Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-03/09**
Date: **30 January 2014**

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v ABDALLAH BANDA ABAKAER NOURAIN

Public

Public redacted "Decision on the 'Defence Request for Termination of Proceedings'"

Order to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda
Mr Julian Nicholls

Counsel for the Defence
Mr Karim A.A. Khan

Legal Representatives of Applicants

Legal Representatives of Victims
Ms Hélène Cissé
Mr Jens Dieckmann

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber IV ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v Abdallah Banda Abakaer Nourain,* after considering Articles 54(1), 61(11), 64(2), 64(3)(c), 64(6)(a), 67(1)(b), 67(2), 69 and 85(3) of the Rome Statute ("Statute") and Rule 77 of the Rules of Procedure and Evidence ("Rules") renders the following Decision on the "Defence Request for Termination of Proceedings".

I. Background and Submissions

1. On 7 March 2011, Pre-Trial Chamber I issued the "Corrigendum of the 'Decision on the Confirmation of Charges'" ("Confirmation Decision").[1]

2. On 26 October 2012, the Chamber rejected[2] the defence's request[3] for a temporary stay of proceedings.

3. On 18 February 2013, the Chamber adopted the "Protocol on the handling of confidential information and contact [...] between a party and witnesses of the opposing party" ("Protocol" or "Protocol Decision").[4]

4. On 6 March 2013, the Chamber set the date for the commencement of the trial as 5 May 2014 and the prosecution final disclosure date as 2 May 2013.[5] On that date, the prosecution disclosed to the defence pursuant to Rule 77 of the Rules the

[1] Corrigendum of the Decision on the Confirmation of Charges, 7 March 2011 (notified on 8 March 2011), ICC-02/05-03/09-121-Red-Corr.
[2] Decision on the defence request for a temporary stay of proceedings (and concurring separate opinion of Judge Eboe-Osuji), 26 October 2012, ICC-02/05-03/09-410.
[3] Defence Request for a Temporary Stay of Proceedings, 6 January 2012, ICC-02/05-03/09-274.
[4] Decision on the Protocol on the handling of confidential information and contact of between a party and witnesses of the opposing party, 18 February 2013, ICC-02/05-03/09-451.
[5] 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.

statements of Witnesses 467 and 471[6] with limited redactions authorised by the Chamber to, *inter alia,* identifying information of family members.[7]

5. On 5 September 2013, the defence for Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus ("defence") filed the "Public Redacted Version of 'Defence Request for Termination of Proceedings'" ("Request"),[8] in which it submits that the charges against the two accused should be dismissed and consequently, the proceedings terminated pursuant to, *inter alia,* Article 85(3) of the Statute.[9]

6. On 4 October 2013, the Chamber issued the "Decision terminating the proceedings against Mr Jerbo",[10] in which it terminated the case against Mr Jerbo without prejudice to resuming such proceedings should information become available that he is alive.[11] The case against Mr Jerbo was terminated after the defence filed the Request and therefore the present Decision addresses the situation of Mr Banda only.

7. In its Request, the defence is of the view that the Office of the Prosecutor ("prosecution") failed to disclose "exonerating evidence that [is] highly relevant to the contested issues in th[e] case".[12] It submits that the prosecution's failure to disclose the statements of Witnesses 467 and 471 prior to the confirmation of

[6] Public Redacted Version of Defence Request for Termination of Proceedings, 5 September 2013, ICC-02/05-03/09-503-Red, paragraph 13.
[7] Decision on the Prosecution's Application for Redactions; the Common Legal Representative Request for Disclosure; the Defence request for reclassification; and Decision establishing simplified proceedings related to future applications for non-disclosure, 19 November 2013, ICC-02/05-03/09-524.
[8] Defence Request for Termination of Proceedings, 3 September 2013, ICC-02/05-03/09-503-Conf and Public Redacted Version of Defence Request for Termination of Proceedings, 5 September 2013, ICC-02/05-03/09-503-Red.
[9] ICC-02/05-03/09-503-Red, paragraphs 1, 25, 26 and 44.
[10] Decision terminating the proceedings against Mr Jerbo, 4 October 2013, ICC-02/05-03/09-512.
[11] ICC-02/05-03/09-512, paragraph 25.
[12] ICC-02/05-03/09-503-Red, paragraph 1.

charges hearing is a "flagrant violation of its obligations under Article 67(2) of the Statute and a serious violation of the fair trial rights of Mr Banda [...]".[13] The defence avers that these statements are clearly exculpatory as they expressly contradict the position that the prosecution advanced at the confirmation stage based on the evidence of Witnesses 446 and 419; namely that Captain Bashir was removed by the African Union Mission in Sudan ("AMIS") from Haskanita base well before the attack.[14] Moreover, the defence argues that this undermines the credibility of the most critical prosecution witness, Witness 419.[15] It also submits that the prosecution was aware of the inconsistencies between the statements of Witnesses 467 and 471 as compared to those of Witnesses 419 and 446.[16] The defence further states that, as the statement of Witness 467 is exculpatory in nature, the prosecution wrongly provided it pursuant to Rule 77 as material to the preparation of the defence rather than pursuant to Article 67(2) of the Statute. Moreover, the defence notes that the prosecution provided no explanation of its earlier submission before Pre-Trial Chamber I that Witness 467's statement did not contain "PEXO [potentially exonerating material]" and did not fall under Rule 77 of the Rules so that there was no reason to disclose it to the defence.[17]

8. It is submitted that by not disclosing the statements it has in its possession, the prosecution "misled the Court about fundamental results of its own investigations".[18] The defence goes on arguing that the incorrect position advanced by the prosecution was "fully relied upon" by Pre-Trial Chamber I and led it to

[13] ICC-02/05-03/09-503-Red, paragraph 27.
[14] ICC-02/05-03/09-503-Red, paragraph 11 and footnote 12 referring to paragraph 69 of the Decision Confirming the Charges, 8 March 2011, ICC-02/05-03/09-121-Conf. The Chamber is of the view that, pursuant to the principle of publicity of proceedings enshrined in Articles 64(7) and 67(1) of the Rome Statute, this information does not warrant a confidential treatment as the same information is made public in the public redacted version of the Decision Confirming the Charges, 8 March 2011, ICC-02/05-03/09-121-Corr-Red, paragraph 69.
[15] ICC-02/05-03/09-503-Red, paragraph 28.
[16] ICC-02/05-03/09-503-Red, paragraph 28.
[17] ICC-02/05-03/09-503-Red, paragraphs 7 and 29.
[18] ICC-02/05-03/09-503-Red, paragraph 31.

confirm the charges on an incorrect basis. [19] The defence adds that, since the Chamber is not in a position to review the Pre-Trial Chamber decision confirming the charges, the prejudice to the defence cannot be remedied.[20]

9. Furthermore, the defence submits that the prosecution has failed to investigate exonerating information equally.[21] The defence gives examples of situations where, according to it, the prosecution should have investigated exonerating circumstances in accordance with its obligation under Article 54(1)(a) of the Statute.[22] Failure to do so is qualified as a "pattern of the OTP conduct" to the extent that, according to the defence, this Chamber "cannot in any respect rely on the OTP's investigations [...] as a counter-balancing measure to the severe prejudice to the Defence arising from their inability to investigate in Sudan".[23]

10. Finally, the defence submits that the late disclosure of the disputed material and the failure to investigate exonerating material equally is prejudicial to it and, in particular, to its own investigation.[24] To this end, the defence states that *inter alia*, the delay in lifting redactions to information required for the purpose of the defence's preparation has prejudiced its ability to conduct a proper investigation.[25] The defence argues that, for example, individuals are now less reachable by phone and less willing to cooperate with the defence than they may have been years ago or, in the meantime, have died.[26] It is submitted that these are lost investigative

[19] ICC-02/05-03/09-503-Red, paragraph 31.
[20] ICC-02/05-03/09-503-Red, paragraph 32.
[21] ICC-02/05-03/09-503-Red, paragraphs 33 and 34.
[22] ICC-02/05-03/09-503-Red, paragraphs 33 and 34.
[23] ICC-02/05-03/09-503-Red, paragraph 35.
[24] ICC-02/05-03/09-503-Red, paragraphs 37 to 40.
[25] It appears that this submission refers in particular to the lifting of redactions to statements of Witnesses 419 and 446. See also, Prosecution's Response to the "Defence Request for Termination of Proceedings"(ICC-02/05-03/09-503-Conf) filed on 24 September 2013, ICC-02/05-03/09-506-Conf. A public redacted version was filed on 27 September 2013, ICC-02/05-03/09-506-Red, paragraphs 47 to 50.
[26] ICC-02/05-03/09-503-Red, paragraphs 38 to 40.

