

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09

Date: 26 October 2012

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
AND SALEH MOHAMMED JERBO JAMUS**

Public

with Confidential *ex parte* Prosecution Only Annex A

Public redacted version of the "Second Decision on Article 54(3)(e) documents"

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

The Office of the Prosecutor

Ms Fatou Bensouda

Legal Representatives of Victims

Ms Hélène Cissé

Mr Jens Dieckmann

Unrepresented Victims

Counsel for the Defence

Mr Karim A.A. Khan

Mr Nicholas Koumjian

Legal Representatives of Applicants

**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

Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IV (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, issues, pursuant to Articles 54(3)(e), 54(6)(f) of the Rome Statute (“Statute”) and Rules 77, 81(3), 82 and 83 of the Rules of Procedure and Evidence (“Rules”), the following Second Decision on Article 54(3)(e) documents.

I - Background and Submissions

1. The prosecution received in the course of its investigations ten documents under confidentiality agreements pursuant to Article 54(3)(e) of the Statute. It received eight documents from a first information provider (“First Provider”) and two documents from a second information provider (“Second Provider”).
2. On 23 November 2011, the Chamber found, upon review of the ten documents in question, that they would indeed have had to be disclosed to the defence had they not been obtained under Article 54(3)(e) of the Statute. For this reason, the Chamber instructed the prosecution to advise the information providers of the ruling of the Chamber and seek their consent. It further requested the Office of the Prosecutor (“prosecution”) to provide an update to the Chamber concerning the outcome of this consultation.¹
3. On 16 January 2012, the prosecution provided an update on its consultations with the First Provider of Article 54(3)(e) documents. As confirmed by the United Nations Office for Legal Affairs (“OLA”), the First Provider agreed to the disclosure of specific narrative summaries for the eight documents. In the prosecution’s submissions, the narrative summaries capture the Rule 77 content of the eight

¹ Decision on 54(3)(e) Documents, 23 November 2011, ICC-02/05-03/09-259, paragraph 17.

documents. The disclosure of the narrative summaries is subject to a number of conditions by the First Provider.²

4. On 17 January 2012, the prosecution provided a further update on its consultations with the OLA and the Second Provider of Article 54(3)(e) documents. The latter formally declined to approve disclosure of the two documents at issue to the accused persons on security grounds. The prosecution therefore requested the Chamber to rule that the disclosure of the analogous evidence is an adequate substitute for the confidential documents.³
5. [REDACTED].⁴ [REDACTED].⁵
6. On 27 August 2012, the prosecution filed an update on its consultations concerning the Article 54(3)(e) documents and application for protective measures.⁶ The First Provider consented to the inclusion of further information in the narrative summaries of the original documents [REDACTED]. It is submitted that the revised versions of the summaries now reflect these passages.⁷ The Second Provider submitted that it is unable to disclose the two documents in any form.⁸ [REDACTED].⁹

² Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures to Allow Disclosure of Summaries of Eight Documents, 16 January 2012, ICC-02/05-03/09-276-Conf-Exp. A public version of this Update was filed by the prosecution on the same date.

³ Prosecution's Further Update on its Consultations Concerning the Article 54(3)(e) Documents, 17 January 2012, ICC-02/05-03/09-277-Conf-Exp. A public version of the Further Update was filed by the prosecution on the same date.

⁴ Transcript of hearing on 12 July 2012, ICC-02/05-03/09-T-19-CONF ET, page 39, lines 1, 2, 10, 11; ICC-02/05-03/09-387-Conf-Exp, paragraph 10.

⁵ Transcript of hearing on 12 July 2012, ICC-02/05-03/09-T-19-CONF ET, page 49, lines 3 to 10.

⁶ Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp.

⁷ Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp, paragraph 1.

⁸ Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp, paragraphs 2 and 10.

⁹ Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp, paragraphs 12 and 15.

II. Analysis

7. The Chamber notes its approach to disclosure of Article 54(3)(e) documents as set out at paragraphs 14 to 18 of its previous “Decision on Article 54(3)(e) documents”.¹⁰
8. In the present case, it has now become clear that, for the time being, the two information providers do not consent to the disclosure of the documents in full to the defence. Pursuant to Article 64(6)(c) of the Statute and Rule 81(3) of the Rules,¹¹ the Chamber does not have the power to order the disclosure of the material. Accordingly, it now needs to determine which counter-balancing measures can be taken to ensure that the rights of the accused persons are protected and that the trial is fair, in spite of the non-disclosure of the information.
9. As indicated by the Appeals Chamber, especially in circumstances where only a small number of documents are concerned, appropriate counter-balancing measures may include identifying new similar exculpatory material, providing the material in summarised form, stipulating the relevant facts or amending or withdrawing the charges.¹²
10. The Chamber notes that several approaches have been proposed as regards the documents under consideration, namely (1) narrative summaries instead of the original documentation, including verbatim quotes of the relevant areas, (2) admissions of fact, and (3) alternative evidence.

¹⁰ Decision on 54(3)(e) Documents, 23 November 2011, ICC-02/05-03/09-259, paragraphs 14 and 16 and 18.

¹¹ See first sentence.

