”.⁸

13. The *Kenyatta* Trial Chamber authorised the Prosecution to add two witnesses after the witness list deadline.⁹ The Trial Chamber found that the requirements of Regulation 35(2) were not met,¹⁰ but permitted the additional evidence because, among other things, it was “not duplicative with the evidence of other proposed witnesses, brings to light previously unknown facts which have a significant bearing on the case and would be of relevance in determining the questions at issue in this case”.¹¹ One of the witnesses was offered as a replacement for a witness who had withdrawn after the deadline, and the Chamber found that in light of the withdrawal, the replacement witness “brings to light otherwise unknown facts which have a significant bearing upon the case”.¹² The Chamber concluded that the additions would

⁵ ICC-01/04-01/07-1590.

⁶ ICC-01/04-01/07-1590, paras 13-16 (concluding that the Prosecution could have alerted the Chamber to the possibility of calling the witness before the expiration of the deadline).

⁷ ICC-01/04-01/07-1590, paras 17-27.

⁸ ICC-01/04-01/07-1590, para 17.

⁹ ICC-01/09-02/11-832.

¹⁰ ICC-01/09-02/11-832, para 12.

¹¹ ICC-01/09-02/11-832, para 13.

¹² ICC-01/09-02/11-832, para 16.

not cause undue prejudice to the Defence because the Defence would have adequate time to prepare and had “previously had an opportunity to prepare for similar evidence in this case”.¹³

14. In *Ruto*, the Trial Chamber permitted the Prosecution to add four witnesses.¹⁴

For two of these witnesses, the Chamber found that their addition would not unduly prejudice the Defence because the witnesses had been included on an earlier Prosecution witness list and because the Defence would be given additional time to prepare before trial.¹⁵ For the other two witnesses, the Chamber found that the circumstances requiring their addition “were outside the Prosecution’s control”,¹⁶ and that calling them towards the end of the Prosecution’s case would counterbalance any prejudice to the Defence.¹⁷

15. The *Ruto* Chamber also permitted the Prosecution to add to its list of evidence four statements obtained during re-interviews of existing witnesses.¹⁸ Noting that the re-interviews were conducted because of information “that required clarification” with the witnesses, the Chamber held that it was appropriate to add the re-interview statements, which “put the Defence on notice of issues that may arise during the testimony of the witnesses concerned”.¹⁹

B. Regulation 35(2) is satisfied with respect to P-0441 and P-0449.

a. P-0441.

16. The need to add P-0441 back onto the Prosecution witness list arose as a result of P-0442’s withdrawal on 28 February 2014, which was “outside [the Prosecution’s] control”.²⁰ P-0442 provided evidence on the intent of the attackers in the form of contemporaneous statements from a rebel commander

¹³ ICC-01/09-02/11-832, paras 14 and 16.

¹⁴ ICC-01/09-01/11-762, ICC-01/09-01/11-899-Red.

¹⁵ ICC-01/09-01/11-762, paras 39-40.

¹⁶ ICC-01/09-01/11-899-Red, para 16.

¹⁷ ICC-01/09-01/11-899-Red, paras 19-20.

¹⁸ ICC-01/09-01/11-762, paras 56-60.

¹⁹ ICC-01/09-01/11-762, paras 56-57.

²⁰ Regulation 35(2).

that the attack was aimed at stealing vehicles and that the target was not “the enemy”, but rather the AU.²¹ While the Prosecution reserves the right to seek admission of P-0442’s statement under Rule 68 in due course, it is not clear at this stage whether the Chamber will grant such relief or whether it will give P-0442’s statement the weight that the Prosecution believes it merits. In the circumstances, the Prosecution considers it necessary to offer additional evidence to supplement the record and wishes to call P-0441 for this reason.

17. Among other matters, P-0441 provides evidence regarding a 29 September 2007 planning meeting allegedly attended by the Accused and other rebel commanders, at which [REDACTED].²² P-0441 also reports that: (i) during the attack, [REDACTED];²³ (ii) after the attack, [REDACTED];²⁴ and (iii) from his vantage point [REDACTED], the “AU soldiers were innocent people” and the “AU was not distinguishing or discriminating between the rebels and the GoS . . . They were impartial”.²⁵ This evidence goes to the Accused’s and the attackers’ state of mind and the true motivation behind the attack. P-0441 also provided the Prosecution with approximately 240 photographs. The Prosecution seeks to add four to its list of evidence, as detailed in Annex 1.