opportunities without any possible remedy and are prejudicial to the defence.[27] The defence concludes that the prosecution's failures, as explained above, have severely prejudiced the defence's investigation, obstructed the administration of justice and violated the right to a fair trial of the accused and therefore, the case should be terminated.[28]

11. On 24 September 2013, the prosecution filed the "Prosecution's Response to the 'Defence Request for Termination of Proceedings' (ICC-02/05-03/09-503-Conf)" ("Response"),[29] in which it opposes the Request.[30] The prosecution appended, in seven annexes, [31] documents disclosed to the defence and the unredacted statements of Witnesses 467 and 471, which it communicated to the Chamber on a confidential *ex parte* basis.[32] The prosecution submits that the information contained in the statements referred to by the defence is not exonerating in nature, the statements were disclosed within the deadline imposed by the Chamber, and the accused has not suffered prejudice significant enough to impact on his rights and certainly not to such an extent that proceedings should be terminated.[33]

12. The prosecution is of the view that the dispute at hand relates not to whether disclosure was effected, but rather to the timing of the disclosure.[34] It submits that all the material that the defence refers to has already been disclosed; the latest being disclosed on 2 May 2013 - a full year before the date set for the opening of the

[27] ICC-02/05-03/09-503-Red, paragraph 41.
[28] ICC-02/05-03/09-503-Red, paragraphs 43 and 44.
[29] Prosecution's Response to the "Defence Request for Termination of Proceedings"(ICC-02/05-03/09-503-Conf) filed on 24 September 2013, ICC-02/05-03/09-506-Conf. A public redacted version was filed on 27 September 2013, ICC-02/05-03/09-506-Red.
[30] ICC-02/05-03/09-506-Red, paragraph 2.
[31] ICC-02/05-03/09-506-Conf-AnxA.
[32] ICC-02/05-03/09-506-Conf-Exp-Anx2 and ICC-02/05-03/09-506-Conf-Exp-Anx3.
[33] ICC-02/05-03/09-506-Red, paragraph 3.
[34] ICC-02/05-03/09-506-Red, paragraph 17.

trial.[35] It is submitted that there is less likelihood of prejudice in relation to material that has already been disclosed.[36] Furthermore, the prosecution avers that there were justifiable reasons as to why disclosure of the statements of Witnesses 471 and 467 was delayed. In this respect, the prosecution explains that there were reservations about disclosure of these statements especially as both witnesses are serving military officers.[37] Moreover, the prosecution submits that it is only upon the adoption of the Protocol by the Chamber on 18 February 2013, allowing for certain safeguards, [REDACTED].[38] Accordingly, the prosecution is of the view that, in any event, should the Chamber find that the timing of disclosure did cause prejudice to the accused, such prejudice is easily mitigated as, from the date of disclosure, there was a full year before the trial start which would enable the defence to complete its investigation. In addition, the prosecution argues that the defence will have the opportunity to question Witness 419 on any of these matters during the trial proceedings. The Chamber is thus adequately "competent to rectify any prejudice in this matter" at trial and termination of proceedings is therefore not warranted.[39]

13. The prosecution further submits that the defence misrepresents the alleged exonerating material contained in the statements of Witnesses 467 and 471.[40] Through selective reliance on the witnesses' statements, the defence proposes an incorrect state of affairs concerning the witnesses' knowledge of the events; namely that Captain Bashir was not removed from the camp. However, the prosecution submits that upon reading of the witnesses' complete statements, it is established that the witnesses are not certain whether Captain Bashir was removed from

[35] ICC-02/05-03/09-506-Red, paragraph 17.
[36] ICC-02/05-03/09-506-Red, paragraph 18.
[37] ICC-02/05-03/09-506-Red, paragraph 19.
[38] ICC-02/05-03/09-506-Conf, paragraph 20.
[39] ICC-02/05-03/09-506-Red, paragraph 22.
[40] ICC-02/05-03/09-506-Red, paragraph 24.

Military Group Site ("MGS") Haskanita or not.[41] Therefore, the prosecution submits that in no way did it "mislead" the Pre-Trial Chamber as the witnesses' statements do not contradict the abundant evidence establishing that Captain Bashir was in fact removed from MGS Haskanita.[42]

14. The prosecution maintains that it did not fail in its investigative duties as, *inter alia*, all witnesses interviewed by the prosecution were appropriately and comprehensively interviewed.[43] In response to the defence's allegation that the prosecution did not complete follow-up interviews with witnesses who submitted screening notes, the prosecution submits that unlike a full interview, "a screening note is merely meant to be a preliminary assessment of the witness's knowledge of the essential elements of the case under investigation as well as his background, to assess whether he should be interviewed further."[44] The prosecution submits that no follow-up interviews were needed as the collected screening notes did not contain exonerating information, according to its assessment. The prosecution further submits that "failure to investigate every single soldier at MGS Haskanita cannot be equated to a failure of the investigation".[45]

15. Furthermore, the prosecution is of the view that the "lifting of redactions on the statements of Witnesses 419 and 446 was not unreasonably delayed and did not prejudice the defence".[46] To this end, the prosecution argues that the alleged lost investigative opportunities, as asserted by the defence, are speculative as there is no obvious link between the lack of the witnesses' cooperation and the date of

[41] ICC-02/05-03/09-506-Conf, paragraph 25.
[42] ICC-02/05-03/09-506-Conf, paragraph 39.
[43] ICC-02/05-03/09-506-Red, paragraph 42.
[44] ICC-02/05-03/09-506-Red, paragraph 44.
[45] ICC-02/05-03/09-506-Conf, paragraph 45.
[46] ICC-02/05-03/09-506-Red, paragraphs 47 to 50.

disclosure.[47] The prosecution contends, *inter alia,* that the defence does not demonstrate its prejudice as it does not explain how an individual whose identity has been recently disclosed to the defence would be a "key individual" for the defence's preparation.[48] The prosecution further insists on the fact that, in any event, it disclosed all material relevant to the defence's preparation before the deadline set by the Chamber.[49]

16. The prosecution finally submits that the threshold for termination of proceedings must logically be higher than that for a temporary stay, which in itself is an exceptional remedy only to be applied as a last resort.[50] The prosecution notes that the statements of Witnesses 467 and 471, the lesser redacted statement of Witness 419 and the "screenings cited by the defence" do not contain information that "changes the contours of this case", as, according to it, "no core piece of evidence is contradicted by the evidence discussed above".[51] The prosecution therefore reiterates that "there is no justification to deploy a drastic remedy which potentially frustrates the objective of the trial of delivering justice and should only be used as a last resort where the relevant information is in the hands of the defence one year prior to trial".[52]

17. On 26 September 2013, the common legal representative for victims ("CLR") filed the "Réponse des Représentants Légaux Communs à la Requête de la Défense pour mettre fin au Procès (ICC-02/05-03/09-503)",[53] in which she opposes the Request[54]

[47] ICC-02/05-03/09-506-Red, paragraph 47.
[48] ICC-02/05-03/09-506-Red, paragraph 50.
[49] ICC-02/05-03/09-506-Red, paragraph 49.
[50] ICC-02/05-03/09-506-Red, paragraphs 52 and 53.
[51] ICC-02/05-03/09-506-Red, paragraph 55.
[52] ICC-02/05-03/09-506-Red, paragraph 56.
[53] Réponse des Représentants Légaux Communs à la Requête de la Défense pour mettre fin au Procès (ICC-02/05-03/09-503), 26 September 2013, ICC-02/05-03/09-509.
[54] ICC-02/05-03/09-509, page 15.

arguing that international justice cannot be done to the detriment of the victims' fundamental right to an equitable and fair trial.[55]

