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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernandez de Gurmendi

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

Defence Response to “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” filed on 15 July 2011

Sources: Defence Team of Abdallah Banda Abakaer Nourain
Defence Team of Saleh Mohammed Jerbo Jamus

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

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I. INTRODUCTION

1. The Defence for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus ("Defence") file this Response to the "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" ("Request"), filed on 15 July 2011.¹
2. The Request fails to satisfy the test for reliance on alternative analogous evidence and should therefore be dismissed. In particular, the Office of the Prosecutor ("OTP") has not demonstrated that counter-balancing measures less impactful on the rights of the accused, namely redactions, anonymous summaries and verbatim excerpts, are unavailable.

II. BACKGROUND

3. In its filing of 14 April 2011,² the OTP informed the Trial Chamber that eight documents provided to the OTP by an information provider ("First Provider") under Article 54(3)(e) of the Rome Statute ("Statute") were subject to disclosure to the Defence pursuant to Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence ("Rules"). The OTP later clarified that it had assessed one document as containing information of a potentially exculpatory nature while the remaining seven were deemed to be material to the preparation of the Defence.³ The OTP further noted in its 14 April filing that it "continues to work on finalising arrangements with the information provider to secure the lifting of restrictions imposed" on these documents pursuant to Article 54(3)(e).⁴ In addition, and as noted by the Trial Chamber at the Status Conference held on 19

¹ ICC-02/05-03/09-176-Red.

² Prosecution's Response to the Trial Chamber's Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, ICC-02/05-03/09-131, para. 18.

³ Request, para. 3.

⁴ Prosecution's Response to the Trial Chamber's Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, ICC-02/05-03/09-131, para. 18.

April,⁵ in a confidential filing before the Pre-Trial Chamber the OTP had indicated that the First Provider was, in principle, agreeable to the production and disclosure of a narrative summary of the eight documents.⁶

4. At the 19 April 2011 Status Conference, the OTP updated to ten the total number of Article 54(3)(e) documents subject to disclosure pursuant to Article 67(2) of the Statute or Rule 77 of the Rules.⁷ Subsequently, in the Request, the OTP clarified that in addition to the eight documents originating from the First Provider, the OTP possessed two documents provided pursuant to Article 54(3)(e) by a second provider ("Second Provider") – one of a potentially exculpatory nature and the other material to the preparation of the defence.⁸
5. In the Request the OTP also updated the Chamber as to the status of the OTP's negotiations with the two information providers, stating "that neither [...] have yet lifted the restrictions imposed on the relevant ten documents", though "the Prosecution continues its efforts to persuade both Providers to revisit their positions."⁹ Further, the OTP indicated that if "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 [...]."¹⁰
6. Finally, the Request submits that the OTP has demonstrated reasonable diligence both when obtaining the ten documents pursuant to Article 54(3)(e) and in continuing to seek the lifting of restrictions on these documents,¹¹ and requests

⁵ ICC-02/05-03/09-T-10-ENG, p. 26, lines 7-11.

⁶ Prosecution's Provision of Alternative Evidence, 22 October 2010, ICC-02/05-03/09-83-Conf, para. 3.

⁷ ICC-02/05-03/09-T-10-ENG, p. 26 at line 21.

⁸ Request, para. 11.

⁹ Request, para. 17.

¹⁰ Request, para. 26.

¹¹ Request, para. 25.

the Chamber to authorise the use of analogous alternative evidence in lieu of disclosing the ten documents.

III. JURISPRUDENCE CONCERNING ARTICLE 54(3)(E) DISCLOSURE

7. The Appeals Chamber has held that in circumstances where the information supplier of material provided pursuant to Article 54(3)(e)

*does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the non-disclosure of the information.*¹²

8. The Appeals Chamber has further noted that where counter-balancing measures are deemed sufficient “to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial”, such measures may take the form,¹³ *inter alia*, of providing the information in summary form, stipulating to the relevant facts, or amending or withdrawing the relevant charges.¹⁴

9. With respect to the counter-balancing measure of “alternative evidence”, the Appeals Chamber held that such mechanisms may be adequate “in appropriate circumstances” to protect the fairness of trial proceedings, but “require(s) an assessment by a Chamber of the adequacy of the alternative evidence proposed by the Prosecutor [...]”¹⁵ In the *Abu Garda* case the learned Single Judge noted in respect of the very same documents supplied by the First Provider in the present matter, that “the so-called principle of analogous information, represents the very last resort” as “it would deprive the Defence from having access to the actual document covered by Article 54(3)(e) of the Statute and therefore to the

¹² *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, para. 48 (emphasis added).

¹³ *Ibid.*, para. 44.

¹⁴ *Ibid.*, para. 28.