18. Adding P-0441 back onto the list will not prejudice the Defence unduly. He is well-known to the Defence, since the Prosecution relied upon his evidence at the confirmation stage and listed him on the 13 June 2011 witness list.²⁶ P-0441’s statement was disclosed to the Defence with identity-related redactions on 20 April 2012, and was re-disclosed without those redactions on 2 May 2013, together with the photographs he provided to the Prosecution.

²¹ DAR-OTP-0181-0489, at 0495; DAR-OTP-0172-0250, at 0262; DAR-OTP-0172-0304, at 0331.

²² Annex B, DAR-OTP-0171-0594, at para 105; *see also* paras 95-109.

²³ Annex B, DAR-OTP-0171-0594, at para 130.

²⁴ Annex B, DAR-OTP-0171-0594, at paras 161-163.

²⁵ Annex B, DAR-OTP-0171-0594, at para 217.

²⁶ ICC-02/05-03/09-162-Conf-AnxC.

As in *Ruto*, P-0441's inclusion on previous Prosecution witness lists limits any prejudice to the Defence.²⁷

b. P-0449.

19. The request to add P-0449 to the witness list arises from a change in his willingness to cooperate with the Court. The Prosecution first screened P-0449 as a potential witness on 4 September 2009, but he informed the Prosecution on 11 September 2009 that he wished to withdraw his cooperation, a position he reiterated in December 2011. He remained unwilling to appear until 9 August 2013, three months after the witness list deadline expired. As a result of his change in position, P-0449 was interviewed on 11-12 September 2013. During his interview, P-0449 provided a 17-page statement regarding the attack on MGS Haskanita,²⁸ annexed to which are approximately 300 photographs contained on three DVDs.²⁹ The Prosecution disclosed P-0449's statement and the photographs to the Defence on 6 December 2013.³⁰ The Prosecution seeks to add the statement and its annexes to its list of evidence.

20. As stated above, P-0449 was [REDACTED] MGS Haskanita during the attack.³¹ His statement contains probative evidence, some of which was previously unknown. In particular, P-0449 provides eyewitness evidence on:

- The warnings received from local staff before the attack that MGS Haskanita would be attacked because the rebels were "fed up with" GoS bombings and "the AMIS forces not doing anything about it".³² This evidence tends to show that the attack was motivated, at least in part, by anger at MGS Haskanita for failing to fulfil the impossible demand on the part of the rebels that MGS Haskanita prevent the GoS

²⁷ ICC-01/09-01/11-762, paras 39-40.

²⁸ Annex D, DAR-OTP-0188-0207.

²⁹ Annex D.

³⁰ Trial Rule 77 package 16.

³¹ Annex D, DAR-OTP-0188-0207, at para 12.

³² Annex D, DAR-OTP-0188-0207, at para 27.

from bombing rebel forces and villages, and not by a desire to remove Captain Bashir as the Defence asserts. (In any event, the evidence demonstrates that Bashir was removed well before the attack.)

- The collaboration of local staff with the rebels during the attack,³³ and the fact that some of the local staff scheduled to work on the day of the attack did not report for work or left early, suggesting that they were aware of a pre-meditated plan to attack MGS Haskanita that day.³⁴ This evidence tends to show that rebel attackers and local staff were in contact, which supports an inference that information obtained by local staff regarding Bashir's removal was communicated to the rebels.
- The theft of PAE property by the attackers, including the contents of the PAE safe, [REDACTED], and personal belongings the attackers stole from PAE staff after they were identified as civilians.³⁵ This evidence tends to show that the attack was motivated, at least in part, by a desire to steal property from MGS Haskanita, and not a desire to remove Bashir, as the Defence asserts.
- The statement of a rebel during the attack that the rebels attacked MGS Haskanita "because the Government of Sudan is bombing us and AMIS is doing nothing".³⁶ This evidence tends to show that the attack was motivated, at least in part, by anger at MGS Haskanita for failing to fulfil the impossible demand of stopping GoS bombings.