18. The CLR submits that considerations of the rights and the personal interests of the victims form part of a fair trial.[56] She further stresses that in assessing the facts to be taken into account when making a decision on a request to terminate proceedings, the rights of victims to a fair and expeditious trial must be taken into account and weighed against the rights of the accused.[57]

19. The CLR submits that Article 85(3) of the Statute, which is relied on by the defence, does not apply to the present case.[58] She then refers to the legal standard applicable to requests for termination and to the Appeals Chamber's jurisprudence on the issue of stay of proceedings, stating that it is a drastic remedy, which is warranted only in situations where it is established that the fair conduct of the proceedings is no longer possible.[59] Referring to the transcript of the status conference held on 26 August 2010 ("26 August 2010 Status Conference") before Pre-Trial Chamber I, the CLR explains that the exculpatory nature of Witness 467's statement was discussed and both parties were in disagreement on this issue.[60] However, she submits that the dispute was later resolved.[61] Indeed, the CLR argues that the prosecution mentioned that the statement of Witness 467 was not to be disclosed to the defence because the witness wished to remain anonymous, the prosecution would not rely on the statement during the pre-trial proceedings and the statement did not

[55] ICC-02/05-03/09-509, paragraph 5.
[56] ICC-02/05-03/09-509, paragraph 6.
[57] ICC-02/05-03/09-509, paragraphs 15 and 16.
[58] ICC-02/05-03/09-509, paragraphs 17 to 20.
[59] ICC-02/05-03/09-509, paragraphs 21 to 24.
[60] ICC-02/05-03/09-509, paragraphs 33 to 35 and 42 to 43.
[61] ICC-02/05-03/09-509, paragraphs 46 to 57.

contain potentially exculpatory evidence.[62] In addition, the CLR notes that, in any event, Article 67(2) of the Statute expressly leaves the responsibility to the prosecution to determine whether the evidence in question may be exculpatory or may affect the credibility of its evidence.[63] At the status conference, the Single Judge indicated the possibility for the defence to file an application to the Pre-Trial Chamber in case of persisting doubt as to the nature of the statement, for it to decide whether the statement would fall under Article 67(2) of the Statute or Rule 77 of the Rules.[64] The CLR submits that the disclosure issue was resolved as the defence did not request Pre-Trial Chamber I to order the disclosure of Witness 467's statement.[65] The CLR underlines that the defence never contested the prosecution's assessment of the nature of Witness 467's statement as not falling under Article 67(2) of the Statute.[66] As the statement was not used by the prosecution and the defence did not file any application with regard to disclosure, the CLR submits that it is logical that Pre-Trial Chamber I did not rely on Witness 467's statement in the Confirmation Decision. Moreover, the CLR stresses that the power rests with the Court, pursuant to Article 69(4) of the Statute, to assess the evidence of the case and that it may well draw different conclusions than the ones of the defence on the alleged exculpatory nature of Witness 467's statement.[67]

20. The CLR further submits that the Confirmation Decision was not solely based on the statements of Witnesses 446 and 419,[68] which appear to be in contradiction, according to the defence, with the newly disclosed statements of Witnesses 467 and 471; instead, there were other pieces of evidence, different from the witnesses'

[62] ICC-02/05-03/09-509, paragraphs 33 and 45.
[63] ICC-02/05-03/09-509, paragraphs 37 to 40.
[64] ICC-02/05-03/09-509, paragraphs 46 and 47.
[65] ICC-02/05-03/09-509, paragraphs 54 and 55.
[66] ICC-02/05-03/09-509, paragraph 41.
[67] ICC-02/05-03/09-509, paragraphs 58 and 59.
[68] ICC-02/05-03/09-509, paragraph 60.The Chamber notes that the Legal Representative appears to have wrongly referred to Witness 416 instead of Witness 419.

statements, which also supported that Captain Bashir was removed from the MGS Haskanita.[69] Therefore, according to the CLR, arguing that late disclosure of the statements of Witnesses 467 and 471 leads to a situation where the Chamber has no other choice than to terminate the proceedings is not tenable.[70] As to the prejudicial effect of the alleged late disclosure, the CLR is of the view that the defence will have the opportunity to investigate, call Witnesses 467 and 471 to testify at trial and question them and the Chamber also has the power throughout the trial to request the submission of all evidence that it considers necessary for the determination of the truth.[71] The CLR concludes that the defence justifies its Request neither factually nor legally.[72]

21. On 11 October 2013, upon the Chamber's leave,[73] the defence filed the "Public Redacted Version of 'Defence Reply to the Prosecution response To the Defence request for termination of Proceedings'" ("Reply").[74] The defence reiterates its argument that the statements of Witnesses 467 and 471 contain exculpatory evidence that should have been disclosed as soon as possible and at the confirmation of charges stage under Article 67(2) of the Statute and Rule 77 of the Rules.[75] It is specified that, had the statements at issue been disclosed in a timely manner, the defence could have argued that, contrary to the prosecution's submission at the confirmation stage, Captain Bashir was not removed from the MGS Haskanita at the initiative of the AMIS[76] but rather left the base on his own

[69] ICC-02/05-03/09-509, paragraphs 60 and 61.
[70] ICC-02/05-03/09-509, paragraph 66.
[71] ICC-02/05-03/09-509, paragraphs 67 to 70.
[72] ICC-02/05-03/09-509, paragraph 72.
[73] Email communication from the Legal Officer to the Trial Chamber to the defence on 4 October 2013, at12.30.
[74] Defence Reply to the Prosecution Response To the Defence Request for Termination of Proceedings, 11 October 2013, ICC-02/05-03/09-513-Conf. A public redacted version was filed on 11 October 2013, ICC-02/05-03/09-513-Red.
[75] ICC-02/05-03/09-513-Red, paragraph 3.
[76] ICC-02/05-03/09-513-Red, paragraphs 2 and 19.

volition or as per instruction of the Government of Sudan ("GoS").[77] It is maintained that the statements of Witnesses 467 and 471 show that "AMIS took no action despite awareness that Captain Bashir was assisting the GoS bombing campaign victimizing civilians in the area from the MGS Haskanita base".[78] It is argued that this distinction is of crucial importance to one of the contested issues, namely: whether the attack by, *inter alia*, the accused person was lawful.[79] It is explained that failure to disclose these statements at the confirmation stage precluded the defence from advancing that Captain Bashir was not removed from the MGS Haskanita at the initiative of the AMIS, thereby preventing it from making its case and the Pre-Trial Chamber I from considering this evidence.[80] It is argued that, as several pieces of evidence showed that Captain Bashir passed on intelligence information from MGS Haskanita to the GoS, the fact that he was removed by the GoS after the rebels had complained to the AMIS, "strongly suggests the Government had a replacement source of intelligence within MGS Haskanita".[81] This hypothesis leads the defence to maintain that the AMIS base was still a legitimate military target at the time of the attack on 29 September 2007.[82] Based on this argumentation, the defence finally reiterates that "the only appropriate remedy at this stage of the proceedings is to terminate proceedings against Mr. Banda".[83]

22. On 21 November 2013, upon request by the CLR[84] and subsequent Chamber's decision,[85] the CLR filed her additional observations on the Request.[86] In her

[77] ICC-02/05-03/09-513-Conf, paragraph s 10and 17.
[78] ICC-02/05-03/09-513-Red, paragraph 16.
[79] ICC-02/05-03/09-513-Red, paragraphs 2 and 17.
[80] ICC-02/05-03/09-513-Red, paragraphs 12 and 20.
[81] ICC-02/05-03/09-513-Red, paragraph 18.
[82] ICC-02/05-03/09-513-Red, paragraph 18.
[83] ICC-02/05-03/09-513-Red, paragraph 20.
[84] Requête des Représentants Légaux Communs Aux Fins de Divulgation de la Déclaration du Témoin Du Procureur P467 et Aux Fins de Prorogation de Délai pour Répondre à la Version Publique Expurgée de la Requête de la Défense

observations, the CLR submits that contrary to the defence assertion, the statement of Witness 467 does not contain exculpatory evidence in relation to determining the contested questions in the context of this case.[87] She further submits that, given the high threshold required to warrant a definitive termination of proceedings, such a remedy cannot be justified on the basis of the statement of Witness 467.[88] Having reviewed the entire statement of Witness 467, the CLR stresses that there are no contradictions as alleged by the defence, in particular, between paragraphs 51, 52, 53 and 56 of Witness 467's statement and paragraphs 45 and 46 of the statement of prosecution Witness 419. According to the CLR, it appears clearly, on the one hand, that the reality of the factual circumstance of the departure of Captain Bashir before the attack of 29 September 2007 against the AMIS base of Haskanita is not challenged by Witness 467, and on the other hand, that the statement of Witness 467 confirmed the existence of evidence to support the charges confirmed by the Confirmation Decision.[89] Lastly, the CLR submits that Witness 467 confirms the statements of Witnesses 419 and 446 as to the lifting of the ban imposed by the rebels on the landing of AMIS helicopters, thus allowing for the departure of a helicopter taking Captain Bashir out of the Haskanita base before the 29 September attack.[90]

