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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 Document

Public redacted version of "Second Prosecution application to amend its lists of witnesses and evidence and request for authorisation of redactions" filed on 7 July 2014 (ICC-02/05-03/09-589-Conf-Exp)

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Introduction

1. Pursuant to Article 69(3) and Regulation 35(2), the Prosecution seeks leave to add an additional witness – P-0477, and related exhibits – to its lists of trial witnesses and evidence. P-0477 was [REDACTED].¹
2. P-0477 reports that he was [REDACTED] during the period covered by the charges and was [REDACTED]. Given [REDACTED] during the relevant period, P-0477 has great potential to assist the Court in determining the truth in this case. His addition is warranted on three bases.
3. *First*, the application to add P-0477 at this stage is required for reasons “outside [the Prosecution’s] control”, within the meaning of Regulation 35(2). While the Prosecution identified P-0477 as a person of interest in 2010, it did not succeed in establishing contact with him until early 2014, after the witness list deadline expired. It was only in April 2014 that the Prosecution met P-0477, established that he had knowledge of the relevant events, and determined that his evidence could assist the Court.
4. *Second*, P-0477’s addition is justified under Article 69(3) because his evidence will assist the Chamber to determine the truth. P-0477 provides information of direct relevance to the contested issues, including the reason for the attack (P-0477 states that it was to steal vehicles) and the attackers’ state of mind (P-0477 indicates they knew the attack was wrong). P-0477’s account sheds new light on the events and issues at the heart of this case and will assist the Chamber to determine the truth. His addition should be permitted on this basis.
5. *Third*, adding P-0477 will not prejudice the Defence because the adjournment of the trial date means that the Defence has time to investigate P-0477’s

¹ [REDACTED].

evidence and prepare for his testimony, which in any event relates to matters already well-known to the Defence.

6. In addition, the Prosecution requests authorisation for temporary redactions to information related to [REDACTED]. In his interviews, P-0477 states that [REDACTED].² The Prosecution has spoken to [REDACTED], who has confirmed that he has knowledge of the relevant events and his willingness to discuss them. A mission to interview [REDACTED] is planned for the coming weeks, as soon as [REDACTED]. Disclosing the information regarding [REDACTED] at this stage may prejudice the Prosecution's investigation because it would create a risk of [REDACTED] being interfered with before the Prosecution is able to interview him. Relatedly, [REDACTED]'s interaction with the Court may put his physical safety at risk, and the Prosecution needs to meet with him before it can assess the risk and determine whether protective measures are needed. The Prosecution therefore seeks authorisation to redact information in P-0477's transcripts regarding [REDACTED] until the interview is complete and any protective measures are put in place, should they prove necessary.

Confidentiality

7. This application and its annex are designated confidential, *ex parte*, because they refer to information disclosed to the Defence in redacted form. The public version of this application removes mention of matters discussed in a confidential status conference, and information that identifies P-0477, which is redacted to ensure the effectiveness of in-court protective measures, should the Chamber authorise them.

² [REDACTED].

Statement of Facts

8. In September 2010, the Prosecution received information that P-0477 may have information relevant to the case and may be willing to speak to the Prosecution. Investigators attempted to make contact with P-0477 in 2010 but were unsuccessful.
9. On 5 August 2011, the Prosecution filed its updated list of trial witnesses.³
10. 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.⁴ 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 2011.⁵
11. In early February 2014 the Prosecution renewed its efforts to locate P-0477. In late February the Prosecution managed to establish contact with P-0477. Prosecution staff met with P-0477 on [REDACTED] April 2014. Unfortunately, poor interpretation prevented a full interview being conducted. It was apparent, however, that P-0477 possessed highly relevant information. P-0477 confirmed that he [REDACTED] during the period covered by the charges⁶ and explained, among other matters, that: (i) the reason the rebels attacked MGS Haskanita was "to get cars";⁷ and (ii) the assertion that the attack was due to AMIS' alleged cooperation with the Government of Sudan ("GoS") was false.⁸ During the interview, P-0477 stated that he knew [REDACTED]'s general location and could find his

³ ICC-02/05-03/09-189-AnxA.