21. The addition of P-0449 will not cause undue prejudice to the Defence because his evidence is concise, to the point, and is unlikely to require extensive investigation or analysis. As in *Kenyatta*, P-0449's evidence is consistent with

³³ Annex D, DAR-OTP-0188-0207, at para 40.

³⁴ Annex D, DAR-OTP-0188-0207, at para 30.

³⁵ Annex D, DAR-OTP-0188-0207, at para 42.

³⁶ Annex D, DAR-OTP-0188-0207, at para 49.

that of other Prosecution witnesses and the Defence has “had an opportunity to prepare for similar evidence in this case”.³⁷

C. The addition of P-0455, P-0460, P-0511 and the re-interview statements of P-0355, P-0419 and P-0446 is warranted under Article 69(3).

22. While the requirements of Regulation 35(2) are not met with respect to the remaining witnesses, the Prosecution seeks their addition pursuant to the Chamber’s Article 69(3) powers, consistent with existing jurisprudence.³⁸ As in *Katanga*, *Kenyatta* and *Ruto*, the Chamber should authorise the additional witnesses because they bring to light additional facts that have a significant bearing on the contested issues at trial. Without their evidence, the Chamber’s ability to adjudicate this case will be constrained unnecessarily. For this reason, and because any prejudice to the Defence can be mitigated by granting additional preparation time, the Chamber should authorise the additions.

a. The addition of P-0455, P-0460, P-0511 will assist the Chamber to resolve the contested issues and will not prejudice the Defence unduly.

23. P-0455, P-0460 and P-0511 were [REDACTED] present during the 29 September 2007 attack. They provide evidence that will assist the Chamber in resolving each of the contested issues.

24. Among other matters, P-0455 explains that:

- Bashir did not have access to the radio room and that he, P-0455, never saw Bashir with a Thuraya phone.³⁹ This evidence is relevant to the contested issues because it tends to undermine the Defence suggestion

³⁷ ICC-01/09-02/11-832, at paras 14 and 16.

³⁸ ICC-01/04-01/07-1590, paras 17-27; ICC-01/09-02/11-832, paras 12-13.

³⁹ Annex E, DAR-OTP-0190-0049, at paras 23 and 30.

that MGS Haskanita lost its protected status because Bashir was allegedly communicating intelligence to the GoS from inside the Camp.

- Bashir was removed from MGS Haskanita a few days after 10 September 2007, following a rebel demand that AMIS hand over any GoS personnel inside the camp, and “was not replaced after his removal”.⁴⁰ This information is relevant because it undermines the Defence suggestion that MGS Haskanita lost its protected status due to the presence of Bashir and/or other GoS personnel in the camp.
- The rebel representatives in MGS Haskanita left the camp sometime between Bashir’s removal and the 29 September attack, and that when they did so, one of the rebel representatives threatened [REDACTED]: “we going to kill you . . . attack this camp!”.⁴¹ This evidence supports the conclusion that rebels knew of Bashir’s removal prior to the attack on MGS Haskanita and yet were still resolved to attack the camp.
- There were no flights into MGS Haskanita between Bashir’s removal and the attack on 29 September 2007, demonstrating that Bashir was not replaced by another GoS representative during this period.⁴²
- [REDACTED],⁴³ the rebels stole P-0455’s belongings, which supports the conclusion that the attack was an unlawful act of piracy, rather than a legitimate military action.

25. P-0460 explains, among other matters, that:

- During a demonstration by Haskanita locals in early September, which the rebels observed, a spokesperson stated that if AMIS “could not stop

⁴⁰ Annex E, DAR-OTP-0190-0049, at paras 36-43.

⁴¹ Annex E, DAR-OTP-0190-0049, at paras 46-48.

⁴² Annex E, DAR-OTP-0190-0049, at para 75.

⁴³ Annex E, DAR-OTP-0190-0049, at paras 55-59.

the GOS from bombing them, then we should leave the camp. They said if we don't leave[,] any time the GOS bombed them they will come and destroy the camp".⁴⁴ This information is relevant to the contested issues because it suggests that the attack was motivated, at least in part, by anger that MGS Haskanita was unable to prevent GoS attacks, and not a desire to remove Bashir as the Defence suggests.

