

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **9 November 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 Request to Vacate the Trial
Commencement Date”, dated 15 April 2014**

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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(Participation/Reparation)**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. Introduction

1. The defence for Mr. Abdallah Banda Abakaer Nourain (“Defence”) respectfully requests the Trial Chamber to vacate the scheduled 5 May 2014 trial commencement date.¹ From the information provided by the Prosecution, the Defence and the Registry, it is clear that this start date is no longer viable.

II. Submissions

Issue 1: Disclosure failures

2. Mr. Banda has a right to timely and adequate disclosure. This includes, importantly, Mr. Banda’s right to disclosure of all prior statements of Prosecution witnesses in a language he fully understands and speaks.²
3. Of recent, the Defence has received considerable incriminatory, Rule 77 and PEXO disclosure, apparently occasioned by recent and on-going Prosecution investigations. Further, to date, the Defence has not received Zaghawa translations of all prior statements of Prosecution trial witnesses. The Defence submits that to maintain a 5 May 2014 trial start date in the face of such disclosure failures would be contrary to Mr. Banda’s Article 67 rights.
4. On 19 November 2012, the Prosecution informed the Chamber that it was trial-ready and submitted that trial could commence in March 2013, once the Prosecution completed its remaining “main task” – the disclosure of outstanding Rule 76(3) materials – as well as the lifting of identifying information for certain former Prosecution witnesses and third parties following the issuance of the Non-Disclosure Protocol.³ In reliance on the Prosecution’s submissions, this Trial

¹ Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, ICC-02/05-03/09-455, 6 March 2013 (“**Trial Start Date Decision**”).

² Rules of Procedure and Evidence (“**Rules**”), Rule 76(3).

³ Prosecution’s Submissions on the Possible Date for Commencement of the Trial, 19 November 2012, ICC-02/05-03/09-421-Conf, para. 1.

Chamber set a date of final disclosure for all incriminatory evidence and Article 67(2) and Rule 77 materials of 2 May 2013.⁴

5. Notwithstanding the foregoing, the Prosecution has continued its post-confirmation investigations in earnest, particularly in recent months. The results of these activities include, *inter alia*, four re-interviews of three core witnesses⁵ and obtaining prior non-OTP statements of five Prosecution trial witnesses. The majority of these items have not been translated into Zaghawa.
6. Separate to the foregoing is the Prosecution's application to add five new trial witnesses.⁶ Clearly, if this application is granted, all the relevant witness statements and documents will also have to be translated into Zaghawa, an endeavour which will require time to complete.
7. In light of the foregoing, the Defence submits that an adjournment will provide time for the Defence to: (i) review the newly disclosed materials; (ii) [REDACTED]; (iii) continue its investigations; and (iv) prepare its case prior to the start of trial. In addition, outstanding matters before the Trial Chamber may result in additional disclosure to the Defence that will likewise impact the fairness and viability of the current trial date.⁷

⁴ Trial Start Date Decision, para. 19.

⁵ P-0355 was interviewed for the third time [REDACTED] and his statement disclosed to the Defence on 10 December 2013. P-0419 was interviewed for the third time between [REDACTED] and his statement disclosed on 18 March 2014. P-0446 was interviewed for the third and fourth times between [REDACTED] and [REDACTED] and his statements disclosed on 2 April and 11 April 2014 respectively.

⁶ Prosecution request to amend its list of witnesses and evidence, ICC-02/05-03/09-557-Red, 11 April 2014. [REDACTED]

⁷ E.g. Request for Disclosure of Documents in the Possession of the Office of the Prosecutor, ICC-02/05-03/09-235, 20 October 2011; Public Redacted Version of "Consolidated Defence Applications pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of cooperation requests to the Governments of Rwanda, Ghana and Nigeria", ICC-02/05-03/09-530-Red, 14 January 2014.

Issue 2: [REDACTED]

8. [REDACTED]⁸ [REDACTED].⁹
9. [REDACTED].¹⁰ [REDACTED].¹¹
10. [REDACTED]
[REDACTED].¹²
11. [REDACTED],¹³ [REDACTED].¹⁴

Issue 3: Pending Prosecution applications

12. As the Trial Chamber is aware, a number of pending Prosecution applications which impact the trial start date are before it; specifically, the *Prosecution request to amend its list of witnesses and evidence*¹⁵ and the *Prosecution request for notice to be given of a possible recharacterisation under Regulation 55*.¹⁶
13. The Defence acknowledges that the aforementioned applications have not yet been determined and, thus, that any prejudice to the Defence is, at this stage, only theoretical. Nevertheless, the Defence submits that these applications further indicate that the 5 May 2014 start date cannot be maintained and that time is required to decide these issues in order that trial can proceed on certain footing.¹⁷

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ [REDACTED]

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ ICC-02/05-03/09-557-Red.

¹⁶ ICC-02/05-03/09-549.

¹⁷ The Defence notes that in the “Prosecution application to amend its list of witnesses and evidence” it anticipates the likelihood that the 5 May 2014 date will require to be vacated in order that the Defence be given sufficient time to prepare. See ICC-02/05-03/09-557-Red, para. 7.

Conclusion

14. It is a matter of regret that it is the Defence which is compelled to make this application.¹⁸ The Defence respectfully submits that, in the discharge of the Prosecution's ethical and professional obligations, the Prosecution ought to have expeditiously requested that the trial start date be vacated because it has not fulfilled its clear statutory disclosure obligations.¹⁹ It is the Prosecution's conscious decision to keep investigating years after confirmation which has led to these eleventh hour difficulties,²⁰ which include the Prosecution being in possession of Rule 76(3) material which it has not yet provided to Mr. Banda in a language he fully understands and speaks.

III. Classification

15. This filing is submitted confidentially and only available to the Prosecution and Defence because it refers to filings which are currently under seal [REDACTED]. A redacted version of this filing will be filed in due course.

IV. Requested Relief

16. In these circumstances the Defence submits that an adjournment is practical and, indeed, necessary for both parties to discharge their obligations under the Rome Statute and to ensure a fair trial.

17. For the reasons set out above, the Defence respectfully requests that:

- a. the trial start date of 5 May 2014 be vacated;
- b. a status conference be scheduled for September 2014; and
- c. a trial start date be set for March 2015.

¹⁸ [REDACTED]

¹⁹ See e.g. Rome Statute, Articles 54(1)(c) ("The Prosecutor shall:....Fully respect the rights of persons arising under this Statute"), 67(2); Rules 76 and 77.

²⁰ See the Prosecution's statement at the 7 April status conference that "[w]e re-interviewed these two witnesses because 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" (ICC-02/05-03/09-T-24-ENG ET, p. 9, line 24 to p. 10, line 2).

18. In addition, given the imminence of trial, the Defence requests that the Trial Chamber shorten the time limits for filing any responses to this request pursuant to Regulation 35 of the Regulations of the Court.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel
for Abdallah Banda Abakaer Nourain

Dated this 9th day of November 2014

At The Hague, Netherlands