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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 the “Public Redacted Version of “Prosecution’s Further Update on Article 54(3)(e) Documents”, filed on 11 August 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 (“the Defence”) file this response to the “Public Redacted Version of “Prosecution’s Further Update on Article 54(3)(e) Documents”, filed on 11 August 2011” dated 20 September 2011¹ (the “Further Update”).
2. In the Further Update, the Prosecution invite the Trial Chamber to authorise it to rely on “analogous evidence” instead of disclosing Article 54(3)(e) material.
3. The Defence submit that the Further Update does not satisfy the test for reliance on alternative analogous evidence because the provision of alternative analogous evidence is a last resort and the Prosecution have not demonstrated that other counter-balancing measures, which would impact less on the rights of the accused, are unavailable.

II. SUBMISSIONS

4. It is matter of regret that the Further Update is skeletal and fails to address the Defence’s arguments made in its “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” (“Response”).² In its Response, the Defence set out the jurisprudence governing disclosure under Article 54(3)(e) of the Rome Statute (“Statute”)³ and submitted that the request to rely on analogous material was premature because the Prosecution had not yet explored other counter-balancing measures which would be less prejudicial to the rights of the accused.

¹ Public Redacted Version of “Prosecution’s Further Update on Article 54(3)(e) Documents”, filed on 11 August 2011”, 20 September 2011, ICC-02/05-03/09-197-Red.

² 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, 9 August 2011, ICC-02/05-03/09-196.

³ Response, paras 7–9.

5. As the Further Update suffers from the same defect as the Prosecution's filing dated 8 July 2011,⁴ the Defence rely on the submissions made in paragraphs 10 to 14 of the Response.
6. In summary, where an information provider does not consent to the disclosure to the Defence of Article 54(3)(e) material, it is for the Chamber to determine "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".⁵
7. Such counter-balancing measures may include providing the information in summary form, stipulating to the relevant facts, or amending or withdrawing the relevant charges.⁶ The Prosecution also undertook to explore disclosing the relevant documents in a redacted or anonymously summarized form or disclosing verbatim excerpts of the effected values in its 8 July 2011 filing.⁷
8. Of these counter-balancing measures, the provision of alternative analogous evidence is the least desirable. The reason is that the provision of alternative analogous evidence by definition denies the Defence access to the actual documents, and, therefore, to the sources of information identified as material to be disclosed to the Defence. This explains why the learned Single Judge in the *Abu Garda* case described the provision of analogous information as "the very last resort".⁸

⁴ 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, 15 July 2011, ICC-02/05-03/09-176-Red.

⁵ *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).

⁶ *Ibid.*, para. 28.

⁷ 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, 15 July 2011, ICC-02/05-03/09-176-Red, para. 26.

⁸ ICC-02/05-02/09-T-6-ENG, 26 August 2009, p. 23, lines 15-22.

9. The Trial Chamber is already seized of the significant ongoing difficulties which the Defence face in conducting investigations. Because of these difficulties, any material covered by Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence assumes even greater importance, since the Defence is already significantly hampered in its ability to uncover material through its own endeavours.

10. The Defence submit that the Prosecution's request to rely on alternative analogous evidence should be dismissed. The Prosecution do not appear to have explored whether other counter-balancing measures can be taken which are less prejudicial to the rights of the accused. If this is correct, then the request to rely on analogous material is premature.

11. Nevertheless, the Defence note the ambiguity in the Prosecution's recent filings. The Further Update makes no mention of discussions with the First Provider on counter-balancing measures. However, the "Public Note of the Confidential, *Ex Parte* Prosecution only Annex A to the 'Prosecution's Update as Regards the Ongoing Consultations Concerning the Article 54(3)(e) Documents' filed on 13 June 2011" notes that the First Provider would not consent to "disclosure of the relevant documents in question or to the disclosure of the information that they contain".⁹ Thus, it may be that the Prosecution has discussed one possible counter-balancing measure with the First Provider. But this ambiguity makes no difference to the result of this request. Since relying on analogous material is a last resort, the Defence submit that the Prosecution should not be permitted to rely on analogous material until all other counter-balancing measures have been exhausted.

⁹ Public Note of the Confidential, *Ex Parte* Prosecution only Annex A to the 'Prosecution's Update as Regards the Ongoing Consultations Concerning the Article 54(3)(e) Documents' filed on 13 June 2011, 20 September 2011, ICC-02/05-03/09-219, para. 3.

III. REQUEST FOR RELIEF

12. The Defence respectfully request that the Trial Chamber:

- a. reject as premature the Prosecution's request to rely on alternative information; and
- b. issue whatever orders are necessary to ensure the implementation of any other counter-balancing measures the Chamber deems most appropriate to ensure that the rights of the accused are protected and that the trial is fair.

Respectfully Submitted,



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Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

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Dated this 27th Day of September 2011

At The Hague, The Netherlands

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