⁴ ICC-02/05-03/09-455, para. 19.

⁵ ICC-02/05-03/09-469, para. 6; ICC-02/05-03/09-469-Conf-AnxA.

⁶ DAR-OTP-0192-0271, at 0282; DAR-OTP-0192-0320, at 0337.

⁷ DAR-OTP-0192-0271, at 0281; *see also* 0291 ("The first thing of this because there is no cars. That is the reason of attack"), DAR-OTP-0192-0296, at 0301 ("[REDACTED]").

⁸ DAR-OTP-0192-0320, at 0333-36 ("there is no proof of [the GoS] getting information from there [MGS Haskanita], but for the leaders, movement leaders, they put this as the reason to attack that camp . . . This is just false accusations, so if African Union ask or anything, so they just keep it as a reason."); *see also* DAR-OTP-0192-0271, at 0291 ("the second reason [given for the attack] is, in the camp, there is a Sudanese force and from the camp the Sudanese forces get the intelligence and attack the [rebel forces]").

telephone number.⁹ Due to the severe interpretation difficulties during the interview, it was determined that the interview of P-0477 should be completed with a different interpreter.

12. The Prosecution met P-0477 again on [REDACTED] May 2014 and continued the interview.

13. On 23 April 2014, the Prosecution referred P-0477 to the VWU for protection. Interim protective measures were implemented on 2 July 2014.

14. P-0477 provided the Prosecution with a contact number for [REDACTED] on [REDACTED] June 2014. The Prosecution spoke with [REDACTED] on [REDACTED] June. He confirmed [REDACTED] and said he was willing to share what he knows. [REDACTED] before he can meet with the Prosecution. The Prosecution has commenced steps to resolve this logistical issue and expects to be in a position to interview [REDACTED] in the coming weeks.

15. The Prosecution is disclosing redacted versions of P-0477's interview transcripts to the Defence today.

Submissions

A. Trial Chambers authorise witness additions where: (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.

16. As addressed in detail in the Prosecution's first motion to add witnesses,¹⁰ Trial Chambers permit the addition of new witnesses who "bring[] to light

⁹ DAR-OTP-0192-0271, at 0284.

¹⁰ ICC-02/05-03/09-557-Red, paras. 12-15.

otherwise unknown facts which have a significant bearing upon the case”,¹¹ or whose evidence “is of such a nature that it will contribute to a better understanding of the case and the establishment of the truth”.¹² When considering whether to authorise a witness addition, Chambers consider whether the addition would “jeopardise the Defence’s right to have adequate time in order to prepare”,¹³ and whether the circumstances requiring the addition “were outside the Prosecution’s control”.¹⁴

B. P-0477’s addition should be granted because the requirements of Regulation 35(2) are met.

17. Regulation 35(2) is satisfied because the Prosecution was unable to include P-0477 in its witness list “for reasons outside [its] control”. The Prosecution’s 2010 efforts to establish contact with P-0477 were unsuccessful and it was not until April 2014, after the expiration of the witness list deadline, that the Prosecution was able to interview P-0477.

C. P-0477’s addition is warranted under Article 69(3) because his evidence is relevant and will assist the Chamber to determine the truth.

18. While P-0477’s addition is justified under Regulation 35(2) alone, Article 69(3) provides an additional basis to permit his inclusion.

19. The utility of P-0477’s evidence is clear. [REDACTED], he provides evidence that speaks directly to the contested issues. Among other matters, P-0477 states that:

¹¹ ICC-01/09-02/11-832, para. 16.

¹² ICC-01/04-01/07-1590, para. 17.

¹³ ICC-01/04-01/07-1590, para. 17.

¹⁴ ICC-01/09-01/11-899-Red, para. 16.