Aux Fins de Mettre Fin au Procès, 24 September 2013, ICC-02/05-03/09-505-Conf-Exp and "Version Expurgée de la « Requête des Représentants Légaux Communs Aux Fins de Divulgation de la Déclaration du Témoin Du Procureur P467 et aux fins de prorogation de délai pour répondre à la Version Publique Expurgée de la Requête de la Défense aux fins de mettre fin au Procès » soumise le 24/09/2013 (ICC-02/05-03/09-505-Conf Exp", 30 September 2013, ICC-02/05-03/09-505-Conf-Red.

[85] Decision on the Prosecution's application for redactions; the Common Legal Representative request for disclosure; the Defence request for reclassification; and Decision establishing simplified proceedings related to future applications for non-disclosure, 19 November 2013, ICC-02/05-03/09-524.

[86] Observations Additionnelles des Représentants Légaux Communs à la Version Publique Expurgée de la Requête de la Défense Aux Fins de Mettre Fin au Procès, 21 November 2013, ICC-02/05-03/09-525-Conf.

[87] ICC-02/05-03/09-525-Conf, paragraph 15.

[88] ICC-02/05-03/09-525-Conf, paragraph 19.

[89] ICC-02/05-03/09-525-Conf, paragraph 20.

[90] ICC-02/05-03/09-525-Conf, paragraph 38.

II. Analysis

23. The Chamber will first address (A) the legal principles applicable to the Request. On the basis of these principles, the Chamber will then consider the merits of the Request, in particular (B) whether, as suggested by the defence, the prosecution's conduct amounted to an abuse of process warranting a termination of proceedings. The Chamber will finally analyse (C) whether the alleged prejudice suffered by the defence may be addressed in the subsequent course of the proceedings.

A - Legal principles applicable to the defence's Request

24. The Chamber notes that the words "termination of the proceedings" are referred to in the Statute only in Article 85(3) of the Statute, in a situation where the accused person is either arrested or convicted and "[I]n exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a *termination of the proceedings* for that reason."[91] Although this provision shows that a "termination of the proceedings" is an available procedural remedy in the framework of the Statute, the Chamber finds that Article 85(3) does not apply to the present case as the accused is neither detained nor convicted.

25. The Chamber notes that the wording used by the defence in its Request to characterise the prosecution's failure to disclose these statements at pre-trial stage suggest that the defence relies on the doctrine of "abuse of process": "[T]his

[91] [Emphasis added].

conduct is *odious to the administration of Justice*",[92] "[T]he OTP have not investigated this exonerating circumstance equally or at all. Instead, the OTP treated these facts as an inconvenient truth, to be ignored whenever possible. *This pattern of OTP conduct* demonstrates that the Defence and the Chamber cannot in any respect rely on the OTP's investigations, as proposed by the Trial Chamber in rejecting the Defence's request for a temporary stay of proceedings, as a counter-balancing measure to the severe prejudice to the Defence arising from their inability to investigate in Sudan,"[93] or "[T]he cumulative effect of these breaches is that it would be *repugnant to the administration of justice to proceed with this trial*"[94].

26. The Appeals Chamber addressed the "doctrine or principle of abuse of process" for the first time in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga case*"), in the context of a defence's request for stay of proceedings.[95] It is the Chamber's view that the principles applied in the *Lubanga case* are instructive in the present case.

27. Although the Appeals Chamber recognised that "the Statute does not provide for stay of proceedings for abuse of process as such",[96] it underlined that "[W]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated

[92] ICC-02/05-03/09-503-Red, paragraph 3.[Emphasis added].
[93] ICC-02/05-03/09-503-Red, paragraphs 34 and 35.
[94] ICC-02/05-03/09-503-Red, paragraph 44. [Emphasis added].
[95] Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 ("*Lubanga* OA 4 Judgment"), paragraphs 26 to 35. See also Trial Chamber I, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", 7 March 2011 (notified on 8 March 2011), ICC-01/04-01/06-2690-Red2, paragraphs 160 to 168.
[96] ICC-01/04-01/06-772, paragraph 35.

and the process must be stopped."[97] The Chambers of the Court also stated that "[N]ot every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial."[98] The Appeals Chamber set then a high threshold for a Chamber to impose a stay of proceedings, requiring that it be "impossible to piece together the constituent element of a fair trial".[99] These principles were applied recently before Trial Chamber V(B) as it was seised of a request for permanent stay of proceedings due to abuse of process.[100]

28. The Chamber considers that the high threshold applicable to a stay of proceedings, defined as a "drastic" and "exceptional" remedy[101] is, *a fortiori* applicable to a request for termination of proceedings, which in effect, if granted, puts a definitive end to a case.

29. Finally, the Chamber recalls the relevant principles it set out in its "Decision on the defence request for a temporary stay of proceedings" ("Stay Decision").[102] In the Stay Decision, the Chamber specifies that a stay of proceedings is exceptional and should be resorted to only "where the Chamber is convinced that the situation motivating the request for the stay cannot be resolved at a later stage or cannot be

[97] ICC-01/04-01/06-772, paragraph 37 and ICC-01/04-01/06-2690-Red2, paragraph 164.
[98] ICC-01/04-01/06-772, paragraph 30 and ICC-01/04-01/06-2690-Red2, paragraph 162; See also Pre-Trial Chamber I in the case *The Prosecutor v. Callixte Mbarushimana*, Decision on the "Defence request for permanent stay of proceedings", 1 July 2011, ICC-01/04-01/10-264, pages 4 and 5.
[99] Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" ("Lubanga OA18 Judgment"), 8 October 2010, ICC-01/04-01/06-2582, paragraph 55, citing *Lubanga* OA 4 Judgment, paragraph 39.
[100] Trial Chamber V(B), Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 December 2013, ICC-01/09-02/11-868-Red, paragraphs 14 and 15.
[101] ICC-01/04-01/06-2582, paragraph 55 and ICC-01/04-01/06-2690-Red2, paragraph 165.
[102] Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410.

cured during the Chamber's conduct of the trial".[103] These principles are also applicable to the Chamber's determination of the Request.

30. The Chamber now turns to the consideration of whether the prosecution's conduct amounted to an abuse of process warranting a termination of proceedings.

B - Whether in the present case there is an abuse of process warranting a termination of proceedings

31. The defence's arguments on the prosecution's failures are threefold: (1) the statements of Witnesses 467 and 471 should have been disclosed during the confirmation of charges proceedings, (2) the delayed lifting by the prosecution of redactions to Witnesses 419 and 446 statements[104] to information relevant to the defence's preparation prejudiced the defence's investigation and (3) the prosecution failed to investigate exonerating material equally.

1 - On the issue of disclosure of Witnesses 467 and 471's statements

32. At the outset, in order to better understand the background of the disclosure dispute between the parties, the Chamber considers it necessary to analyse the occurrence of events at confirmation of charges stage, including the submissions made on the disclosure of the statement of Witness 467 at the 26 August 2010

[103] ICC-02/05-03/09-410, paragraph 121.
[104] The Chamber notes that in its Request, the defence, at paragraphs 38 to 40 and the related footnotes does not mention the pseudonyms of the witnesses whose statements have been allegedly disclosed in a lesser redacted form in an untimely manner. At footnote 55 of the Request, only DAR-OTP-0164-1159 is to be found in the Ringtail system and available to the Chamber. DAR-OTP-0164-1159 appears to correspond to a statement by prosecution Witness 315. However, in its Response, at paragraphs 47 to 50, the prosecution only refers to the lifting of redactions to Witnesses 419's and 446's statements. The Chamber notes that the ERN numbers corresponding to the statements of Witnesses 419 and 446 are not the ones mentioned by the defence in footnote 55 of its Request. As the information the defence claims was disclosed to it in an untimely manner appears to be contained, according to the prosecution, in the statements of Witnesses 419 and 446, the Chamber will only refer to these two witnesses.

