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TRIAL CHAMBER IV

Before: Judge Joyce Alouch, Presiding Judge
Judge Fatouma Demele Diarra
Judge Silvia Fernández de Gurmendi

SITUATION IN DARFUR, SUDAN

IN THE CASE OF THE PROSECUTOR v. ABDALLAH BANDA ABAKAER

NOURAIN AND SALEH MOHAMMED JERBO JAMUS

PUBLIC DOCUMENT

Public Redacted Version of "Prosecution's further update on the status of 10 documents obtained pursuant to Article 54(3)(e) and request to rely on analogous alternative evidence", filed on 8 July 2011

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Introduction

1. The Office of the Prosecutor (“Prosecution”) requests authorisation to rely on alternative evidence previously disclosed to the Defence, in lieu of disclosure of ten documents obtained pursuant to Articles 54(3)(e) of the Rome Statute (“Statute”).
2. [REDACTED].

I. Background

3. The Prosecution, in discharging its disclosure obligations pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (“Rules”) in view of the confirmation hearing in the case *the Prosecutor v. Bahar Idriss Abu Garda* (“the *Abu Garda* case”), reviewed the evidence in its possession within the Darfur collection and identified among the pool of items falling within the scope of the cited provisions eight documents that had been obtained pursuant to Article 54(3)(e). More specifically, one document was assessed as containing information of a potentially exculpatory nature and seven other documents as being material for the preparation of the defence.

4. The Prosecution had obtained the eight documents on 19 July 2007 from [REDACTED], (the “First Provider”) on condition of confidentiality, pursuant to Article 54(3)(e). Since the provider could not consent to the lifting of the confidentiality restrictions and consent to their disclosure, on 10 September 2009 the Prosecution submitted to the Single Judge of the Pre Trial Chamber I a list of items that contained analogous values to the ones in the protected documents and sought the authorization to be allowed to use them as alternative evidence.¹

5. On 8 February 2010, Pre-Trial Chamber I issued its decision declining to confirm the charges against the Suspect in the *Abu Garda* case.

¹ ICC-02/05-02/09-94-Red.

6. Subsequently, in the context of *the Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (“the *Banda and Jerbo* case”), the Prosecution undertook the same exercise of reviewing its evidence collection in order to fulfill its disclosure obligations vis-à-vis the two Suspects and assessed that the same eight documents that had been previously identified in the *Abu Garda* case were equally potentially exculpatory and material to the preparation of the defence.

7. On 23 June 2010, during the status conference in the *Banda and Jerbo* case, the Prosecution informed the Single Judge of the Pre-Trial Chamber I that the Prosecution was making efforts to secure the lifting of the Article 54(3)(e) restrictions imposed by the providers on the eight documents. The Prosecution further informed the Chamber that in the event that its efforts to secure the lifting of the restrictions failed, it would be able to disclose appropriate alternative or analogous materials².

8. On 8 July 2010 and 5 August 2010, pursuant to Article 67(2) and in accordance with the Chamber’s “Decision on issues relating to disclosure”, the Prosecution disclosed two packages of incriminating evidence and one package of potentially exculpatory documents to each of the Defence teams of Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus.³

9. [REDACTED].⁴

10. On 7 March 2011, Pre-Trial Chamber I issued its decision confirming the charges against the Suspects in the *Banda and Jerbo* case.

11. At the status conference held on 19 April 2011⁵ and in its subsequent filing dated 9 May 2011,⁶ the Prosecution informed the then constituted Trial Chamber of

² ICC-02/05-03/09-T-5-ENG, page 9 line 8 to page 10 line 5.

³ ICC-02/05-03/09-49.

⁴ [REDACTED].

⁵ ICC-02/05-03/09-T-10-ENG ET WT, pp. 26-27.

the *Banda and Jerbo* case about the status of the lifting procedures concerning the eight outstanding 54(3)(e) documents. At the status conference, the Prosecution further informed the Trial Chamber that upon further review of its collection, it had identified two additional Article 54(3)(e) protected documents that warranted disclosure to the Defence, one being potentially exculpatory and the other materially relevant to the preparation of the Defence. Those two documents had been obtained by [REDACTED], (“the Second Provider”) on condition of confidentiality on 15 August 2007, in the context of the investigation in another case in the situation of Darfur.

