

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **6 May 2014**

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 the “Defence response to ‘Prosecution application to amend its lists of witnesses and evidence’”

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. More than 3 years after the charges were confirmed,¹ approximately 16 months after the Prosecution declared itself “trial ready”,² some 11 months after the date of “final” disclosure and with, then, 24 days remaining prior to the start of trial, the Prosecution filed its *Prosecution application to amend its lists of witnesses and evidence* (“Application”), in which it seeks to add 5 new witnesses and the re-interviews and related material pertaining to 3 trial witnesses to its Lists of Witnesses and Evidence.³
2. The defence for Mr. Abdallah Banda Abakaer Nourain (“Defence”) respectfully submits that, save in respect of one witness (P-0449), there is no proper justification at this advanced stage of proceedings for the late addition of the new witnesses and the new material to the Prosecution’s Lists of Witnesses and Evidence. The reality is that the Application is necessitated by the Prosecution’s apparent failure to “*have conducted a more thorough investigation prior to confirmation in accordance with its statutory obligations under Article 54(1)(a) of the Statute*”,⁴ or, at the very least, the Prosecution’s fears regarding the sufficiency and strength of its evidence.
3. The Defence acknowledges that the 5 May 2014 trial start date has been vacated.⁵ However, the provision of additional time to the Defence is no answer to the Application in this case. First, the Application should be dismissed on principle. The Prosecution is seeking to rely on the fruits of investigations conducted years after confirmation without proper justification. Second, the Application should be dismissed on grounds of prejudice. There must be some finality to the

¹ Corrigendum of the “Decision on the Confirmation of Charges”, ICC-02/05-03/09-121-Conf-Corr, 8 March 2011.

² Prosecution’s Submissions on the Possible Date for Commencement of the Trial, 19 November 2012, ICC-02/05-03/09-421-Red.

³ ICC-02/05-03/09-744-Conf; ICC-02/05-03/09-744-Red.

⁴ *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, ICC-01/09-02/11-728, 26 April 2013 (“**Kenyatta Art. 64(4) Decision**”), para. 123.

⁵ Public redacted Decision vacating the trial date of 5 May 2014, ICC-02/05-03/09-564-Red, 16 April 2014.

disclosure of new evidence, particularly when (excepting P-0449) the collection and addition of such evidence is not due to matters outside the Prosecution's control.⁶ Third, in respect of P-0441, the request is premature and this witness is not a genuine replacement for P-0442.

II. Submissions

(1) The request to add 5 new witnesses (P-0441, P-0449, P-0455, P-0460 and P-0511)

a. P-0449

4. On the basis of the facts provided in the Application, including that the individual was unwilling to be a witness until 9 August 2013, the Defence does not object to the addition of P-0449 to the Prosecution's List of Witnesses.⁷

b. P-0441

5. Contrary to the Prosecution's assertions, Regulation 35(2) of the Regulations of the Court ("Regulations") is not satisfied with respect to P-0441 and the request to add this witness should be dismissed as premature.⁸ The Prosecution presents P-0441 as a replacement for P-0442.⁹ However, it is clear from the plain terms of the Application that P-0442 has not been withdrawn as a witness because "*the Prosecution reserves the right to seek admission of P-0442's statement under Rule 68 in due course*".¹⁰ The Prosecution is, therefore, simply trying to put in place a contingency plan for a failed Rule 68 application. Unless and until such an application is made and fails there is no basis for the request to add P-0441. To find otherwise would be, in colloquial terms, to allow the Prosecution "to have its cake and eat it". Simply put, if the Application were granted, not only would P-0441 be available to give *viva voce* evidence but the Prosecution would also have the possibility of adding to its case via a successful Rule 68 application in

⁶ Kenyatta Art. 64(4) Decision, para. 120.

⁷ Application, para. 19.

⁸ Application, paras. 5, 16.

⁹ Application, para. 16.

¹⁰ Application, para. 16.

respect of P-0442's evidence.¹¹ The unfairness of such a situation to the Defence is clear.

6. The Defence's objection to the addition of P-0441 as premature is supported by the Court's jurisprudence. In the *Ruto & Sang* case, Trial Chamber V(A) held that "*it [was] premature to add, at this stage, extra witnesses that may or may not be called upon to replace evidence that – based on the current state of the Prosecution case and its list of witnesses – will be given by other witnesses.*"¹² Trial Chamber V(A) also held that to add witnesses "*when ultimately their testimony may not need to be replaced, would unduly burden the Defence in its preparation for trial.*"¹³ Trial Chamber V(A)'s finding was stated to be without prejudice to the Prosecution making "*a renewed application*" later if one or more of the witnesses did actually withdraw.¹⁴ Accordingly, the Prosecution should not be permitted to "hedge its bets" vis-à-vis P-0442 via the Application.