Status Conference. The prosecution mentioned that the statement of Witness 467 was not to be disclosed to the defence because the witness wished to remain anonymous and the prosecution chose therefore not to rely on the statement during the confirmation proceedings.[105] The prosecution further indicated that the statement of Witness 467 neither contained potentially exculpatory evidence nor was material to the preparation of the defence.[106] In the course of the hearing, the defence, referring to Rule 77 of the Rules and its broad interpretation given by the Appeals Chamber, nevertheless asked for disclosure of the statement.[107] The defence counsel also submitted during the 26 August 2010 Status Conference that:

> "I don't think it is a matter of dispute. I would be content if the Prosecution simply ensure that they do their job bearing in mind that particular rule [Rule 77 of the Rules] make a determination that it falls to be disclosed, your Honour, I think at the moment that would be sufficient and in due course no doubt the -- if we're not satisfied, your Honour, we may seize the Pre-Trial Chamber of the matter".[108]

33. The Single Judge took note of the disclosure dispute and invited the defence to file an application with the Pre-Trial Chamber in case of persisting doubt as to the disclosability of the statement.[109] The defence did not file any such motion. Consequently, Pre-Trial Chamber I could not make any determination under Article 67(2) of the Statute and, in the absence of disclosure, the statement of Witness 467 was not relied upon at the confirmation hearing on 8 December 2010 or in the Confirmation Decision issued on 7 March 2011.

---

[105] Pre-Trial Chamber I, Transcript of hearing, 26 August 2010, ICC-02/05-03/09-T-7-ENG ET, page 5, line 25 to page 6, line 5 and ICC-02/05-03/09-509, paragraphs 33 and 45.
[106] ICC-02/05-03/09-T-7-ENG ET, page 15, line 7 to 19.
[107] ICC-02/05-03/09-T-7-ENG ET, page 16 line 8 to page 17 line 11; page 18, line 13 to page 19, line 4 and ICC-02/05-03/09-509, paragraphs 46 and 47.
[108] ICC-02/05-03/09-T-7-ENG ET, page 14, line 23 to page 15, line 4.
[109] ICC-02/05-03/09-T-7-ENG ET, page 13, line 25 to page 14, line 4 and page 18, line 25 to page 19, line 4.

34. The Chamber notes that the statement of Witness 467 was disclosed together with the statement of Witness 471 on 2 May 2013, the final date for disclosure set by the Chamber. In addition, according to the prosecution, disclosure could be effected only after the adoption of the Protocol on 18 February 2013. However, the defence claims that the statements should have been disclosed as of the confirmation of charges stage of the proceedings and pursuant to Article 67(2) of the Statute as it is "clearly exculpatory". Therefore, the dispute lies on (i) the timing of disclosure and (i) the nature of the information contained in the statements at issue.

(i) Timing of disclosure

35. As to the issue of timing of disclosure of the statements of both Witnesses 467 and 471, the Chamber observes that the prosecution indicated that the two witnesses wished to remain anonymous at the confirmation of charges stage. [REDACTED]. The Chamber recalls that the main reason for adopting the Protocol was that some individuals refused to disclose their identities to the defence, even though such information was relevant to the defence's preparation.[110]

36. At the same time, the Chamber notes that the Protocol was, *inter alia*, adopted to solve disclosure issues relating to eleven known Article 67(2) or Rule 77 witnesses and Witnesses 467 and 471 were not among them.[111] The Chamber further emphasizes that the prosecution's disclosure obligation, be it under Article 67(2) of the Statute or Rule 77 of the Rules, is an on-going process and should be effected "as soon as practicable". Even if the Chamber accepts that disclosure of the identities of Witnesses 467 and 471 could only take place after the adoption of the Protocol, as submitted by the prosecution, this does not undermine the

[110] ICC-02/05-03/09-451, paragraphs 13, 15 and 23.
[111] ICC-02/05-03/09-410, paragraph 116.

prosecution's obligation to disclose information falling under Article 67(2) of the Statute or Rule 77 of the Rules that is contained in the statements of these two witnesses "as soon as practicable" as long as the revelation of this information would not lead to the witnesses' identification. Therefore, the Chamber considers that the prosecution's argument that disclosure of the statements of Witnesses 467 and 471 could not be effected before the adoption of the Protocol is ill-founded.

(ii) Nature of the information contained in the statements

37. The Chamber notes that the nature of both statements is highly contested. Indeed, the prosecution and the CLR firmly oppose the defence's submission that information contained in those statements is "clearly" exculpatory. To the contrary, the CLR submits that Witness 467 confirms the incriminatory declarations of prosecution Witness 419.

38. Having reviewed Witness 467's statement, the Chamber observes, in particular, that information, which the defence claims in its Reply should have been disclosed earlier, is, for example, referred to at paragraphs 51 and 56 of Witness 467's statement:[112]

[REDACTED]

39. Furthermore, having reviewed the statement of Witness 471,[113] the Chamber observes that this witness was interviewed on 29 November 2010 and some of the collected information was classified by the prosecution under the category

[112] ICC-02/05-03/09-513-Red, paragraph 12 and Witness 467's statement, DAR-OTP-0176-0057-R01.
[113] DAR-OTP-0180-0342-R01and Disclosure note, ICC-02/05-03/09-506-Conf-Anx7.

"Potentially exonerating information".[114] However, this information was disclosed to the defence on 2 May 2013.

(iii) Chamber's assessment

40. The Chamber is of the view that it may have been difficult to determine at the time of the 26 August 2010 Status Conference that Witness 467's statement may have been material for the defence's preparation. However, in view of the statements of Witness 419 and the statement of Witness 471 on 29 November 2010, the prosecution could have, in the Chamber's opinion, reasonably assessed that the two statements at issue were *at least* material to the preparation of the defence. Such interpretation of parts of the witnesses' statements at an earlier date would have resulted in an earlier disclosure date between the parties. Therefore, the Chamber considers that the prosecution should have disclosed the statements of Witnesses 467 and 471 at an earlier date than 2 May 2013. Having said that, this does not *automatically* mean that the prosecution should have disclosed the statements at issue at the confirmation of charges stage. Indeed, the Chamber notes that the statement of Witness 471 is dated 29 November 2010 whilst the confirmation hearing pursuant to Article 61 of the Statute was held on 8 December 2010, namely only about 10 days after the collection of Witness 471's statement.

41. Considering the past disclosure history of the statements at issue and the fact that the nature of the information contained in both witnesses' statements remains a genuinely disputed issue, the Chamber does not consider that the prosecution's failure *at the confirmation of charges stage* to correctly assess the nature of the statements as falling at a minimum under Rule 77 of the Rules, amounts to a

[114] DAR-OTP-0180-0342-R01at 0364, paragraphs 111 to 113.

conduct that has been such that it would be "odious" or "repugnant" to the administration of justice for the proceedings to continue.

