

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 28 August 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

**Decision on Protection Measures Requested in Prosecution's Update on
Cooperation Issues**

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. Adebowale Omofade

Counsel for the Defence

Mr. Karim A.A. Khan

Mr. Nicholas Koumjian

Legal Representatives of Victims

Ms. Hélène Cissé

Mr. Jens Dieckmann

Legal Representatives of Applicants

Unrepresented Victims

**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

Deputy Registrar

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*, after considering Articles 54(1), 54(3)(e), 54(3)(f) and 67(2) of the Rome Statute (“Statute”), Rules 77, 81, 82 and 83 of the Rules of Procedure and Evidence (“Rules”) and Regulation 23 *bis* of the Regulations of the Court (“Regulations”), issues the following Decision on Protection Measures Requested in Prosecution’s Update on Cooperation Issues.

I. Background and Submissions

1. On 2 May 2013, the Office of the Prosecutor (“prosecution”) filed the “Prosecution’s Update on Cooperation Issues” (“Request”).¹
2. In the Request, the prosecution informs the Chamber that it has been in correspondence with the [REDACTED] (“Information Provider”) regarding a request for access to materials which could be of a potentially exculpatory nature or information that could be material to the preparation of the defence.² Among other documents addressed in this correspondence, the prosecution indicates that the Information Provider identified: [REDACTED].³ The prosecution indicates that it was provided with narrative summaries of these documents (“Summaries”)⁴ and, subject to the condition that certain specified protective measures are imposed related to their use, the Information Provider is prepared to consent to disclosing the Summaries to the defence.⁵

¹ ICC-02/05-03/09-468-Conf-Exp with four annexes.

² Request, ICC-02/05-03/09-468-Conf-Exp, paragraphs 3-5.

³ Request, ICC-02/05-03/09-468-Conf-Exp, paragraph 5. *See also* Annex A4 to the Request, ICC-02/05-03/09-468-Conf-Exp-AnxA4.

⁴ Annex A4 to the Request, ICC-02/05-03/09-468-Conf-Exp-AnxA4.

⁵ Request, ICC-02/05-03/09-468-Conf-Exp, paragraph 6.

3. The prosecution submits that it considers the Summaries to contain material that is potentially exculpatory and/or material to the preparation of the defence.⁶ Consequently, the prosecution requests the Chamber to “authorise the protective measures” as specified by the Information Provider prior to disclosure of the Summaries to the defence.⁷

II. Analysis

4. From the Request and its annexes, it is clear that the prosecution was given the Summaries from the Information Provider with conditions of confidentiality. However, the prosecution: (i) does not inform the Chamber that the Summaries were obtained “solely for the purpose of generating new evidence” and (ii) because the Information Provider did not provide the full documents at issue to the prosecution, the Summaries constitute the entirety of the documents in the prosecution’s possession.
5. As such, the Chamber does not know if the protective measures sought are conditions of consent for documents protected by Article 54(3)(e) of the Statute or if the Request seeks relief under the Chamber’s authority to provide for the protection of confidential information in disclosable material more generally.⁸ This distinction may affect whether the Chamber has discretion to order disclosure despite the existence of a confidentiality agreement between the prosecution and an information provider.
6. Irrespective of whether the Summaries are covered by Article 54(3)(e) of the Statute, the Chamber is nevertheless satisfied that the conditions set out by the Information

⁶ Request, ICC-02/05-03/09-468-Conf-Exp, paragraph 7.

⁷ Request, ICC-02/05-03/09-468-Conf-Exp, paragraph 9. The prosecution references the protective measures set out in Annex A1 of the Request, but the protective measures themselves are actually set out in Annex A3 of the Request.

⁸ See Articles 64(2), 64(3)(c) and 64(6)(c) of the Statute and Rule 81(4) of the Rules.

Provider in the present case are appropriate measures of protection. The conditions of disclosure are the following:

- i. [REDACTED];
- ii. [REDACTED];
- iii. [REDACTED];
- iv. [REDACTED];
- v. [REDACTED];
- vi. [REDACTED];
- vii. [REDACTED];
- viii. [REDACTED];
- ix. [REDACTED];
 - (a) [REDACTED]
 - (b) [REDACTED].⁹

7. The Chamber notes that the defence will receive full access to the Summaries, which do not indicate the precise source of the information but include general references as to the source of the information contained therein.¹⁰ For this reason, the Chamber does not consider that the defence is unduly prejudiced by the proposed disclosure but invites the prosecution to consider whether any admissions of fact or alternative evidence could be used with respect to the Summaries. Furthermore, when disclosing the Summaries, the prosecution is ordered to include an explanatory note which identifies which portions of the Summaries it considers to be exculpatory. Moreover, as proceedings move forward, the Chamber will continue to review the adequacy of the information on the source of the Summaries as is necessary for purposes of protection of the rights of the accused.¹¹

8. The Chamber notes that this decision is limited to disclosure of the Summaries, as the entirety of the documents are not in the prosecution's possession at this time. However, the Chamber reminds the prosecution of its duties under Article 54(1) of the Statute to establish the truth and take appropriate measures to ensure effective

⁹ Request, ICC-02/05-03/09-468-Conf-Exp, paragraph 8; Annex A3 to the Request, ICC-02/05-03/09-468-Conf-Exp-AnxA3, pages 3-4.

¹⁰ [REDACTED].

¹¹ See ICC-02/05-03/09-442-Red2, paragraph 17. See also Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, paragraph 149.

investigation. As such, the Chamber expects the prosecution to continue making reasonable efforts to seek the Information Provider's consent for the full versions of the documents to be disclosed to the prosecution and defence.

9. Finally, the Chamber notes the prosecution's submission on 2 May 2013 that it "will file a Public Redacted Version of this filing".¹² However, to date, no public redacted version of the Request has been filed in the case record. Pursuant to Regulation 23*bis* of the Regulations, the prosecution is ordered to file a public redacted version of the Request.
10. For the foregoing reasons, the Chamber hereby:
 - (a) **grants** the protective measures requested by the Information Provider for the disclosure of the Summaries by the prosecution to the defence under the conditions set out in paragraphs 6 and 7 of the present Decision;
 - (b) **orders** the prosecution to immediately disclose the Summaries to the defence;
 - (c) **directs** the prosecution to continue to make reasonable efforts to seek the Information Provider's consent for the full versions of the documents to be disclosed to the prosecution and defence; and
 - (d) **orders** the prosecution to file, within seven days of notification of the present Decision, a public redacted version of the Request.

¹² Request, ICC-02/05-03/09-468-Conf-Exp, paragraph 10.

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



Judge Joyce Aluoch



Judge Silvia Fernández de Gurmendi



Judge Cile Eboe-Osuji

Dated 28 August 2013

At The Hague, The Netherlands