

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **30 July 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 “Defence response to ‘Confidential redacted version of the Second Prosecution application to amend its lists of witnesses and evidence and request for authorisation of redactions’”**

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**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 *Confidential redacted version of the Second Prosecution application to amend its lists of witnesses and evidence and request for authorisation of redactions* ("Application")<sup>1</sup> the Prosecution requests, *inter alia*, to add a sixth witness, P-0477, to its list of trial witnesses and indicates that an application to add a seventh is imminent.<sup>2</sup> The Application is the second such filing to be made in the past few months<sup>3</sup> and is the result of an apparent up-scale in investigations in this case which occurred in late 2013, several years after the charges were confirmed<sup>4</sup> and around year after the Prosecution declared itself "trial ready".<sup>5</sup>
2. The defence for Mr. Abdallah Banda Abakaer Nourain ("Defence") respectfully submits that the application to add P-0477 should be dismissed for the following three reasons. First, the Prosecution fails to establish that it was unable to include P-0477 in its witness list prior to 2 May 2013, the deadline set by the Chamber for the filing of the Prosecution's final witness list.<sup>6</sup> Second, P-0477 provides only duplicative evidence and does not offer any evidential value. Third, the application should be dismissed on grounds of prejudice.

## II. Submissions

### (1) The Prosecution fails to satisfy Regulation 35(2)

3. As noted above, the time limit for adding new witnesses in this case was 2 May 2013.<sup>7</sup> Therefore, for an application to add witnesses after this date, Regulation 35(2) of the Regulations of the Court ("Regulations") requires the Prosecution to

<sup>1</sup> ICC-02/05-03/09-589-Conf-Red, 7 July 2014.

<sup>2</sup> Application, paras. 1, 6.

<sup>3</sup> See Prosecution application to amend its lists of witnesses and evidence, 11 April 2014, ICC-02/05-03/09-557-Conf, in which the Prosecution requests, *inter alia*, to add 5 new witnesses. See also ICC-02/05-03/09-577-Red.

<sup>4</sup> Corrigendum of the "Decision on the Confirmation of Charges", 8 March 2011, ICC-02/05-03/09-121-Conf-Corr.

<sup>5</sup> Prosecution's Submissions on the Possible Date for Commencement of the Trial, 19 November 2012, ICC-02/05-03/09-421-Red.

<sup>6</sup> Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013, ICC-02/05-03/09-455, para. 25(iii).

<sup>7</sup> ICC-02/05-03/09-455, 6 March 2013, para. 25(iii).

establish that it “was unable to file the application within the time limit for reasons outside [its] control”.

4. In the Application, the Prosecution fails to establish properly that it was unable to include P-0477 in its final witness list on 2 May 2013 “for reasons outside [its] control”.<sup>8</sup> While it might be accepted that investigators were unable to make contact with P-0477 initially in late 2010, absolutely no attempt is made by the Prosecution to detail what steps it undertook as a diligent and professional investigative and prosecuting authority to make contact with the witness in the intervening three and half year period, i.e. between September 2010 and February 2014.<sup>9</sup> This failure is glaring and significant. During that period, several milestones came and went, all of which might have triggered attempts to contact P-0477 for the purposes of adding him to the witness list. For example, almost a year after the Prosecution tried unsuccessfully to make contact with P-0477 in 2010, the updated list of trial witnesses was filed on 5 August 2011.<sup>10</sup> The Prosecution provides no information about what attempts were made in that period to contact P-0477. Some twenty-two months after the 5 August 2011 milestone and pursuant to the Chamber’s order,<sup>11</sup> the Prosecution filed its updated list of evidence on 2 May 2013 and advised that its final list of witnesses was the same as that filed in 2011.<sup>12</sup> Again, no explanation is provided about the investigative efforts which were expended by the Prosecution to contact P-0477 in the period running up to the 2 May deadline. The inevitable conclusion is that no effort was made by the Prosecution to contact P-0477 between September 2010 and February 2014. Reliance on the 2010 position for over three and half years is not sufficient justification to state baldly and without any further

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<sup>8</sup> Application, paras. 3, 17.

<sup>9</sup> Application, paras. 8, 11, 17.