2 - On the issue of timing for lifting redactions to statements of Witnesses 419 and 446

42. The defence contends that the redactions to information and names of third parties contained in the statements of Witnesses 419 and 446 were lifted too late, jeopardising, according to it, its investigation and resulting in the loss of investigatory opportunities to the extent that the proceedings should be terminated.[115]

43. The Chamber recalls that the application of redactions to Witnesses 419's and 446's statements was decided by Pre-Trial Chamber I, as "it is ultimately for the relevant Chamber and not the Prosecutor to assess and decide on measures which may restrict the rights of the defence in order to protect individuals and [...] with respect to redactions of information from material and evidence to be disclosed to the Defence specifically, the Prosecutor may only redact such information with the authorisation of the competent Chamber".[116] The Chamber further recalls the Appeals Chamber's jurisprudence on the issue of protection and that "the responsibility of the Trial Chamber under Article 64(2) of the Statute explicitly encompasses ensuring not only that a trial is conducted fairly, expeditiously and

[115] ICC-02/05-03/09-503-Red, paragraphs 38 to 40 and footnotes 55 and 56; ICC-02/05-03/09-506-Red, paragraphs 47 to 50.
[116] See for example, Pre-Trial Chamber I, First decision on the Prosecutor's Requests for Redactions, 29 July 2010, ICC-02/05-03/09-58, page 9. See also, Lubanga OA18 Judgment, ICC-01/04-01/06-2582, paragraph 52 citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, "Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I", 26 November 2008, ICC-01/04-01/07-776 (OA 7), paragraphs 59 and 60.

with full respect for the rights of the accused, but also that the trial is conducted with 'due regard for the protection of victims and witnesses'".[117]

44. The Chamber acknowledges that Witnesses 419 and 446 are part of the prosecution's list of witnesses and the full disclosure of their statements was therefore not dependent on the adoption of the Protocol. However, the Chamber further notes the disclosure history of these statements, which have been disclosed to the defence since the confirmation stage and several times, with each disclosure being a lesser redacted version of the statements at issue. The Chamber therefore understands that the redactions to the statements of these witnesses were lifted only after the prosecution could ascertain that identifying information mentioned in Witnesses 419's and 446's statements could be revealed confidentially to the defence without endangering the security of the third parties concerned. The Chamber has no reason to believe the contrary and the defence does not substantiate its claim that the prosecution unreasonably waited in making its security assessment relating to the third parties referred to in Witness 419's statement before disclosing their identifying information to the defence. Once again, the prosecution's disclosure obligation with respect to potentially exculpatory information or material relevant to the defence's preparation is on-going.

45. The Chamber acknowledges that individuals whose names are mentioned in the less redacted statements of Witnesses 419 and 446 are not willing to be contacted, are not reachable by the defence or have died. The Chamber nevertheless concurs with the prosecution that the defence does not demonstrate the "link between the

[117] Lubanga OA18 Judgment, ICC-01/04-01/06-2582, paragraph 50.

lack of cooperation and the date of disclosure".[118] Furthermore, the Chamber is not in a position, at this stage, to hold the prosecution responsible, as suggested by the defence, for the logistical and technical investigatory difficulties encountered by the defence. In the present case, the Chamber notes that both parties face severe investigatory difficulties.

46. In this context, the Chamber disagrees with the defence's argument that it is faced with a prosecution's "flagrant violation of its disclosure obligation".[119] Therefore, the Chamber fails to see how the prosecution's conduct would be "repugnant" or "odious" to the administration of justice.

3 - On the defence's claim that the prosecution did not investigate exonerating material equally

47. The defence claims that there is a "systemic problem" on the part of the prosecution not to investigate exculpatory evidence equally.[120] To illustrate its claim, the defence argues, *inter alia*, that the prosecution (i) did not appropriately question Witness 419, failing to ask follow-up questions on the presence and the role of Captain Bashir within the Haskanita base as an intelligence officer passing on information to the Government of Sudan and (ii) did not organise follow-up interviews of some individuals that were screened by the prosecution in the course of its investigation and would have, according to the defence, reported information on the alleged collaboration between the Haskanita base and the Government of Sudan. The Chamber will address these two aspects of the defence's claim.

[118] ICC-02/05-03/09-506-Red, paragraphs 47 and 49.
[119] ICC-02/05-03/09-503-Red, paragraph 41.
[120] ICC-02/05-03/09-503-Red, paragraphs 34 and 35.

(i) Witness 419's interview

48. As to the defence's claim relating to Witness 419's interview, the Chamber notes that the prosecution is responsible for conducting its investigation in accordance with its obligations under Article 54(1)(a) of the Statute. The so-called "follow-up" questions the defence claims the prosecution should have asked relate specifically to paragraphs 10 and 11 of Witness 419's second statement.[121] This statement disclosed in full by the prosecution more than a year ago, was relied on by the prosecution and Pre-Trial Chamber I for the purpose of confirmation of charges. The Chamber notes that Witness 419's second statement contains, *inter alia*, information that was used by the prosecution and interpreted by Pre-Trial Chamber I as incriminatory evidence.[122] In particular, both statements of Witness 419 were relied on by Pre-Trial Chamber I to prove, *inter alia*, that Captain Bashir was removed from the Haskanita base before the 29 September attack. Pre-Trial Chamber I also referred to evidence suggesting that there was no replacement of Captain Bashir at the MGS Haskanita at the time of the attack.[123] At this stage, this Chamber is not in a position to question such a preliminary judicial assessment. This is without prejudice to a full assessment by the Chamber in light of all evidence of the case to be presented at trial. The Chamber notes nevertheless that Witness 419 was interviewed twice in 2009 and, as far as the second statement is concerned, the witness focused his statement on the "Expulsion of GOS representative from Haskanita MGS" and was thus interviewed on the specific issue of Captain Bashir's removal from the Haskanita base. In this context, it is not clear to the Chamber why the prosecution should have sought more information from this witness. In any event, the Chamber does not see any "pattern" or

[121] ICC-02/05-03/09-503-Red, paragraph 33(a), footnote 49.
[122] See for example, DAR-OTP-0168-0168 at 0171, paragraph 14.
[123] ICC-02/05-03/09-121-Corr-Red, paragraph 63(iv), footnotes 83 (ii) and (iii).

"systemic problem" in the prosecution's behaviour and the way Witness 419 was questioned.

49. In addition, having reviewed the disclosure history of the second statement by Witness 419, DAR-OTP-0168-0168, the Chamber observes that this statement was first disclosed to the defence at the confirmation of charges stage on 8 July 2010 (disclosure package 2), re-disclosed in a lesser redacted form on 22 October 2010 (disclosure package 8) and finally disclosed in an even lesser redacted version on 17 September 2012 (disclosure package 34). Redactions applied to paragraphs 10 and 11 were limited to the name of a third person, which was further revealed to the defence on 17 September 2012. The full content of these paragraphs has therefore been known to the defence for more than a year and the Chamber thus fails to understand the timing of the defence's present claim when it argues that the prosecution did not appropriately question Witness 419.

(ii) Issue related to two screened individuals who were not further interviewed

50. As to the defence's claim concerning the screening notes of two individuals,[124] the defence questions the prosecution's investigatory choice not to interview them further. At the outset, the Chamber underlines that, it has a review power over the prosecution's obligation to "investigate incriminating and exonerating circumstances equally" under Article 54(1)(a) of the Statute in the context of its general obligation to ensure the fairness of the trial pursuant to Article 64(2) of the Statute. However, this does not mean that it is appropriate for a Chamber, at either the confirmation of charges or trial stage, to make determinations on each of the prosecution's investigative choices.

[124] ICC-02/05-03/09-503-Red, paragraph 33 (c) and (d).

51. Having analysed the screening notes themselves, it appears that one interviewed person reported events [REDACTED].[125] In this respect, the Chamber concurs with the prosecution that information contained in this particular screening note is not relevant to the contested issue and understands therefore the prosecution's choice not to pursue an interview of this individual. However, the two other individuals, in the Chamber's view, provided information that appears to be relevant to the contested issue and [REDACTED].[126] The Chamber considers that such information may have warranted the prosecution's attention. However, in the circumstances of the case the Chamber is not convinced that absent such investigation, the constituent elements of a fair trial can no longer be pieced together.

52. In summary, the Chamber sees some merit in two specific defence's claims, namely (i) that the statements of Witnesses 467 and 471 should have been permitted for inspection earlier - but not necessarily at the confirmation of charges stage - and (ii) that the declarations of two screened individuals may have warranted further investigation. However, the Chamber is not convinced for the abovementioned reasons, that the prosecution's alleged failures, when considered together, would amount to a conduct that would be "odious" or "repugnant" to the administration of justice such as to constitute an abuse of process.

[125] ICC-02/05-03/09-506-Conf-Anx6.
[126] ICC-02/05-03/09-506-Conf-Anx4.

C – Whether the alleged prejudice suffered by the defence may be addressed in the subsequent course of the proceedings

53. The question at hand is whether the Chamber is satisfied that the situation motivating the defence's request for termination of proceedings cannot be resolved at a later stage or cannot be cured during the trial.