- Before the attack, the Accused, Mr Abu Garda, and other rebel commanders held a meeting at which they discussed “how to get cars from the African Union”, which was the reason for the attack.¹⁵
- [REDACTED].¹⁶
- The assertion that MGS Haskanita was attacked because of AMIS’ alleged cooperation with the GoS was “a false accusation”, which rebel commanders “use[d] as a pretext . . . they wanted everybody to say this if they were asked why they attacked the African Union”.¹⁷
- Prior to the attack on MGS Haskanita, the Accused and his group had participated in multiple attacks on civilian convoys, in which goods were looted and vehicles ransomed.¹⁸

20. This evidence goes to the first and second contested issues – the allegedly unlawful nature of the attack and the Accused’s knowledge thereof. Importantly, P-0477’s evidence will help the Chamber to evaluate one of the Defence’s key claims, that the attack on MGS Haskanita was aimed at removing GoS representative Captain Bashir (whom AMIS had already removed prior to the attack), rather than a desire to steal property and punish AMIS for its inability to prevent GoS attacks, as the Prosecution contends. P-0477 suggests that the Bashir narrative was a mere “pretext” concocted by rebel commanders who knew the attack was unlawful,¹⁹ and that the real reason for the attack was a desire to steal AMIS property.²⁰ This conclusion is bolstered by P-0477’s evidence regarding the Accused’s alleged

¹⁵ DAR-OTP-0192-0564, at 0572-74; *see also* DAR-OTP-0192-0579, at 0581-83 (“[REDACTED]”).

¹⁶ DAR-OTP-0192-0564, at 0575-77; *see also* DAR-OTP-0192-0579, at 0580-81 (“[REDACTED]”).

¹⁷ DAR-OTP-0192-0579, at 0587-90.

¹⁸ DAR-OTP-0192-0523, at 0533-42, 0545-46.

¹⁹ DAR-OTP-0192-0579, at 0587-90.

²⁰ DAR-OTP-0192-0564, at 0572-74; DAR-OTP-0192-0579, at 0581-83; DAR-OTP-0192-0579, at 0589-90.

robbery of civilian convoys prior to September 2007,²¹ which suggests a pattern of conduct that supports the inference that the Accused attacked MGS Haskanita, at least in part, out of a desire to steal property.

21. P-0447's evidence is also unique. As [REDACTED] during the relevant period, he provides information from a different vantage point to that of other Prosecution witnesses, which will enable the Chamber to evaluate the relevant events from a new perspective. All of the information listed above in paragraph 19 is new, and while it corroborates other Prosecution evidence, it fleshes out the events in important ways. Put simply, P-0477 is one of a limited group of individuals available to the Court who, from an evidentiary point of view, was present and participated in key events, [REDACTED], and is available to share his knowledge of the relevant events with the Chamber.

22. Consistent with the approach taken in *Katanga* and *Kenyatta*, the Chamber should authorise P-0477's addition because his evidence "brings to light previously unknown facts which have a significant bearing on the case"²² and will "contribute to a better understanding of the case and the establishment of the truth".²³

D. P-0477's addition will not cause undue prejudice to the Defence.

23. Any Defence preparations required by P-0477's addition would be limited and would not prejudice the Defence unfairly.

24. *First*, the volume of P-0477's evidence is limited. The transcripts of his interviews are brief [REDACTED] and are focused on the contested issues,²⁴

²¹ DAR-OTP-0192-0523, at 0533-42, 0545-46.

²² ICC-01/09-02/11-832, para. 13.

²³ ICC-01/04-01/07-1590, para. 17.

²⁴ The transcripts of the two Prosecution interviews total 192 pages. Even this low number overstates the volume of information provided because it includes the text of Arabic translations, rather than the English text

with little in the way of extraneous information. The account he provides is straight-forward and can be analysed and investigated in a limited period of time.

25. *Second*, the nature of P-0477's evidence is such that permitting its addition will not prejudice the Defence unfairly. As in *Kenyatta*, the Defence has "had an opportunity to prepare for similar evidence" in the past,²⁵ including evidence about the desire to steal vehicles being a key reason for the attack. Because P-0477's evidence does not require the Defence to address new allegations for the first time, any disadvantage caused by his addition would be limited.