- On 10 or 11 September 2007, a rebel delegation came to MGS Haskanita to demand that the GoS representative be handed over to them on the basis that "he was giving information to the GOS about the location of the rebels and the GOS forces were using this information to bomb the rebels positions".⁴⁵ This information tends to support the contention that in early September, certain rebels believed Bashir was passing intelligence to the GoS from MGS Haskanita.
- Bashir left MGS Haskanita approximately two weeks before the attack.⁴⁶ This information undermines the Defence suggestion that the attack was lawful because MGS Haskanita had lost its protected status as a result of Bashir's alleged actions while in the camp.
- That the rebels stole the camp's medical drips during the attack, which prevented proper treatment of wounded AMIS personnel.⁴⁷ This evidence supports the conclusion that the attack was motivated, at least in part, by a desire to steal supplies from MGS Haskanita.

26. P-0511 explains, among other matters, that:

- Around 10 September 2007, the rebels requested AMIS to hand Bashir over to them, that Bashir was removed as a result, and "was not

⁴⁴ Annex F, DAR-OTP-0190-0156, para 49.

⁴⁵ Annex F, DAR-OTP-0190-0156, para 59.

⁴⁶ Annex F, DAR-OTP-0190-0156, paras 70-72.

⁴⁷ Annex F, DAR-OTP-0190-0156, para 106.

replaced with another GoS representative”.⁴⁸ This information undermines the Defence suggestion that MGS Haskanita lost its protected status due to the presence of Bashir or other GoS personnel.

- The rebel representative assigned to MGS Haskanita participated in the attack.⁴⁹ This information demonstrates that individuals who knew that Bashir had left the camp prior to 29 September nevertheless chose to attack it, undermining the Defence suggestion that the attack was a legitimate military action motivated by a desire to remove Bashir.
- During the attack, rebels demanded money from P-0511 and stole his property.⁵⁰ This evidence supports the conclusion that the attack was motivated, at least in part, by a desire to steal property, rather than a desire to carry out a legitimate military operation, as the Defence suggests.

27. The above is a sample of the evidence provided by P-0455, P-0460 and P-0511 that speaks to the contested issues. Adding these witnesses will make it easier for the Chamber to adjudicate this case because their evidence corroborates other evidence in the record suggesting that the attack was motivated in large measure by the rebels’ desire to steal property rather than a genuinely held belief that MGS Haskanita had lost its protected status, as the Defence contends. While there is already evidence in the record regarding Bashir’s removal from MGS Haskanita before the attack, his activities while in the camp, the timing of his removal and the rebels’ knowledge thereof are heavily disputed issues that are of central importance in the case. It is therefore appropriate for the Prosecution to offer corroborative evidence on this point, which will assist the Chamber in resolving this contested issue at trial.

⁴⁸ Annex G, DAR-OTP-0190-0027, paras 38-40.

⁴⁹ Annex G, DAR-OTP-0190-0027, para 47.

⁵⁰ Annex G, DAR-OTP-0190-0027, para 47.

28. Adding these three witnesses will not unduly prejudice the Defence because the statements are brief and straight-forward: 15, 21 and 17 pages long. Moreover, the Defence has “had an opportunity to prepare for similar evidence in this case”,⁵¹ and will not be required to grapple with entirely new allegations for the first time. While the Prosecution acknowledges that additional Defence preparations will be required, this can be remedied by an additional grant of time, either before trial or by ordering that the witnesses be called towards the end of the Prosecution case.⁵²

b. The re-interview statements of P-0355, P-0419 and P-0446 provide additional information and clarify earlier statements, which will assist the Chamber to resolve the contested issues at trial.

i. P-0355.

29. P-0335’s six-page re-interview statement is an index of documents he provided to the Prosecution on 16 September 2013.⁵³ With the exception of one paragraph,⁵⁴ the statement contains no substantive evidence from P-0355. The documents that P-0355 provided to the Prosecution are annexed to the re-interview statement.⁵⁵ They include reports from various investigative bodies relating to the attack on MGS Haskanita, lists of casualties and AMIS material stolen during the attack, and brief non-ICC statements taken during the AU’s investigations into the attack. The Defence asked the Prosecution to obtain these very same documents as early as July 2011.⁵⁶

30. The investigative reports will assist the Chamber to resolve the contested issues because they provide further information indicating that, contrary to

⁵¹ ICC-01/09-02/11-832, paras 14 and 16.