1 - On the defence's alleged prejudice due to the prosecution's failure to timely allow for inspection of Witnesses 467 and 471's statements

54. On the issue of timing of disclosure of the statements of Witnesses 467 and 471, the defence submits that these statements contradict the statements of prosecution Witnesses 419 and 446 in such a manner that Pre-Trial Chamber I would not have confirmed the charges if it had relied on the statements of Witnesses 467 and 471. In this respect, the Chamber now turns to a consideration of whether contradictions exist between the abovementioned statements and, whether the statements of Witnesses 419 and 446 are the only statements on which Pre-Trial Chamber I relied on to confirm the charges.

55. First, the Chamber explained above that the interpretation of the statements of Witnesses 467 and 471 is highly disputed and the nature of the dispute is such that it is difficult to resolve it at the present stage of the proceedings and on the basis of the material available to the Chamber. In addition, considering the genuine dispute as to the nature of the information contained in these statements, it is not clear to the Chamber, at this stage, that significant contradictions exist between the statements of Witnesses 419 and 446 and of Witnesses 467 and 471.

56. Second, the Chamber notes that the information relating to the presence of GoS intelligence officers within the Haskanita base, was contemplated in the Confirmation Decision. Accordingly, in making its determination on the removal of Captain Bashir from the Haskanita base before the 29 September 2007 attack, PTC I relied *not only* on the statements of Witnesses 419 and 446 *but also* on other evidence such as the statements of, *inter alia*, Witnesses 416, 417, 420 and 447.[127] Pursuant to Article 61 of the Statute, Pre-Trial Chamber I therefore found *sufficient* evidence to establish substantial grounds to believe that the Haskanita attack was unlawful.

57. For the above reasons, the Chamber is not convinced that, had the statements at issue been disclosed at the confirmation of charges stage, Pre-Trial Chamber I's conclusion would have been significantly different. Furthermore, the Chamber notes that the defence now argues that the fact that Captain Bashir departed from the base on his own volition "strongly suggests the Government had a replacement source of intelligence within MGS Haskanita."[128] The Chamber is of the view that this issue would more appropriately be addressed at trial and assessed by the Chamber when considering the evidence as a whole after the parties and participants, as appropriate, have had an opportunity to question the relevant witnesses.

2 - On the defence's alleged prejudice due to the prosecution's failure to timely lift redactions to statements of Witnesses 419 and 446.

58. The Chamber acknowledges that, due to the unique circumstances of the present case, it may take some time to ensure that disclosure of identifying information of

[127] ICC-02/05-03/09-121-Corr-Red, paragraph 63(iv) and footnote 83.
[128] ICC-02/05-03/09-513-Red, paragraph 18.

third parties does not endanger their security or to obtain their consent before revealing their identifying information to the defence. Nevertheless, the Chamber has repeatedly stressed that the "redactions it has authorised to date are under on-going scrutiny"[129] and that "[I]f the prosecution is unable to locate, contact and secure the consent of the witnesses at issue, or otherwise resolve the underlying disclosure issue, the Trial Chamber will need to consider whether a fair trial may still be conducted in the absence of the full disclosure to the defence of the potentially exculpatory or Rule 77 material".[130] This applies also to the lifting of redactions to confidential information contained in both statements relevant to the defence's investigation and statements of prosecution witnesses. Any prejudice suffered by the defence due to the timing of the lifting of redactions and which may have resulted in lost investigative opportunities, can be best addressed by the Chamber through the adoption of appropriate measures during the course of the trial.

59. More importantly, the defence received the lesser redacted statements of Witnesses 419 and 446 as well as the statements of Witnesses 471 and 467 more than a year before the date set for the start of trial. The defence, in the Chamber's view, has sufficient time for preparing its case. In this respect, the Chamber recalls its Protocol on the regulation of contacts between the party and a witness of the opposing party. This applies, *inter alia*, to contacts between the defence and prosecution Witnesses 419 and 446, subject to their consent to be interviewed.[131] In the event that these witnesses refuse to be contacted by the defence, the Chamber underlines that the defence will have the opportunity to question them at trial. This possibility mitigates any prejudice alleged by the defence.

[129] ICC-02/05-03/09-410, paragraph 116.
[130] Public Redacted Decision on the prosecution's request for non-disclosure or redactions of material relating to Witnesses 304,305,306 and 312, ICC-02/05-03/09-265-Red, paragraph 27.
[131] ICC-02/05-03/09-451-AnxA, paragraphs 20 to 31.

3 - On the defence's alleged prejudice that the prosecution did not investigate exonerating material equally

(i) Witness 419's interview

60. The Chamber notes once again that, should the defence consider that Witness 419 gave an incomplete statement to the prosecution and that he needs to be interviewed for the purpose of the defence's investigation, the Protocol adopted by the Chamber on 18 February 2013 serves such a purpose by regulating the contacts between the party and a witness of the opposing party.[132] The defence is at liberty to organise such contacts before the start of trial. In this context, the Chamber reiterates its statement made in the Stay Decision, albeit for different witnesses, that it encourages the prosecution to "continue its efforts to secure defence contacts or interviews with the prosecution witnesses".[133] Should the defence experience difficulties in contacting Witness 419, the Chamber may take these difficulties into consideration as part of its final determination on the case once *all* evidence has been presented. The Chamber is therefore not convinced that this issue cannot be corrected during the trial proceedings. In particular, the Chamber is of the view that this issue would more appropriately be addressed at trial and assessed by the Chamber when considering the evidence as a whole after the parties and participants, as appropriate, have had an opportunity to question Witness 419.

(ii) Issue related to two screened individuals who were not further interviewed

61. The Chamber notes that the prosecution provided the screening notes of two individuals to the defence that it annexed to its Response, together with a

[132] ICC-02/05-03/09-451-AnxA, paragraphs 20 to 31.
[133] ICC-02/05-03/09-410, paragraph 128.

disclosure note of 2 May 2013.[134] The prosecution asserts that the screening note in Annex 4 did not mention any potentially exculpatory evidence, justifying the choice to not interview this individual further.[135] As explained above, the Chamber finds however that information given by the screened individual was potentially relevant to the contested issues. Whilst the defence is in possession of the identity of this screened individual who may be thus more easily located and interviewed before the start of trial as part of the defence's investigation, the Chamber encourages the prosecution to share any confidential information in its possession for the purpose of the defence's preparation.[136] It is up to the parties to first try to resolve such an issue *inter partes*. The defence may further seise the Chamber with a reasoned and specific request in case of a dispute between the parties. In this respect, the Chamber will make its determination on a case-by-case basis and, if justified, allow the defence sufficient preparation, mitigating therefore any prejudice the defence may have suffered from non-disclosure or late disclosure.

62. In addition, the Chamber notes that the prosecution made no submission as to the content of the screening note of another individual provided to the defence in Annex 5 to its Response. Absent of any explanation, the Chamber is not in a position to make any determination on the prosecution's choice not to interview the individual concerned.

63. The Chamber finally emphasises that, pursuant to Article 57(3)(b) of the Statute, the Chamber may, as necessary, assist the accused person in the preparation of his defence or may, in accordance with Article 69(3) of the Statute, request the submission of all evidence that it considers necessary for the determination of the

[134] ICC-02/05-03/09-506-Conf-Anx4 to ICC-02/05-03/09-506-Conf-Anx7.
[135] ICC-02/05-03/09-506-Red, paragraph 44.
[136] ICC-02/05-03/09-451-Anx, paragraph 3 concerning screened individuals and Sections II and III of the Protocol on the handling of confidential information and contact between a party and witnesses of the opposing party.

truth, including calling witnesses as appropriate. Measures under these provisions may be taken by the defence or the Chamber, as appropriate, without the necessity for the Chamber to resort to the drastic remedy of termination of the proceedings.

III – Conclusion

64. In respect of each of the defence's claims, the Chamber, for the reasons explained above, is not satisfied that the situation motivating the request for termination constitute an abuse of process and cannot be addressed at a later stage.

65. Therefore, the Chamber hereby REJECTS the defence's Request.

Judge Eboe-Osuji will append a concurring separate opinion in due course.

Done in both English and French, the English version being authoritative.