7. Even if, *arguendo*, the Trial Chamber finds the request to add P-0441 is not premature, the Defence submits it should still be dismissed because the evidence which P-0441 [REDACTED] provides does not replace that of P-0442 [REDACTED].¹⁵ Instead, P-0441's evidence introduces completely new allegations which have no equivalent in P-0442's evidence. According to the Application, P-0442's importance to the Prosecution case is his evidence of "*the intent of the attackers in the form of contemporaneous statements from a rebel commander*".¹⁶ The transcripts show that this commander was [REDACTED] who allegedly relayed statements made by the late co-accused Saleh Jerbo about the motive for the attack.

¹¹ [REDACTED]

¹² *Prosecutor v. Ruto and Sang*, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, ICC-01/09-1/11-762, 3 June 2013 ("**Ruto Decision**"), para 36.

¹³ *Ruto Decision*, para 36.

¹⁴ *Ruto Decision*, para 38.

¹⁵ Agreed Facts, paras. 16, 17.

¹⁶ Application, para. 16 citing to DAR-OTP-0181-0489 at 0495; DAR-OTP-0172-0250 at 0262; DAR-OTP-0172-0304 at 0331.

8. In contrast, the focus of P-0441's evidence is Abdallah Banda,¹⁷ with respect to whom the Office of the Prosecutor had presumably determined the expected testimony of Witness [REDACTED] – was sufficient to obtain a conviction beyond a reasonable doubt with regard to Mr. Banda.¹⁸ From a review of P-0441's evidence and, indeed, the summary of its highlights provided in paragraph 17 of the Application, it is clear that P-0441 does not provide any evidence about the *"intent of the attackers"*. The Prosecution is, therefore, seeking to replace a witness whose focus is the former accused, the deceased Mr. Jerbo, with one whose allegations seek to bolster the Prosecution's case against the remaining accused, Mr. Banda. Further, P-0441's evidence does not satisfy the Prosecution's stated aim of providing evidence which *"goes to the Accused's and the attackers' state of mind and the true motivation behind the attack."*¹⁹ The request to add P-0441 is, therefore, not only improper but irrelevant.
9. In addition, the Prosecution's argument that *"[a]dding P-0441 back onto the list will not prejudice the Defence unduly"* because *"[h]e is well-known to the Defence"* is without merit.²⁰ Since 5 August 2011, P-0441 has been a dropped witness.²¹ The Defence does not, and cannot reasonably be expected to, investigate dropped Prosecution witnesses in the same manner in which it would seek to investigate individuals on the List of Witnesses. This is especially so for a witness who remained anonymous until the date of "final" disclosure in May 2013.²² [REDACTED] The Trial Chamber is well aware of the serious difficulties the Defence faces in conducting investigations in this case, particularly

¹⁷ See the summary provided at Application, para. 17 where the references are all to "the Accused" and [REDACTED]. See also P-0441's material: DAR-OTP-0173-0364-R01; DAR-OTP-0173-0389-R01; DAR-OTP-0171-0594-R02.

¹⁸ [REDACTED]

¹⁹ Application, para. 17.

²⁰ Application, para. 18. See also para. 7.

²¹ Application, para. 10 citing to ICC-02/05-03/09-189-AnxA.

²² P-0441's statement with identity related redactions was disclosed to the Defence on 20 April 2012, 9 months after he was dropped (see Application, para. 18). Further, P-0441's identity was only disclosed to the Defence on 2 May 2013, approximately a year and 10 months after he had been dropped as a Prosecution witness (see Application, para. 18).

investigations which concern [REDACTED] due to the non-cooperation [REDACTED].²³ [REDACTED]²⁴ [REDACTED].²⁵ Adding a new witness, without proper justification at this late stage, who introduces new allegations would, thus, seriously prejudice the rights of the Defence.

c. P-0455, P-0460 and P-0511

10. There is a well-founded principled objection to the addition of P-0455, P-0460 and P-0511 to the Prosecution's witness list. The plain fact is that there is no proper justification for the Prosecution conducting interviews of 3 new witnesses at the end of March/beginning of April 2014. The Prosecution concedes as much in the Application.²⁶

11. According to the Appeals Chamber, the Prosecution's investigations should be "*largely completed*" by the confirmation hearing,²⁷ which in this case was held in December 2010. In the *Kenyatta* case, a Majority of the Trial Chamber identified that post-confirmation investigations "*may*" be appropriate in the following two circumstances:

- (i) "*when it pertains to evidence which the Prosecution could not with reasonable diligence have discovered or obtained prior to confirmation*"; and
- (ii) "*when certain evidence that was available prior to confirmation, unexpectedly and through no fault of the Prosecution, becomes unavailable for use at trial (e.g. a witness dies or otherwise becomes unavailable).*"²⁸

²³ See, e.g., Defence request for a temporary stay of proceedings, ICC-02/05-03/09-274, 6 January 2012 and Confidential Redacted Version of "Defence Submissions on the Possible Date for the Commencement of the Trial" filed on 19 November 2012, ICC-02/05-03/09-422-Conf-Red, paras. 26-29.