<sup>10</sup> ICC-02/05-03/09-189-AnxA.

<sup>11</sup> ICC-02/05-03/09-455, para. 25(iii).

<sup>12</sup> ICC-02/05-03/09-469, para. 6; ICC-02/05-03/09-469-Conf-AnxA.

information that “Regulation 35(2) is satisfied”.<sup>13</sup> On this basis alone the application to add P-0477 should be dismissed.

5. Related to the foregoing is the principled argument that the Prosecution should not be entitled to rely on the fruits of investigations conducted years after confirmation without proper justification. There must be some finality to the disclosure of new evidence. The Defence acknowledges that post-confirmation investigations are not prohibited, but the Appeals Chamber jurisprudence is clear that investigations should “largely be completed” by the confirmation hearing.<sup>14</sup> In this regard, the following guidance provided by the Majority of the Trial Chamber in the *Kenyatta* case as to when post-confirmation investigations “may” be appropriate is instructive:

- (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).”<sup>15</sup>

6. The foregoing is of assistance because it underlines that, in respect of post-confirmation investigations, the Prosecution is expected to act diligently and should not be permitted to remedy investigative or evidentiary deficiencies long after confirmation (or any other Court imposed deadline such as the filing of a final list of trial witnesses) save where the deficiency is not due to the fault of the

<sup>13</sup> Application, para. 17.

<sup>14</sup> *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”, 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 44 citing to *Prosecutor v. Lubanga*, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568 (OA 3), para. 54.

<sup>15</sup> *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 120.

Prosecution and the Prosecution acts promptly to remedy it. As noted in paragraph 4 above, in the present case, there is a gap period spanning years where it appears the Prosecution did not make any attempt to contact P-0477. Instead, the Prosecution's purported interest in this witness lay dormant from 2010 onwards with not even the 2 May deadline prompting efforts by the Prosecution to try to get in contact with him. In fact, the contact made with P-0477 in 2014 does not appear to have been the moment when years of effort finally bore fruit. Rather, it seems that the truth of the matter is that an investigative avenue, undisturbed since 2010, was dusted down and revived by the Prosecution simply because it believes that an adjournment in proceedings permits it to continue to "supplement its evidentiary record".<sup>16</sup> The Defence submits that the Prosecution's position is incorrect and does not accord with the Prosecution's obligation to act with reasonable diligence at all times rather than when expedient.

*(2) P-0477's evidence is duplicative*

7. Contrary to the Prosecution's assertions, P-0477's addition is not justified under Article 69(3) because his evidence will not assist the Chamber to determine the truth.<sup>17</sup> The fact that P-0477 is allegedly [REDACTED] is of superficial significance. Scrutiny of this witness' evidence reveals that it is duplicative and, thus, that he is unable to "bring[] to light otherwise unknown facts which have a significant bearing upon the case"<sup>18</sup> or to "contribute to a better understanding of the case and the establishment of the truth".<sup>19</sup>
8. At paragraph 19 of the Application, the Prosecution identifies four points in P-0477's evidence which it asserts justifies his addition to the witness list. The first and third points collapse into one and basically concern the motive for the attack

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<sup>16</sup> Application, para. 26.

<sup>17</sup> Application, paras. 4, 18-22.

<sup>18</sup> Application, para. 16 citing to ICC-01/09-02/11-832, para. 16.

<sup>19</sup> Application, para. 16 citing to ICC-01/04-01/07-1590, para. 17.

being the acquisition of cars. However, this part of the Prosecution narrative is provided by no less than eight current Prosecution trial witnesses<sup>20</sup> and, thus, cannot be fairly described as “unique”.<sup>21</sup> In fact, the Prosecution concedes the duplicative nature of P-0477’s evidence when it states that “it corroborates other Prosecution evidence”<sup>22</sup> and “P-0477’s evidence does not require the Defence to address new allegations for the first time”.<sup>23</sup> Indeed, when reviewing all the witness’ transcripts, the evidentiary worth of the witness is difficult to discern<sup>24</sup> and the asserted “different vantage point” proves to be limited.<sup>25</sup> When one parses through the extremely confusing interview transcripts, much of P-0477’s evidence boils down to hearsay about what was said at a meeting he did not attend.<sup>26</sup> It also transpires that P-0477 was [REDACTED].<sup>27</sup> These facts all undermine the Prosecution’s claim that P-0477 “participated in key events”.<sup>28</sup>