Judge Joyce Aluoch
Presiding Judge

Judge Silvia Fernández de Gurmendi

Judge Chile Eboe-Osuji

Dated this 30 January 2014

At The Hague, The Netherlands

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-03/09**
Date: **3 February 2014**

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v ABDALLAH BANDA ABAKAER NOURAIN

Public

Separate Opinion of Judge Eboe-Osuji to the 'Decision on the "Defence Request for Termination of Proceedings"'

Order to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda
Mr Julian Nicholls

Counsel for the Defence
Mr Karim A.A. Khan

Legal Representatives of Applicants

Legal Representatives of Victims
Ms Hélène Cissé
Mr Jens Dieckmann

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

SEPARATE OPINION OF JUDGE EBOE-OSUJI

1. I agree with the decision of my colleagues, Judge Aluoch and Judge Fernandez, dismissing the Defence request for termination of proceedings. My reasons are as follows.

I

2. The first plank of the Defence case for termination rests upon the argument that the African Union peacekeeping mission had lost neutrality because they had not promptly removed Captain Bashir from their midst—despite complaints made to the AU peacekeeping mission by the rebel movements of which the accused was a leading member, and that the Government of Sudan had a replacement source of intelligence within the mission. According to the Defence, the Prosecution was in possession of evidence tending to prove the factual proposition underlying that argument, but did not disclose the evidence for purposes of the confirmation proceedings. Had the disclosure been made, argues the Defence, the Pre-Trial Chamber would have declined to confirm the indictment.

3. I do not accept that argument, as a basis for termination of the case.

4. Purely for purposes of argument, we may accept as true the factual proposition advanced by the Defence, in the sense that the AU peacekeeping mission had not promptly removed Captain Bashir from their midst, despite complaints made to the AU peacekeeping mission by the rebel movements, and that the Government of Sudan had a replacement source of intelligence within the mission. I still do not see the correct legal result as one that forecloses any further judicial inquiry, by a Trial Chamber, as to both the neutrality of the AU peacekeeping mission and the legality of the attack against them by the rebel movement.

5. That there remains a judicial inquiry to be had is supported by the principle of international humanitarian law, which does not denude a civilian population of its protected status merely because of the presence of individual combatants. In *Prosecutor v Galić*, the ICTY Appeals Chamber explained the principle in this way:

> 'The Appeals Chamber finds that the jurisprudence of the International Tribunal in this regard is clear: *the presence of individual combatants within the population attacked does not* necessarily *change the fact that the ultimate character of the population remains, for legal purposes, a civilian one*. If the population is indeed a "civilian population", then the presence of combatants within that population does not change that characterisation.
> ...
> *If, however, one is discussing whether a population is civilian based on the proportion of civilians and combatants within it, that is, the status of the population has yet to be determined or may be changing due to the flow of civilians and military personnel, then the conclusion is slightly different.* The *Blaškić* Appeal Judgement qualified the general proposition of the *Kordić and Čerkez* Appeal Judgement with an important addendum. It states, quoting the ICRC Commentary, that "in wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian

> population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population." *As such, the Appeals Chamber in* Blaškić *found that "in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined".*'[1]

6. The foregoing dictum is consistent with article 50(3) of the Additional Protocol I to the Geneva Conventions[2] and the other decisions of the ICTY,[3] ICTR[4] and the Special Court for Sierra Leone.[5]

7. Taken alone, the foregoing affords an analogy that is sufficient to create doubt about the propriety of terminating the case, on the basis of the Defence arguments as made in the application. And that doubt is made deeper by the specific language of article 8(2)(e)(iii) of the Rome Statute that, in its own terms, makes it a war crime to intentionally direct 'attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are *entitled to the protection given to civilians or civilian objects* under the international law of armed conflict.' [Emphasis added.]

8. Thus, a judicial inquiry by a Trial Chamber is not ruled out *even if* the defence concerns—as argued in the application—are material. This is specifically the case for peacekeeping missions where there is still a debate about the threshold of impartiality beyond which the personnel of the mission and the installations, material, units and vehicles of the mission lose its protection as civilians and civilian objects.

---

[1] *Prosecutor v Galić* (*Judgment*), dated 30 November 2006 [ICTY Appeals Chamber], paras 136 and 137[emphasis added].

[2] Article 50(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: 'The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character'. See also *Prosecutor v. Blaškić*, (*Judgment*), dated 29 July 2004 [ICTY Appeals Chamber], para 110: 'Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law'; and *Prosecutor v. Kordić and Čerkez, (Judgment)*, dated 17 December 2004 [ICTY Appeals Chamber], para 97.

[3] *Prosecutor v. Blaškić, supra*, paras 113 and 115; *Prosecutor v. Kordić and Čerkez, supra*, paras 50, 97; *Prosecutor v. Pavle Strugar (Judgment)*, dated 31 January 2005 [ICTY Trial Chamber], para 282; *Prosecutor v. Mrkšić* et al. (*Judgment*), dated 27 September 2007 [ICTY Trial Chamber], paras 442 and 453.

[4] *Prosecutor v. Akayesu* (*Judgment*), dated 2 September 1998 [ICTR Trial Chamber], para 582; *Prosecutor v. Kayishema and Ruzindana* (*Judgment*), dated 21 May 1999 [ICTR Trial Chamber], para 180; *Prosecutor v. Rutaganda (Judgement and Sentencing)*, dated 6 December 1999, para 72.

[5] *Prosecutor v Fofana and Kondewa*, (*Judgment*), dated 2 August 2007 [SCSL Trial Chamber], paras 116 and 117.

II

9. The second plank of the Defence case for termination of the case rests on their complaint that the Prosecution had not properly or thoroughly investigated the case, in accordance with article 54 of the Statute.

10. The Defence complaint in that regard is similarly insufficient, in my view, to result in termination of the case.

11. I had earlier, in a different case, expressed concerns regarding a call to judicial interference on grounds that the Prosecutor had not conducted 'proper' or 'thorough' or 'full' investigations. The concern was primarily expressed as follows:

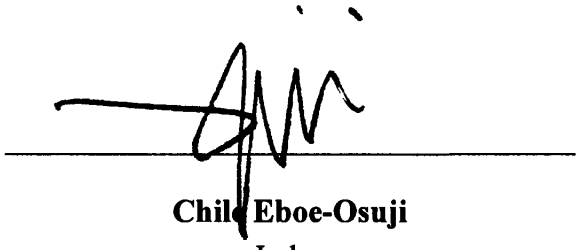
> '[A]s a matter of policy and practicality, that a rule of limitation that engages the question whether the post-confirmation investigations in particular circumstances had resulted from what my esteemed colleagues describe as lack of 'proper' or 'thorough' or 'full' investigation is not easily implemented. Contrary to public policy, it will merely invite needless interlocutory litigation, especially as to what amounts to 'proper' or 'thorough' or 'full' investigation. The determination of the question will necessarily require a judicial inquiry as to the proper standards of prosecutorial investigations; and, whether those standards were complied with in the complex and varied circumstances of particular cases. The question is necessarily provoked as to what should inform the judicial appreciation of the correct standards. Will it be judges' own proven experience as expert investigators of serious crimes? Or will it be the views of opposing parties? Or will it be the views of expert witnesses specially called to answer the question? An expert witness will necessarily have to review precisely all that the Prosecution did in their investigation and will write an expert witness's report to be considered by the Chamber. Apart from the complexity alone of such an inquiry, and the question whether it enhances or hinders efficiency in the judicial process, there is also the matter concerning whether the inquiry can even be conducted properly amidst questions that will inevitably arise as regards protection of the legal professional privilege that may prevent such an inquiry from being conducted meaningfully.'[6]

12. I adopt the same view here. Judges should be cautious in engaging with a question about the propriety of the investigations. A judicial interference into such an issue might lead to needless interlocutory litigation. Furthermore, it is also a difficult question for judges to determine considering the lack of a standard in light of the complex and varied circumstances of particular cases.

13. The Defence application does not override these concerns.

[6] *Prosecutor v Kenyatta* (*Decision on Defence Application pursuant to Article 64(4) and Related Requests*) dated 5 December 2013 [Trial Chamber], Concurring Separate Opinion of Judge Eboe-Osuji, para 99.

Done in both English and French, the English version being authoritative.



Chile Eboe-Osuji
Judge

Dated 3 February 2014
At The Hague, The Netherlands