⁵² See ICC-01/09-01/11-899-Red, paras 19-20.

⁵³ Annex A, DAR-OTP-0188-0526.

⁵⁴ Annex A, DAR-OTP-0188-0526, at para 26.

⁵⁵ Annex A, DAR-OTP-0188-0526, at para 9.

⁵⁶ See ICC-02/05-03/09-234-Conf-AnxA, pp. 5-6, items 1-4, 8-10, 13 and 14 under the title “ANNEX B-AFRICAN UNION DOCUMENTS”.

the Defence suggestion that the attack was lawful, it was in fact aimed at stealing AMIS equipment and retaliating against a peacekeeping force unable to protect the rebels and Haskanita locals from GoS attacks.⁵⁷ The lists of property the rebels stole during the attack further support the conclusion that the attack was unlawful and that the Accused knew it.⁵⁸ The non-ICC statements are relevant because they include accounts that other Prosecution witnesses – P-0417,⁵⁹ P-0419,⁶⁰ P-0446,⁶¹ P-0486,⁶² and P-0449⁶³ – provided to various boards of inquiry in the immediate aftermath of the attack. These near contemporaneous records will provide the Chamber with useful guidance regarding the recollections of the witnesses shortly after the attack.

31. Permitting the Prosecution to add P-0355's re-interview statement and annexes will not prejudice the Defence unduly. The existence of the documents comes as no surprise to the Defence; as stated above, the Defence asked the Prosecution to obtain the documents in July 2011. The Defence has also had adequate time to analyse the materials. The Prosecution disclosed the materials to the Defence on 6 December 2013 and informed the Defence on 28 January 2014 that it intended to file an application to add the materials to its list of evidence.⁶⁴ The Defence has thus had four months to analyse the materials and has known for two-and-a-half months of the possibility that they may be added to the list of evidence. If the Defence is able to

⁵⁷ See, e.g., Annex A, DAR-OTP-0188-0557, at 0567 ("The developments in the general area of Haskanita with the GoS carrying out aerial bombardments on SLA United Movement Camps and the inability to stop the GoS by AMIS was responsible for the attack"), 0572 ("The continuous bombardments by the GoS of these rebel positions, AMIS inability to prevent these offensive actions and the need for logistics by the attackers to prosecute their operations were basically responsible for the attack"); DAR-OTP-0188-0673, at 0691 ("The main purpose of the attack was for re supply of the Rebel forces").

⁵⁸ Annex A, DAR-OTP-0188-0557, at 0616; DAR-OTP-0188-0673 at 0797.

⁵⁹ Annex A, DAR-OTP-0188-0673 at 0720.

⁶⁰ Annex A, DAR-OTP-0188-0557 at 0574, DAR-OTP-0188-0673 at 0709.

⁶¹ Annex A, DAR-OTP-0188-0545, DAR-OTP-0188-0557 at 0581, DAR-OTP-0188-0673 at 0724.

⁶² Annex A, DAR-OTP-0188-0557 at 0585, DAR-OTP-0188-0673 at 0736.

⁶³ Annex A, DAR-OTP-0188-0673 at 0764.

⁶⁴ Email from the Prosecution to the Defence on 28 January 2014 at 17:05.

demonstrate any prejudice at all, it could be cured with a modest amount of additional preparation time.

ii. P-0419 and P-0446.

32. The Prosecution re-interviewed P-0419 on 14 March 2014 and P-0446 on 23 and 25 March and 4-6 April 2014. The interviews were designed to clarify parts of their earlier statements that were ambiguous and [REDACTED] certain AMIS situation reports (“sitreps”) from the period relevant to the charges. The Chamber should permit the addition of the re-interview statements and their annexes because they: (i) are an integral part of the witnesses’ evidence, without which their evidence would be incomplete; (ii) provide notice of clarifications the witnesses are expected to provide during their testimony; and (iii) provide probative information on the contested issues.