9. The fourth point of purported significance identified by the Prosecution relates to alleged similar fact evidence of attacks on civilian convoys in which goods were looted and vehicles ransomed.<sup>29</sup> This point is irrelevant at this stage in proceedings and should not be considered as part of the Application. Whether similar fact evidence will be considered admissible in this case is properly a matter for a future specific ruling by this Trial Chamber. There can be no presumption that it will be automatically admitted. Further, admission at that

<sup>20</sup> See, e.g., the evidence of (i) P-0446 (DAR-OTP-0169-0808-R05 at 0827, para. 170); (ii) P-0486 (DAR-OTP-0181-0204-R02 at 0230, para. 151); (iii) P-0355 (DAR-OTP-0165-0352-R06 at 0362, para. 67); (iv) P-0315 (DAR-OTP-0164-1159-R06 at 1175, para. 67); (v) P-0487 (DAR-OTP-0181-0158-R02 at 0170, paras. 63-64); (vi) P-0485 (DAR-OTP-0181-0177-R02 at 0193, para. 77); (vii) P-0419 (DAR-OTP-0165-0489-R06 at 0507, para. 95); (viii) P-0442 (DAR-OTP-0171-0002 at 0009-0010, para. 35).

<sup>21</sup> Application, para. 21.

<sup>22</sup> Application, para. 21.

<sup>23</sup> Application, para. 25.

<sup>24</sup> The first interviews conducted in April 2014 suffered from “severe interpretation difficulties” (Application, para. 11). Much of the evidence in these sessions is garbled and is either mistranslated or not translated at all.

<sup>25</sup> Application, para. 21.

<sup>26</sup> See, e.g., DAR-OTP-0192-0564\_R01, at 0574, lines 367-369 (“[REDACTED]”); DAR-OTP-0192-0579\_R01, at 0582, lines 97-99 (“[REDACTED]”); DAR-OTP-0192-0579\_R01, at 0583, lines 145-146 (“[REDACTED]”).

<sup>27</sup> See DAR-OTP-0192-0417, at 438, lines 696-699 (“[REDACTED]”). See also DAR-OTP-0192-0417, p. 0431, line 430 to p. 0432, line 488.

<sup>28</sup> Application, para. 21.

<sup>29</sup> Application, para. 19.

later stage will be subject to satisfaction of the three step admissibility test set out in the Court's jurisprudence.<sup>30</sup> In respect of the third element of the admissibility test, of obvious concern is the prejudice to Mr. Banda of introducing evidence of allegedly similar fact criminal conduct which is unrelated to the charges and has not been the subject of any defence investigations.<sup>31</sup>

10. Of additional concern is the fact that the second point of purported significance in P-0477's evidence is completely redacted. As a result, the Defence is completely unable to address this matter. This is clearly unfair. Moreover, the Prosecution cannot have it both ways, arguing in Section C of the Application that this redacted element of P-0477's evidence is of such significance it merits his late inclusion in the witness list, while in Section E asserting that the redactions "are not inconsistent with, or prejudicial to, [Mr. Banda's] right to a fair and impartial trial."<sup>32</sup> The Defence submits that a less redacted version of the Application should be filed to allow the Defence to provide meaningful submissions on all of the Prosecution's arguments.

*(3) P-0477's addition will cause undue prejudice to the Defence*

11. Trial is scheduled to commence in approximately four months' time, i.e. on 18 November 2014.<sup>33</sup> The addition of another witness at this late stage in proceedings and so close to the start of trial will result in undue prejudice to the Defence. This is particularly so when P-0477 may be one of seven new witnesses for whom the Defence will have to investigate and prepare.<sup>34</sup> The request to add P-0477 to the witness list should, therefore, additionally be dismissed on grounds of prejudice.

<sup>30</sup> For admission, evidence must be: (i) relevant; (ii) have probative value; and (iii) sufficiently relevant and probative to outweigh any prejudicial effect that could be caused by its admission. *See, e.g., Prosecutor v. Lubanga*, Decision on the admissibility of four documents, 13 June 2008, ICC-01/04-01/06-1399, paras. 26-31.