26. *Third*, the delay in this trial means that the Defence will have time to prepare. The Chamber has not set a new trial date since it vacated the 5 May 2014 commencement date.²⁶ Because the need for an adjournment stems in large part from difficulties [REDACTED],²⁷ it is proper to permit the Prosecution to supplement its evidentiary record with material that will assist the Chamber in adjudicating the case. Since the adjournment provides the Defence with additional time to prepare, the Accused's fair trial rights will not be impacted.

E. Temporary redactions are warranted under Rule 81(2) and Rule 81(4).

27. Consistent with the accepted practice in this case,²⁸ and in an effort to expedite proceedings, the Prosecution redacted information relating to

alone. To avoid double counting, this figure does not include the version of P-0477's April 2014 interview that has been translated entirely into English.

²⁵ ICC-01/09-02/11-832, paras. 14 and 16.

²⁶ ICC-02/05-03/09-564-Red.

²⁷ ICC-02/05-03/09-564-Conf, para. 11.

²⁸ ICC-02/05-03/09-524, para. 39.

[REDACTED] in the interview transcripts being disclosed today and is now seeking retroactive authorisation for those redactions.²⁹

28. This Chamber uses the following criteria when considering redaction requests:

(i) the existence of an “objectively justifiable risk” to the safety of the person concerned or which may prejudice further or ongoing investigations; (ii) the risk must arise from disclosing the particular information to the accused; (iii) the infeasibility or insufficiency of less restrictive protective measures; (iv) an assessment as to whether the redactions sought are “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”; and the obligation to periodically review the decision authorising the redactions should circumstances change.³⁰

29. Each of the criteria is satisfied here.

30. *First*, there is an objectively justifiable risk that the Prosecution’s investigations and possibly [REDACTED] safety may be prejudiced by disclosing [REDACTED] (all included in P-0477’s transcripts). Disclosing the information to the Accused would create a risk of [REDACTED] being interfered with before the Prosecution can interview him. According to P-0477’s account, which is consistent with other information in the Prosecution’s possession,³¹ [REDACTED] is potentially capable of providing highly probative evidence about the events and against the Accused, which creates a powerful incentive to interfere with him. Recent information suggests this risk is not hypothetical. [REDACTED]. This information suggests that individuals supportive of the Accused may be making efforts to interfere with, or retaliate against, real or perceived Prosecution witnesses.

²⁹ The Prosecution has colour-coded redactions, using pink to represent redactions applied to specific identifying information of [REDACTED].

³⁰ ICC-02/05-03/09-265-Red, para. 29; *see also* ICC-02/05-03/09-524, para. 25 and n.32.

³¹ *See* [REDACTED].

This, in turn, demonstrates the risk of disclosing the information about [REDACTED] evidentiary potential at this stage.

31. *Second*, less restrictive protective measures are infeasible or insufficient. Negating the risk would require relocating [REDACTED] to a safe location where tampering is not possible. Such an invasive protective measure is infeasible until representatives of the Court have met with him to determine whether he requires, and is willing, to accept protective measures.
32. *Third*, the redactions are not inconsistent with, or prejudicial to, the Accused's right to a fair and impartial trial. While the redactions will limit the Defence's ability to investigate part of P-0477's evidence in the short term, the Prosecution expects that it will be in a position to lift the redactions well before P-0477 testifies, which will give the Defence an opportunity to tailor its investigations based on the new material. In the meantime, the Defence has full disclosure of the rest of P-0477's evidence and can commence its investigations and preparation on that basis. The Prosecution is not seeking permanent redactions, but rather an interim measure to enable proper investigative steps to occur.
33. *Fourth*, the requested redactions will be lifted as soon as circumstances permit. Once the information regarding [REDACTED] can be disclosed without risk to his safety or the investigation, the redactions will be lifted and the information disclosed. This will occur once: (i) the planned interview with [REDACTED] takes place; and (ii) any protective measures have been implemented, should they prove necessary.
34. Finally, there would be no merit to any argument, such as that advanced in the Defence opposition to the Prosecution's first motion to add witnesses, that redactions should not be authorised because the Prosecution's ability to

investigate is limited after confirmation.³² The Appeals Chamber has ruled that “the Prosecutor may continue his investigation beyond the confirmation hearing”.³³ While indicating that “ideally, it would be desirable”,³⁴ for the investigation to “largely be completed” by confirmation,³⁵ the Appeals Chamber has squarely rejected the argument – now advanced by the Defence – that investigations “must be brought to an end before the confirmation hearing, barring exceptional circumstances”.³⁶ Instead, the Appeals Chamber has held that “the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth”.³⁷