¹² ICC-01/04-01/06-1486, paragraphs 28 and 44.

a. Documents originating from the First Provider

11. [REDACTED].¹³ The First Provider consented to the inclusion of further information in the narrative summaries of the original documents [REDACTED]¹⁴ and revised versions of the summaries have been made available to the Chamber.¹⁵

12. The Chamber has reviewed the narrative summaries and the revised versions. The Chamber is of the view that information relevant to the preparation of the defence pursuant to Rule 77 of the Rules is now properly reflected in the summaries.

13. [REDACTED]¹⁶ [REDACTED].

14. Therefore, the Chamber does not decide at this stage whether disclosure of the narrative summaries together with the alternative evidence are sufficient counter-balancing measures, in the sense that they ensure that the rights of the accused persons are protected and that the trial is fair. Instead, the prosecution is directed to reconsider the possibility of entering into admissions of fact, which should be as comprehensive as possible, with regard to the eight documents obtained from the First Provider.

15. That said, and in order to expedite the proceedings pursuant to Article 64(2) of the Statute, the Chamber has reviewed the [REDACTED] set out by the First Provider

¹³ Transcript of hearing on 11 July 2012, ICC-02/05-03/09-T-19-CONF ET, page 40 lines 8 to 15.

¹⁴ Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp.

¹⁵ Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp, paragraph 1.

¹⁶ Transcript of hearing on 12 July 2012, ICC-02/05-03/09-T-19-CONF ET, page 39, lines 1, 2, 10, 11; ICC-02/05-03/09-387-Conf-Exp, paragraph 10.

related to the use in court of the narrative summaries of the eight documents, which are the following:

- i. [REDACTED]
- ii. [REDACTED]
- iii. [REDACTED]
- iv. [REDACTED]
- v. [REDACTED]
- vi. [REDACTED]
- vii. [REDACTED]¹⁷

16. In the view of the Chamber, the [REDACTED] listed above are acceptable in the sense that they provide for a sufficient degree of protection to the information received under confidentiality agreements whilst they ensure, at the same time, appropriate disclosure and meaningful use of the information during the trial.

b. Documents originating from Second Provider

17. [REDACTED].¹⁸

18. The Chamber notes that the Second Provider still refuses to disclose the two documents in any form.¹⁹ However, the prosecution has advanced an admission of facts, which, when considered together with the alternative evidence,²⁰ would dissipate any prejudice to the defence.²¹ [REDACTED]²²

[REDACTED]

¹⁷ ICC-02/05-03/09-276-Conf-Exp, paragraph 8.

¹⁸ Transcript of hearing on 11 July 2012, ICC-02/05-03/09-T19-CONF ET page 49 lines 3 to 10.

¹⁹ Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp, paragraphs 2 and 10.

²⁰ Annex B to the 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, 11 July 2011, ICC-02/05-03/09-176-Conf-Exp-AnxB.

²¹ Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp, paragraphs 15 and 16.

²² Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp, paragraphs 12 and 15.

19. The Chamber considers that this admission of facts assists in ensuring the fairness of the trial. The Chamber has assessed the undisclosed material and the suggested concession along with the alternative evidence, and it finds that the latter represents a sufficient counterbalance. The concession is sufficiently broad in scope and, together with the alternative evidence, does cover for the essential elements contained in the confidential documents. The defence should be able to rely on this admission from the prosecution rather than having to seek to establish the facts through the unavailable material. Indeed, and even though the admission is not binding on the Chamber, the defence is put in a more favorable evidential position than it would have been otherwise.

20. Nonetheless, as proceedings move forward, the Chamber will continue to review the adequacy of these measures as necessary for purposes of protection of the rights of the accused.

21. For the foregoing reasons, the Chamber hereby:

(i) **Orders** the prosecution to consider entering into admissions of facts, as comprehensive as possible, in relation to the eight documents received from the First Provider under confidentiality agreements, and inform the Chamber of such admissions by 29 October 2012;

(ii) **Grants** the protective measures requested by the First Provider to the use of the narrative summaries of the eight documents received under confidentiality agreements;

(iii) **Orders** the prosecution to:

- (i) inform the defence in writing of the [REDACTED] related to the use of the eight documents;
- (ii) immediately disclose the narrative summaries to the defence;
- (iii) inform the Legal Representatives of victims about this Order and of the [REDACTED] which are hereby given effect, in the event the summaries are sought to be submitted as evidence.

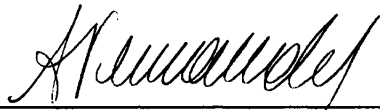
(iv) Decides that, at this stage, the counter-balancing measures proposed by the prosecution *in lieu* of full disclosure of the documents it has received from the Second Provider are sufficient.

(v) Directs the prosecution to communicate to the defence its admission of facts as set out in paragraph 18 of the present Decision.

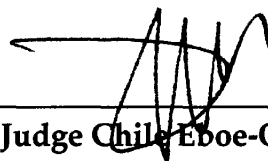
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fernández de Gurmendi



Judge Chile Eboe-Osuji

Dated this 26 October 2012

At The Hague, the Netherlands