<sup>31</sup> *See infra*, paras. 12-13, regarding the Defence's investigative difficulties.

<sup>32</sup> Application, para. 32.

<sup>33</sup> Decision as to the Further Steps for the Trial Proceedings, 14 July 2014, ICC-02/05-03/09-590-Red.

<sup>34</sup> ICC-02/05-03/09-557-Red; Application, paras. 1, 6.



12. P-0477 is [REDACTED]. The Trial Chamber is well aware of the serious difficulties the Defence faces in conducting investigations in this case, [REDACTED].<sup>35</sup> These difficulties are now compounded by the question of whether [REDACTED],<sup>36</sup> [REDACTED].<sup>37</sup> Adding a new witness, without proper justification at this late stage, would, thus, seriously prejudice the rights of the Defence.

13. The Prosecution's submission that any prejudice caused by the addition of P-0477 can be addressed by the fact that "the Defence will have time to prepare"<sup>38</sup> fails to properly take into account the above described serious investigative difficulties experienced by the Defence in this case, [REDACTED].

*(4) Temporary redactions request*

14. The Defence denies that the request for temporary redactions is justified because of any risk arising from disclosure of witness material to either the Defence or Mr. Banda. Nevertheless, on the basis that the redactions applied to P-0477's transcripts are temporary, the Defence does not oppose the redactions request. However, the Defence questions the extent of the redactions and whether such extensive redactions are required to prevent disclosure of the discrete issue of the identity of the individual at issue. The Defence submits that the redactions should be reviewed to assess whether a lesser redacted version can be provided which only redacts what is absolutely necessary. In addition, the Defence requests disclosure of the redacted material as soon as possible in order that it is afforded as much time as possible to conduct the relevant investigations.

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<sup>35</sup> [REDACTED].

<sup>36</sup> "Second submission of the Registry pursuant to regulation 24bis of the Regulations of the Court on the trial preparation" submitted on 31 March 2014 (ICC-02/05-03/09-550-Conf-Exp), ICC-02/05-03/09-550-Conf-Red, 3 April 2014, para. 18 ("[REDACTED]") and para. 24 ("[REDACTED]").

<sup>37</sup> ICC-02/05-03/09-573-Conf-Exp.

<sup>38</sup> Application, para. 26.

### III. Viability of 18 November 2014 trial start date

15. As noted above, trial is set to commence on 18 November 2014. When setting this date, the Chamber did not take into account the pending Prosecution application to add 5 new witnesses nor, of course, the Application which was filed subsequent to the decision setting the new trial date.<sup>39</sup> As argued above and also in the response to the Prosecution application to add 5 new witnesses,<sup>40</sup> these applications to add a total of 6 new witnesses, if granted, will prejudice defence trial preparations and, thus, impact on the viability of the November 2014 start date, as will the grant of any application to add a seventh new witness. Therefore, the Defence takes this opportunity to inform the Chamber pursuant to paragraph 24 of the *Decision as to the Further Steps for the Trial Proceedings*<sup>41</sup> that the addition of any additional witness will cause difficulties to the Defence due to its well-known investigative problems [REDACTED].

### IV. Classification

16. Pursuant to Regulation 23bis of the Regulations, this filing is submitted confidentially. A public redacted version of this filing will be filed in due course.

### V. Relief Requested

17. For the foregoing reasons, the Defence respectfully requests that the Trial Chamber dismiss the application to add P-0477 to the Prosecution witness list.

18. The Defence does not oppose the request for temporary redactions but submits that the requested redactions should be reviewed with a view to the provision of a lesser redacted version. In addition, the Defence requests that the temporary redactions be lifted as soon as possible.

<sup>39</sup> ICC-02/05-03/09-590-Red, paras. 23, 24.

<sup>40</sup> ICC-02/05-03/09-574-Conf-Red.

<sup>41</sup> ICC-02/05-03/09-590-Red.

Respectfully Submitted,



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

Dated this 30<sup>th</sup> day of July 2014

At The Hague, Netherlands