12. On 13 June 2011, pursuant to the Chamber order of 30 May 2011 instructing the Prosecution to provide an update as regards the ongoing consultations concerning the ten Article 54(3)(e) documents,⁷ the Prosecution informed the Chamber that the consultations with First Provider to obtain the lifting of restrictions on the eight documents were still ongoing. In respect of the further two documents mentioned during the 19 April 2011 status conference,⁸ the Prosecution informed the Chamber that it had received a negative response from the Second Provider but that it would nevertheless revert back to provider in order to further explore its position.

13. In this respect, the Prosecution undertook to further update the Chamber of any developments⁹ and proposed to make a separate filing to the Chamber in order to provide an alternative solution to this matter should the Providers being unable to lift the restrictions on the outstanding documents.

II. Prosecution Submissions

Prosecution’s efforts to secure the lifting of restrictions

⁶ ICC-02/05-03/09-142.

⁷ ICC-02/05-03/09-155.

⁸ ICC-02/05-03/09-T-10-ENG CT WT 19-04-2011, page 26 line 14 to page 27 line 17.

⁹ ICC-02/05-03/09-161.

14. On 10 August 2009, the Prosecution requested the First Provider to lift the confidentiality restrictions imposed on eight documents pursuant to Article 54(3)(e).¹⁰ This request was rejected by the First Provider in its letter of 14 October 2009.¹¹ This request was repeated on a number of occasions throughout 2010 and 2011.

15. On 20 July 2010, the Prosecution requested the Second Provider to lift the confidentiality restrictions imposed on two documents pursuant to Article 54(3)(e).¹² This request was rejected by the Second Provider [REDACTED].¹³ This request was repeated on a number of occasions throughout 2011.

16. [REDACTED].

Current Arrangements

17. The Prosecution hereby informs the Chamber that neither of the Providers have yet lifted the restrictions imposed on the relevant ten documents that are subject to the Article 54(3)(e) restrictions. However, the Prosecution continues its efforts to persuade both Providers to revisit their positions.

Request to rely on alternative evidence previously disclosed to the Defence in lieu of disclosure of the ten documents

18. Considering that the Prosecution's efforts to lift the restrictions are still continuing, the Prosecution hereby provides to the Chamber analogous or alternative materials and requests authorisation to rely on alternative evidence previously

¹⁰ See Prosecution letter addressed to [REDACTED].

¹¹ See Letter from [REDACTED].

¹² See Prosecution letter addressed to [REDACTED].

¹³ See Letter from [REDACTED].

disclosed to the Defence, in lieu of disclosure of the ten documents which contain information relevant pursuant to Article 67(2) and Rule 77, [REDACTED].

Obligation pursuant to Article 54(3)(e)

19. Both Providers have not consented to lift the confidentiality restrictions to allow disclosure of the ten documents to the Defence notwithstanding the Prosecution's requests to do so, as described in paragraphs 11 and 12. In those circumstances, as confirmed by the Appeals Chamber:¹⁴ *"where the material in question was obtained on the condition of confidentiality, the Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement concluded by the Prosecutor under Article 54(3)(e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider [...]."*¹⁵ The Prosecution notes that this approach has been adopted by the Trial Chamber in *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* case.¹⁶

20. The Appeals Chamber has also recognised that there may be circumstances in which a Trial Chamber is unable to order full disclosure even of potentially exculpatory materials, such as where an information provider refuses to grant its consent to disclosure of a document, and that the Chamber is then authorised to determine *"whether and, if so, which counter-balancing measures can be taken to ensure the rights of the accused are protected and that the trial is fair, in spite of non-disclosure of the information."*¹⁷

21. Moreover, in its Decision of 21 October 2008, the Appeals Chamber held that it *"cannot exclude that the provision of alternative evidence may, in appropriate circumstances,*

¹⁴ ICC-01/04-01/06-1486, para 48.

¹⁵ ICC-01/04-01/07-1661-Red2-tENG, para 11.

¹⁶ ICC-01/04-01/06-2052-Red, para 10.

¹⁷ ICC-01/04-01/06-1486, para 48.

be one way of ensuring fairness in spite of the non-disclosure of material obtained on the condition of confidentiality under Article 54(3)(e) of the Statute". However, the Appeals Chamber notes that "this would require an assessment by a Chamber of the adequacy of the alternative evidence proposed by the Prosecutor".¹⁸

22. [REDACTED].