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ Application, paras. 8, 22.

²⁷ *Prosecutor v. Mbarushimana*, Judgement on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges", ICC-01/04-01/10-514, 30 May 2012, para. 44.

²⁸ *Kenyatta* Art. 64(4) Decision, para. 120.

12. Neither scenario applies with respect to the 3 new witnesses at issue. Indeed, the Prosecution's decision, at this stage in proceedings, to pursue interviews with [REDACTED] is particularly unjustifiable in view of the fact that, on 5 August 2011, the Prosecution informed the Trial Chamber that it had concluded interviews the previous month with [REDACTED] P-0484, P-0485, P-0486 and P-0487 – and would call as witnesses the last three individuals “*if the trial proceeds on the basis of the Agreed Facts*”.²⁹ The inevitable conclusion is that none of these three new interviews would be required if the pre-confirmation investigation had been properly conducted, or, at the very least, diligent investigations had been pursued and concluded following the parties' extensive Agreed Facts.
13. Even stepping past this primary objection, it is questionable whether these witnesses are actually necessary based on the Prosecution's own statement that the witnesses' “*evidence corroborates other evidence in the record*”.³⁰ Of note are also the Prosecution's actions at the time it filed the *Prosecution's Updated List of Witnesses* on 5 August 2011³¹ when it dropped P-0447 and decided not to add the aforementioned P-0484, [REDACTED] and whose statements likewise provide corroborating evidence to that of [REDACTED] presently on the List of Witnesses.³² Thus, it appears, based on the Prosecution's own assessment that, at core, the evidence of P-0455, P-0460 and P-0511 is duplicative and the result of investigations conducted over three years after confirmation. The burden of Prosecution investigative failures or concerns about the sufficiency of its own case should not be borne by the Defence at this stage of proceedings. The request to add P-0455, P-0460 and P-0511 – which would constitute an increase by fifty per cent of the number of [REDACTED] witnesses – should, therefore, be dismissed. To find otherwise is to condone the collection of evidence which

²⁹ Prosecution's Updated List of Witnesses, ICC-02/05-03/09-189, para. 4.

³⁰ Application, para. 27.

³¹ See ICC-02/05-03/09-189 and related annex, ICC-02/05-03/09-189-AnxA.

³² These are witnesses P-0419, P-0417, P-0420, P-0416, P-0446 and P-0486.

could reasonably have been collected, at best, prior to, and at worst, shortly after, the confirmation hearing or, at least, at the time of the Agreed Facts.

14. In addition, the request to add P-0455, P-0460 and P-0511 should be dismissed on the grounds of prejudice to the Defence. The disclosure of witness material almost a year after the date of “final” disclosure violates Mr. Banda’s right to timely disclosure and adequate time and facilities for the preparation of his defence. As discussed above, the difficulties faced by the Defence in the conduct of investigations are acute and well-known to the Chamber.³³
15. Further, P-0455, P-0460 and P-0511 are [REDACTED]. As the Trial Chamber is aware, the Defence is faced with particular difficulties investigating matters which require [REDACTED].³⁴ In contrast to the Prosecution, which has recently interviewed these 3 new [REDACTED] witnesses and re-interviewed another existing [REDACTED] witness (P-0446) with apparent ease, the Defence has been met with substantive silence in respect of all its investigative requests (one dating from 2011) addressed to [REDACTED].³⁵ It is against this background of non-cooperation that the Prosecution’s simplistic arguments that “*the Defence ‘has had an opportunity to prepare for similar evidence in this case’*” and any prejudice can be remedied “*by an additional grant of time*” must be set.³⁶ The Prosecution clearly has no appreciation or understanding of the Defence’s investigative reality.
16. Accordingly, the Prosecution’s argument that its serious investigative failures should be overridden by the Trial Chamber’s duty to determine the truth and the resulting prejudice to the Defence remedied by the provision of additional time should be rejected.³⁷ Instead, the fair and appropriate course is the “*exclusion of all or part of the evidence*” which the Prosecution could reasonably have been

³³ *Supra*, para. 9.

