

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 31 August 2012

TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document

**Public Redacted Version of “Prosecution’s Update on its Consultations
Concerning the Article 54(3)(e) Documents and Application for Protective
Measures”, filed on 27 August 2012**

Sources: Office of the Prosecutor

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

Court to:

The Office of the Prosecutor

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Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

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Defence

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Amicus Curiae

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Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. [REDACTED]¹ Following consultations, the First Provider consented to the inclusion of the further information in the narrative summaries and has submitted revised versions to the Prosecution.
2. [REDACTED].² After further consultations, the Prosecution informs the Chamber that the Second Provider is unable to deviate from its initial position regarding disclosure and is unable to consent to the disclosure of the two documents in any form.
3. [REDACTED] it characterized document DAR-OTP-0128-0691 as containing potentially exculpatory information under Article 67(2) [REDACTED].³ Upon reconsideration of the information contained in the document, the Prosecution [REDACTED] re-characterizes this document as disclosable under Rule 77.

II. Background and Prosecution's Submissions

4. In compliance with the Chamber's Decision No. 259 of 23 November 2011 ("the Decision"),⁴ the Prosecution informed the Chamber on 16 January 2012 that upon further consultation with the source providers, it "secure[d] the agreement of the providers for a more comprehensive disclosure" for eight out the 10 Article 54(3)(e) of the Rome Statute (Statute) documents outstanding. In a letter [REDACTED]⁵ the United Nations Office for Legal Affairs ("the OLA") confirmed that the First

¹ [REDACTED]

² [REDACTED]

³ [REDACTED]

⁴ ICC-02/05-03/09-259.

⁵ [REDACTED]

Provider consents to the disclosure of the narrative summaries of the respective Rule 77 portions,⁶ subject to the condition that certain protective measures are imposed related to the use of the eight documents in court.⁷

5. In addition to the Prosecution's continuing efforts to lift the restrictions in order to disclose to the Defence the Article 54(3)(e) documents,⁸ [REDACTED] the Prosecution [REDACTED] steps [REDACTED] to secure the agreement of the providers to greater disclosure.
6. [REDACTED] the Prosecution sent an electronic message to the OLA [REDACTED]. [REDACTED] the Prosecution sent formal letters to [REDACTED] (via the OLA) requesting the disclosure of the Article 54(3)(e) documents to the Defence. The Prosecution's letter addressed to the First Provider is appended as Confidential *Ex Parte* and Prosecution only Annex "A1" and the Prosecution's letter addressed to the Second Provider is appended as Confidential *Ex Parte* and Prosecution only Annex "A2" to this filing.
7. As regards the First Provider [REDACTED], the Prosecution [REDACTED] sought to include additional information in two narrative summaries [REDACTED].⁹ In a letter [REDACTED] the First Provider consented to the inclusion of the additional information in extended versions of the narrative summaries. The extended versions of the summaries now include the addition information [REDACTED]. The extended versions, together with the accompanying letter from the First Provider, are

⁶ [REDACTED].

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

attached to this filing as Confidential *Ex Parte* and Prosecution only Annex "B".

8. In the circumstances, the Prosecution reiterates its request for the Chamber's authorisation of the protective measures specified by the OLA so that the Prosecution can proceed with a "more comprehensive disclosure"¹⁰ by disclosing the narrative summaries to the Defence.
9. The Prosecution submits that the narrative summaries, including the two extended narrative summaries from the First Provider, fully provide the essential Rule 77 information and will satisfy the interests and rights of the Accused persons. In order that it may disclose these narrative summaries to the Accused, the Prosecution requests the Chamber to authorize the protective measures referred to above.
10. As regards the remaining two documents from the Second Provider, the Prosecution reverted to the Second Provider [REDACTED] and again requested its consent to the disclosure of the two documents, preferably in full but, if that is not possible, in a redacted or summary form. The Prosecution has now received a formal response from the Second Provider [REDACTED], reiterating that it is unable to agree to disclose the two documents in any form (attached herewith as Confidential *Ex Parte* and Prosecution only Annex "A3"). Accordingly, the Prosecution continues to rely on the previously submitted analogous evidence as an appropriate counter-balancing measure, in addition to the fact that the Chamber can access the full and un-redacted versions of the two documents.

¹⁰ Paragraph 18 of ICC-02/05-03/09-259.

11. [REDACTED]¹¹ [REDACTED].¹² Upon reconsideration, the Prosecution [REDACTED] it is more appropriately characterized as Rule 77 information.
12. [REDACTED].¹³ [REDACTED].
13. In light of the above, the Prosecution submits that in accordance with the Chamber's Decision [REDACTED], it has done all that it can do to resolve the outstanding disclosure issues related to the limited number of Article 54(3)(e) documents in the case.
14. For the eight documents from the First Provider, in addition to the analogous evidence previously submitted by the Prosecution, the Prosecution has been able to secure the consent of this provider to enable the disclosure of the two extended narrative summaries of those documents.
15. In light of the repeated unsuccessful discussions with the Second Provider, the Prosecution is of the view that additional efforts are not likely to prove successful. Thus, as regards the document DAR-OTP-0128-0691, which continues to be unavailable to the Defence, the Prosecution submits that [REDACTED] dissipates any prejudice to the Defence resulting from the non-disclosure of this document.
16. The above demonstrates the Prosecution's diligent steps to discharge its disclosure obligations under the Statute and in accordance with the Chamber's Decision. In addition, the disclosure of the summaries of the

¹¹ [REDACTED]

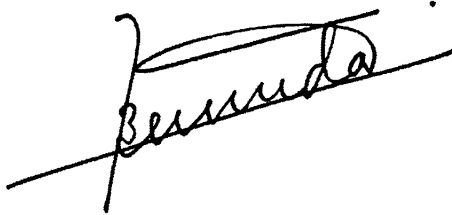
¹² [REDACTED]

¹³ [REDACTED]

relevant excerpts of the eight documents, including the two extended narrative summaries, from the Second Provider, together with the previously submitted analogous documents for all 10 documents, enables the provision of appropriate counter-balancing measures to ensure that the rights of accused persons are protected and that there are no impediments to the trial progressing fairly. Since the Chamber possesses the originals of all outstanding Article 54(3)(e) documents, it also can continue to adequately safeguard the rights of the Accused Persons, should it develop as the trial progresses that the withholding of other information in the documents creates unforeseen prejudice that is not offset by [REDACTED] analogous evidence [REDACTED].

III. Request for receipt of filing as Confidential *Ex Parte*

The Prosecution submits that the classification of the present filing and its annexes as “Confidential – *Ex Parte* – Prosecution Only” is necessary as they relate to confidential information obtained pursuant to Article 54(3)(e), as well as the identity of the information providers. The Prosecution will file a Public Redacted Version of this filing.

A handwritten signature in black ink, appearing to read 'Bensouda', is written over a horizontal line.

Fatou Bensouda
Prosecutor

Dated this 31st August 2012
At The Hague, The Netherlands