¹⁵ *Ibid.*, para. 95.

sources of the information identified as material to be disclosed to the Defence pursuant to Article 67(2) of the Statute and 77 of the Rules.”¹⁶

IV. DEFENCE SUBMISSIONS ON THE OTP REQUEST

10. The Defence is perplexed by the OTP’s submission at paragraph 26 of the Request that in the event the two providers “ultimately decide not to lift the restrictions” on the 10 documents (the ‘best evidence’ available to the Chamber and the Defence), the OTP “will explore”, at that stage, potential agreement on counter-balancing measures such as redactions, anonymous summaries and verbatim excerpts – all of which would much better protect the fundamental fair trial rights of the accused in comparison to the “last resort” of alternative analogous evidence.
11. With respect to the First Provider, the OTP has negotiated, with extremely limited success since at least August 2009 in the *Abu Garda* case¹⁷ and continuing into the present case, the lifting of Article 54(3)(e) restrictions on the eight documents in question. In fact, contrary to the OTP’s submissions at paragraph 26 of the Request, and as noted above,¹⁸ the OTP had already opened discussions with the First Provider on the possibility of providing a narrative summary of the eight documents to the Defence as opposed to the actual documents.¹⁹ Similarly, since July 2010, the OTP has requested the Second Provider, without success, to lift the Article 54(3)(e) restrictions imposed on the two documents.²⁰
12. Presumably then, the OTP has little reasonable expectation that the two information providers will change their longstanding positions on the matter of lifting the Article 54(3)(e) restrictions on the ten documents. Given that the OTP

¹⁶ ICC-02/05-02/09-T-6-ENG, 26 August 2009, p. 23, lines 15-22 (emphasis added).

¹⁷ See *Prosecutor v. Bahar Idriss Abu Garda*, Public Redacted Version of Prosecution’s Provision of Alternative Evidence filed on 10 September 2009, 14 October 2008, ICC-02/05-02/09-94-Red.

¹⁸ See *supra* para. 3.

¹⁹ Prosecution’s Provision of Alternative Evidence, 22 October 2010, ICC-02/05-03/09-83-Conf, para. 3.

²⁰ Request, para. 20.

has itself acknowledged the logistical difficulties relating to organisations,²¹ prudence would dictate the OTP proceeding with requests to and discussions with the information providers on the types of counter-balancing measures set out at paragraph 26 of the Request.

13. Instead, the OTP has bypassed what the Defence submit is a clear hierarchy of counter-balancing measures and immediately proceeded to request the Chamber's authorisation for the "last resort option" of reliance on analogous alternative evidence. If the OTP is unable, due to its own policy decisions, to fulfill its statutory disclosure obligations pursuant to Article 67(2) and Rule 77, then it is incumbent upon the OTP to diligently pursue counter-balancing measures that will have the least negative impact on the rights of the accused. In the present circumstances, the Defence submits that such measures are redactions, anonymous summaries and/or verbatim excerpts of the 10 documents.
14. In the unique circumstances of this case, where the Defence, as the Chamber is well aware, continues to experience significant difficulties in conducting its investigations,²² it is not only the specific Article 67(2) or Rule 77 content of the ten documents that matter, but also other contextual information that may provide the Defence with new investigative leads.
15. With respect to the core content of the documents, the two documents – one from each information provider – containing potentially exculpatory information deserve special attention. Given the Defence's investigative difficulties, materials covered by Article 67(2) are potentially of even greater value than in the context

²¹ ICC-02/05-03/09-T-10-ENG, 19 April 2011, p. 27, lines 2-4 ("The difficulty is as -- is one that I believe even my friend for the Defence alluded to in the Defence filing, the difficulty with relating to organisations as opposed to individuals, sometimes it takes longer than one anticipates.").

²² See Decision on "Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan", 1 July 2011, ICC-02/05-03/09-169; Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the African Union", 1 July 2011, ICC-02/05-03/09-169.

of a defence that does not face such difficulties. In addition to the counter-balancing measures mentioned at paragraph 26 of the Request, the OTP's stipulation as to the relevant facts arising out of these two documents is another potentially effective tool for protecting the fundamental rights of the accused.

16. Accordingly, the Defence respectfully submits that the Trial Chamber, in evaluating which counter-balancing measures, in the face of Article 54(3)(e) restrictions, are best suited to "ensure that the rights of the accused are protected and that the trial is fair", should view the use of alternative evidence as a last resort and should take into account the particular difficulties faced by the Defence in this case.

IV. REQUEST FOR RELIEF

17. Based on the above, the Defence respectfully requests that the Trial Chamber:
 - a. reject the OTP's request to rely on analogous alternative information;
 - b. order the OTP to immediately engage in discussions with the information providers as to the possibility of providing redacted versions, anonymous summaries and/or verbatim excerpts of the 10 documents currently subject to Article 54(3)(e) restrictions and to regularly update the Chamber on the status of these discussions;
and / or
 - c. order the OTP to prepare stipulations as to the relevant information arising from the two documents of a potentially exculpatory nature for consideration by the Defence.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 9th Day of August 2011

At Nairobi, Kenya

Dated this 9th Day of August 2011

At Dhaka, Bangladesh