³⁴ [REDACTED]

³⁵ [REDACTED]

³⁶ Application, para. 28 (internal footnotes omitted).

³⁷ Application, paras. 6, 7, 8, 22, 23, 27, 28.

expected to have collected prior to confirmation.³⁸ This would address “*the Prosecution’s conduct as well as...allay any potential prejudice caused to the accused.*”³⁹ The Defence submits exclusion is appropriate in this case.

(2) Request to add re-interviews and related material of P-0355, P-0419 and P-0446

17. The Prosecution should not be permitted to rely on evidence obtained years after confirmation where there is no compelling justification for the conduct of dilatory investigations.
18. P-0419 and P-0446 were re-interviewed in March and April 2014.⁴⁰ At the status conference held on 7 April 2014, the Prosecution Senior Trial Attorney candidly admitted that the reason behind these re-interviews was: “*when I came here, read through their statements and looked at them, there were clear inconsistencies that were diametrically opposed, there were areas that were not clear and that’s why they were re-interviewed to clear those up.*”⁴¹ No explanation, however, has been provided why these “*clear inconsistencies*” were not addressed years earlier.⁴²
19. In respect of P-0355’s 16 September 2013 re-interview, the Prosecution correctly acknowledges that the Defence asked the Prosecution, in July 2011, to obtain the documents received from this witness during the 2013 re-interview.⁴³ However, the Prosecution fails to advise that it “*first requested P-0355 to provide the documents*” only on 23 August 2013.⁴⁴ The Defence request was no small matter but concerned, *inter alia*, obtaining the statements taken by boards of inquiry into the attack as well as other contemporaneous reports relating to the attack.⁴⁵ Again, no explanation is provided as to why the Defence’s request was ignored

³⁸ Kenyatta Art. 64(4) Decision, para. 121.

³⁹ Kenyatta Art. 64(4) Decision, para. 121.

⁴⁰ Application, para. 32.

⁴¹ ICC-02/05-03/09-T-24-ENG ET, p. 9, line 24 to p. 10, line 2.

⁴² Application, para. 36 (“[t]he Prosecution acknowledges that it would have been preferable to clarify these matters earlier”).

⁴³ Application, paras. 29, 31.

⁴⁴ See email provided in confidential annex A hereto.

⁴⁵ See ICC-02/05-03/09-234-Conf-AnxA.

for 2 years and these materials were not obtained earlier. The Prosecution simply glosses over its failings by stating that all that is required is for the Defence to be accorded "*a modest amount of additional preparation time.*"⁴⁶

20. The Defence acknowledges that, in the *Ruto & Sang* case, Trial Chamber V(A) held that "*the addition of re-interview statements does not particularly burden the Defence. Rather, the re-interview statements put the Defence on notice of issues that may arise during the testimony of the witnesses concerned.*"⁴⁷ However, the present case can be distinguished from that arising in *Ruto & Sang* by the egregious nature of the Prosecution's conduct. In *Ruto & Sang*, the Prosecution had not sat on their hands for years before conducting re-interviews and acting upon a Defence request for disclosure. Further, while the Defence is now in possession of information to which it is entitled under Articles 54(1)(a) and 67(2) and Rule 77 and can make use of this information in any way it deems appropriate during its investigations and the trial proceedings, it does not necessarily or automatically follow that the Prosecution should be entitled to rely on this unreasonably late obtained evidence. As noted above, it is open to the Trial Chamber to exclude this evidence.⁴⁸ Indeed, it is the Defence's position that the Prosecution should not be entitled to lead the evidence obtained in the re-interviews but, if it is elicited by the Prosecution during trial, that it be either excluded from the Chamber's final deliberations or given significantly reduced weight.

III. Classification

21. Pursuant to Regulation 23*bis* of the Regulations, this filing is submitted confidentially. In addition, this filing refers to filings not currently available to the Common Legal Representatives. Redacted versions of this filing will be filed in due course.

⁴⁶ Application, para. 31.

⁴⁷ *Ruto* Decision, para. 57.

⁴⁸ *Supra*, para. 16.

IV. Relief Requested

22. For the foregoing reasons, the Defence respectfully requests that, save in respect of P-0449, the Trial Chamber dismiss the Application.

23. If the Trial Chamber is minded to grant the Application, either in whole or in part, the Defence requests that the grant is a factor which is taken into account in the setting of a new trial start date and that the Defence is afforded an opportunity to address the Chamber on the additional time required.

Respectfully Submitted,



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Dated this 6th day of May 2014

At The Hague, Netherlands