33. P-0419’s re-interview statement clarifies: (i) the information he received suggesting that Bashir was passing information regarding rebel positions to the GoS;⁶⁵ (ii) that although P-0419 was unable to verify the information, he decided that Bashir should be removed from the camp as soon as possible;⁶⁶ (iii) that Bashir was removed from the camp before the 29 September attack, following a rebel demand for his removal;⁶⁷ (iv) that representatives of the JEM/SLA rebel groups witnessed Bashir’s departure;⁶⁸ and (v) that, to P-0419’s knowledge, Bashir was not replaced.⁶⁹

34. P-0446 clarifies that: (i) Bashir left MGS Haskanita sometime after 10 September 2007;⁷⁰ and (ii) he does not know if Bashir was replaced, but did

⁶⁵ Annex H, DAR-OTP-0189-0153, at para 11.

⁶⁶ Annex H, DAR-OTP-0189-0153, at paras 11-17.

⁶⁷ Annex H, DAR-OTP-0189-0153, at paras 20, 24-32.

⁶⁸ Annex H, DAR-OTP-0189-0153, at para 33.

⁶⁹ Annex H, DAR-OTP-0189-0153, at para 26.

⁷⁰ Annex C, DAR-OTP-0189-0470, at para 19.

not see any GoS representative in the camp after Bashir's departure.⁷¹ [REDACTED] certain sitreps for the period relevant to the charges.⁷² These contemporaneous records are highly probative evidence of the events in question. Among other matters, the sitreps address the 6 September 2007 demonstration where the "crowd demanded that AMIS leave or face forcible eviction",⁷³ the rebels' 10/11 September demands for Bashir's removal,⁷⁴ and the no-fly zone the rebels imposed on or about 11 September.⁷⁵ This information goes to the contested issues of the lawfulness of the attack and the Accused's knowledge and will assist the Chamber in determining those issues.

35. It is to be expected that P-0419 and P-0446 will testify at trial to the facts contained in their re-interview statements, so adding the statements on the list of evidence simply provides notice of their anticipated testimony. As in *Ruto*, the issues addressed in the re-interview statements "required clarification", and their addition to the list of evidence will "put the Defence on notice of issues that may arise during the testimony of the witnesses concerned".⁷⁶

36. The Prosecution acknowledges that it would have been preferable to clarify these matters earlier and that the additional statements and materials will require additional preparation by the Defence. This burden can be remedied by a grant of additional preparation time, either before trial or before the witnesses testify. In this respect, it bears noting that the re-interview statements are brief (nine, eight and 12 pages) and that the evidence contained therein is straight-forward and can be digested quickly.⁷⁷ More

⁷¹ Annex C, DAR-OTP-0189-0470, at paras 26-30; *see also* para 12 (stating that he does not recall if there was a GoS representative in the camp on 29 September 2007).

⁷² *See* Annex C.

⁷³ Annex C, DAR-OTP-0190-0222, at para 47, and DAR-OTP-0190-0266.

⁷⁴ Annex C, DAR-OTP-0190-0222, at paras 53-57, and DAR-OTP-0190-0276 and DAR-OTP-0190-0277.

⁷⁵ Annex C, DAR-OTP-0190-0222, at para 57, and DAR-OTP-0190-0277.

⁷⁶ ICC-01/09-01/11-762, para 57.

⁷⁷ The vast majority of the 41 sitreps provided by P-0446 are one page long and none is more than four pages.

importantly, the materials clarify important aspects of the witnesses' evidence and thus should save the Defence time, both in terms of investigations and in-court questioning. In the final analysis, the additional materials will assist the parties and the Chamber to determine the truth in this case, and their addition to the list of evidence should be authorised on this basis.

Relief requested

37. For the foregoing reasons, the Prosecution respectfully requests the Chamber to authorise the addition of:

- P-0441, P-0449, P-0455, P-0460 and P-0511 to the Prosecution's trial witness list; and
- The statements of P-0441, P-0449, P-0455, P-0460 and P-0511, the re-interview statements of P-0355, P-0419 and P-0446, and related documents, as detailed in Annex 1, to the Prosecution's list of evidence.



Fatou Bensouda
Prosecutor

Dated this 11th day of April 2014

At The Hague, The Netherlands