23. Additionally, the exculpatory and Rule 77 aspects of the protected documents are cumulative to a considerable volume of analogous alternative information already disclosed to the Defence, as detailed in Confidential *ex parte* Annex A to this filing.¹⁹ The alternative sources include witnesses who will be testifying at trial and/or whose identities have been disclosed to the Defence.

Obligation to protect persons at risk due to activities of the Court

24. The ten documents name the First and the Second Provider as authors of these documents and contain references to names of individuals who provided information to the Providers [REDACTED]. Providing the full documents to the accused persons will reveal [REDACTED] the sources who provided information contained in the documents. As indicated above, both Providers did not consent to disclose this information to the accused persons [REDACTED].

Prosecution demonstrated reasonable diligence

25. The Prosecution submits that it has met the applicable burden of proof and demonstrated reasonable diligence. First, as is mentioned in paragraph 10, the ten documents have been received on condition of confidentiality pursuant to Article

¹⁸ ICC-01/04-01/06 OA13, para. 95.

¹⁹ See ICC-01/04-01/06-1557, para. 41. See also ICC-01/04-01/06-1644, paras 46-47. In the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* case, Trial Chamber I has determined that alternative evidence can be an appropriate counter-balancing measure as regards potentially exculpatory evidence.

54(3)(e) from both Providers on 19 July 2007 and 15 August 2007 respectively in the context of other cases in the Sudan situation, while the attack on the MGS Haskanita which is the matter in dispute in the *Banda and Jerbo* case occurred only on 29 September 2007. At the time of the receipt of these documents, the Prosecution could thus not have anticipated that it would initiate an investigation into this incident. In fact the investigation started only in 2009 and the relevance of these documents became apparent to the Prosecution through its review of the evidence in preparation for the confirmation hearing in this case. Second, as mentioned in paragraph 14, the Prosecution continues its efforts to secure the lifting of restrictions imposed on the ten documents.

26. In the event that both providers ultimately decide not to lift the restrictions, the Prosecutor will explore the possibility of them agreeing on counter-balancing measures such as disclosing the relevant documents in a redacted or anonymously summarized form or disclosing verbatim excerpts of the effected values from the non-disclosable documents. For instance, in *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, the Trial Chamber authorised the disclosure of a summary of an Article 54(3)(e) document, provided by an NGO, observing that in the circumstances of that document, although the Defence did not know the source of the document nor had access to the whole document, the Defence benefited from alternative compensatory means which did not compromise the rights of the accused persons to a fair trial.²⁰

Annexes

27. The Prosecution is annexing to the present filing a list of items of proposed alternative evidence as Annex B to cover the information contained in Annexes A1 to A10 to the present filing.

28. [REDACTED]:

²⁰ ICC-01/04-01/07-1661-Red2-tENG, para 16.

- (i) [REDACTED];
- (ii) [REDACTED];
- (iii) [REDACTED];
- (iv) [REDACTED]; and
- (v) [REDACTED].

29. The Prosecution notes that the items identified in Annexes A1 - A10 to the present filing as proposed alternative evidence have already been disclosed to the Defence in the *Banda and Jerbo* case.

30. The Prosecution also notes that the originals are already in the possession of the Registry since they have been filed in the records of both *Abu Garda* and *Banda and Jerbo* cases.²¹

Request for receipt of filing as Confidential *Ex Parte*

31. The Prosecution submits that the classification of the present filing and the Annex B and Annexes A1 to A10 as Confidential – *Ex Parte* – Prosecution Only is necessary as they contain information of a confidential nature and concern materials that are currently subject to confidential restrictions. The Prosecution is prepared, however, to file a Public Redacted Version of the filing should the Trial Chamber determine it to be appropriate in the circumstances.

Relief Sought

32. For the foregoing reasons, the Prosecution requests that the Chamber authorise reliance on alternative information previously disclosed, in lieu of

²¹ ICC-02/05-02/09-81 02-09-2009; ICC-02/05-02/09-84 04-09-2009; ICC-02/05-02/09-103 14-09-2009; ICC-02/05-02/09-122 30-09-2009.

disclosure of the ten document received by the Prosecution on condition of confidentiality, pursuant to Article 54(3)(e).



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Luis Moreno-Ocampo

Prosecutor

Dated this 15th day of July 2011

At The Hague, The Netherlands