35. The Appeals Chamber’s guidance is apposite here. The Prosecution has received information that may lead to highly relevant evidence. That evidence may prove to be incriminating, or exonerating, or a combination of both. In any event, it appears to be highly relevant to the contested issues in the case and has the potential to assist the Court in resolving them. Consistent with the Prosecution’s Article 54(1)(a) duty to determine the truth, it must be able to pursue the lead and determine whether the information can assist the Court in this case. The redactions sought will enable the Prosecution to do so.

36. Finally, the Prosecution seeks authorisation for redactions to the location of P-0477’s interviews. The Prosecution seeks this relief for the reasons set out in paragraphs 26 and 27 of the Prosecution’s 25 June 2014 Consolidated Redaction Application – namely, that disclosing the locations may render it

³² See ICC-02/05-03/09-574-Red2, paras. 11-13; *see also* [REDACTED].

³³ ICC-01/04-01/10-514, para. 44, n.89 (citing ICC-01/04-01/06-568, para. 54).

³⁴ ICC-01/04-01/06-568, para. 54.

³⁵ ICC-01/04-01/10-514, para. 44.

³⁶ ICC-01/04-01/06-568, para. 49 (reversing Pre-Trial Chamber ruling that investigations must be completed prior to confirmation).

³⁷ ICC-01/04-01/06-568, para. 52.

impossible or more difficult for the Prosecution to use such locations in the future, both in this case and others.³⁸

Relief requested

37. For the foregoing reasons, the Prosecution respectfully requests the Chamber to authorise: (i) the addition of P-0477 to the Prosecution's trial witness list; (ii) the addition of P-0477's interview transcripts,³⁹ as well as the photographs he was shown during his interview,⁴⁰ to the list of evidence; and (iii) the redactions to P-0477's transcripts included in Annex A.



Fatou Bensouda
Prosecutor

Dated this 8th day of July 2014

At The Hague, The Netherlands

³⁸ ICC-02/05-03/09-588-Red. These redactions are colour-coded in blue in the transcripts contained in Annex A.

³⁹ The transcript ERNs are: DAR-OTP-0192-0271 (English translation at DAR-OTP-0192-0417); DAR-OTP-0192-0296 (English translation at DAR-OTP-0192-0444); DAR-OTP-0192-0320 (English translation at DAR-OTP-0192-0470); DAR-OTP-0192-0339 (English translation at DAR-OTP-0192-0491); DAR-OTP-0192-0347 (English translation at DAR-OTP-0192-0501); DAR-OTP-0192-0523; DAR-OTP-0192-0543; DAR-OTP-0192-0564; DAR-OTP-0192-0579; DAR-OTP-0192-0591; DAR-OTP-0192-0612; DAR-OTP-0192-0627.

⁴⁰ The ERNs of the photographs are: DAR-OTP-0191-0445; DAR-OTP-0191-0446; DAR-OTP-0191-0447; DAR-OTP-0191-0448; DAR-OTP-0191-0449; DAR-OTP-0191-0450; DAR-OTP-0191-0451; DAR-OTP-0191-0452; DAR-OTP-0191-0453; DAR-OTP-0191-0454; DAR-OTP-0191-0455; DAR-OTP-0191-0456; DAR-OTP-0191-0457; DAR-OTP-0191-0458; DAR-OTP-0191-0459; DAR-OTP-0191-0460; DAR-OTP-0191-0461; DAR-OTP-0191-0462.