

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 June 2013

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 Redacted Version
of the “Third 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
Mr Adebawale Omofade

Counsel for the Defence

Mr Karim A.A. Khan
Mr Nicholas Koumjian

Legal Representatives of Victims

Ms Hélène Cissé
Mr Jens Dieckmann

Unrepresented Victims

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

Mr Herman von Hebel

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Others
Section**

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 Article 54(3)(e) and (f) of the Rome Statute ("Statute") and Rules 77, 81(3), 82 and 83 of the Rules of Procedure and Evidence ("Rules"), the following Third Decision on Article 54(3)(e) documents.

I - Background and Submissions

1. The prosecution has 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 decided, 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.¹ For this reason, the Chamber instructed the prosecution to seek the consent of the information providers, advising them of the ruling of the Chamber. It further requested the Office of the Prosecutor ("prosecution") to provide an update to the Chamber concerning the outcome of this consultation.²
3. Accordingly, on 16 January 2012, the prosecution provided an update on its consultations with the First Provider of Article 54(3)(e) documents.³ As confirmed by the United Nations Office for Legal Affairs ("the OLA"), the First Provider agreed to the disclosure of specific narrative summaries for the eight documents. In

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

² *Ibid.*

³ [REDACTED]

the prosecution's submissions, the narrative summaries capture the Rule 77 content of the eight documents. The inspection of the narrative summaries is subject to a number of conditions by the First Provider.⁴

4. [REDACTED]⁵
5. 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] and [REDACTED] as requested by the Chamber. It is submitted that the revised versions of the summaries now reflect these passages.⁷
6. On 19 October 2012, the Chamber granted the protective measures requested by the First Provider to the use of the narrative summaries and instructed the prosecution to disclose those narrative summaries to the defence.⁸ [REDACTED].⁹ In addition, the Chamber decided that 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.¹⁰

⁴ [REDACTED]

⁵ [REDACTED]

⁶ [REDACTED]

⁷ [REDACTED]

⁸ Second Decision on Article 54(3)(e) documents, 19 October 2012, ICC-02/05-03/09-407-Conf, paragraphs 21(ii) and (iii).

⁹ *Ibid.*, paragraph 5.

¹⁰ *Ibid.*, paragraph 21.

7. The Chamber noted that the prosecution had failed to advance admissions of fact and directed it to reconsider the possibility of entering into such admissions, which should be as comprehensive as possible.¹¹

8. [REDACTED].¹²

9. [REDACTED].¹³

II. Analysis

10. The Chamber recalls 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”.¹⁴

11. In the present case, it has now become clear that the First Provider does 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, 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.

12. 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

¹¹ ICC-02/05-03/09-407-Conf, paragraph 21(i).

¹² [REDACTED]

¹³ [REDACTED]

¹⁴ Decision on 54(3)(e) documents, 23 November 2011, ICC-02/05-03/09-259, paragraphs 14 to 18.

material in summarised form, stipulating the relevant facts, or amending or withdrawing the charges.¹⁵

13. The Chamber notes that a variety of 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.

14. The Chamber has reviewed the information reflected [REDACTED]¹⁶ ¹⁷ and, [REDACTED],¹⁸ it has analysed whether these documents, taken together, capture the Rule 77 value of the original documents and offer a sufficient counterbalance *in lieu* of non-disclosure.

15. In this respect, the Chamber is of the view that the aforementioned information that is material to the defence's preparation is also reflected in the confidential documents. The admissions of fact, together with the narrative summaries and the alternative evidence are sufficient counter-balancing measures in the sense that they ensure that the rights of the accused persons are protected at this stage of the proceedings.

16. In particular, the latest proposed admissions of fact assist in ensuring the fairness of the trial. The defence should be able to rely on these admissions from the prosecution rather than having to seek to establish the facts through the unavailable

¹⁵ 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, paragraphs 28 and 44.

¹⁶ [REDACTED]

¹⁷ [REDACTED]

¹⁸ [REDACTED]

material. Indeed, and even though the admissions are not binding on the Chamber, the defence is put in a more favourable evidential position than it would have been otherwise.

17. 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.

18. For the foregoing reasons, the Chamber hereby:

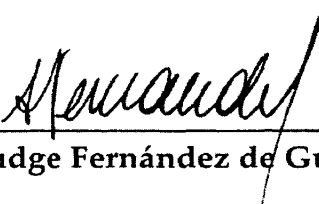
(a) decides that, at this stage, the counter-balancing measures ordered by the Chamber *in lieu* of full disclosure of the documents, which the prosecution received from the First Provider on the basis of confidentiality agreements pursuant to Article 54(3)(e) of the Statute, are sufficient.

(b) directs the prosecution to immediately communicate to the defence its admissions of facts as set out in the Annex to the present Decision.

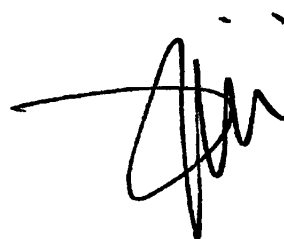
Done in both English and French, the English version being authoritative.

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

Judge Joyce Aluoch

A handwritten signature in black ink, appearing to read 'Fernández de Gurmendi', written over a horizontal line.

Judge Fernández de Gurmendi

A handwritten signature in black ink, appearing to read 'Eboe-Osuji', written over a horizontal line.

Judge Chile Eboe-Osuji

Dated this 21 June 2013

At The Hague, The Netherlands