

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-03/09  
Date: 23 November 2011

**TRIAL CHAMBER IV**

**Before:** Judge Joyce Aluoch, Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Silvia Fernández de Gurmendi

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF  
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN  
AND SALEH MOHAMMED JERBO JAMUS***

**Public**

**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**

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

**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**

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**Registrar**

Ms 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) and 67(2) of the Rome Statute ("Statute") and Rule 77 of the Rules of Procedure and Evidence ("Rules"), the following Decision on Article 54(3)(e) documents.

## **I - Background and Submissions**

1. During the status conference held on 23 June 2010, the Office of the Prosecutor ("prosecution") informed the Single Judge of Pre-Trial Chamber I that it was engaged in efforts with an information provider ("First Provider") to secure the lifting of Article 54(3)(e) restrictions on seven documents, one of which was potentially exonerating and subject to Article 67(2) of the Statute, and six of which were considered to be material for the preparation of the defence pursuant to Rule 77.<sup>1</sup> The prosecution further informed the Single Judge that it would be able to disclose the Article 67(2) document, and that in the event that it was unable to secure the consent of the provider to lift the restrictions on the six Rule 77 documents, it would be able to provide appropriate alternative or analogous material that it had previously disclosed in the case of *The Prosecutor v. Abu Garda* ("*Abu Garda* case").<sup>2</sup>
2. On 22 October 2010, the prosecution informed the Single Judge that the matter of the Article 54(3)(e) restrictions was unresolved. However, the prosecution stated that the First Provider was in principle "[...] 'agreeable to the production and disclosure of a narrative summary containing the passages' of relevant

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<sup>1</sup> ICC-02/05-03/09-T-5-ENG, page 9, line 8 to page 10, line 2.

<sup>2</sup> ICC-02/05-03/09-T-5-ENG, page 9, line 8 to page 10, line 5.

information.”<sup>3</sup> As the prosecution considered it unlikely that arrangements with this provider with respect to “eight” documents<sup>4</sup> would be complete prior to the disclosure deadline, it submitted a list of alternative evidence that had previously been disclosed to the defence in this case.<sup>5</sup>

3. On 14 April 2011, the prosecution informed the Chamber that it was working to finalise an arrangement with the First Provider concerning the eight documents which contained potentially exonerating information under Article 67(2) of the Statute or which fell under Rule 77 of the Rules.<sup>6</sup> The information provider indicated that “in principle, it was agreeable to disclosure of a narrative summary containing the relevant information on the condition that the summary would be kept confidential by the Defence and used only in closed session”.<sup>7</sup>
4. During the 19 April 2011 status conference,<sup>8</sup> the prosecution updated the Chamber on its efforts to secure the lifting of the Article 54(3)(e) restrictions. The prosecution alerted the Chamber to an error in the 22 October 2010 filing in that the prosecution intended to indicate that there were ten rather than eight documents which were subject to Article 54(3)(e) restrictions.<sup>9</sup> It further clarified that only one of the ten documents is potentially exculpatory pursuant to Article 67(2) and that the remainder of the documents are subject to Rule 77 of the Rules.<sup>10</sup> Moreover, it

<sup>3</sup> Prosecution’s Provision of Alternative Evidence, 22 October 2010, ICC-02/05-03/09-83-Conf, paragraph 3.

<sup>4</sup> Although the prosecution referred to seven documents during the 23 June 2010 status conference (see paragraph 1 in this decision), in reality the first information provider has submitted eight documents in total. The second information provider has submitted two documents and hence the total number of 54(3)(e) documents is currently ten.

<sup>5</sup> ICC-02/05-03/09-83-Conf, paragraph 4.

<sup>6</sup> Prosecution’s Response to the Trial Chamber’s Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, 14 April 2011, ICC-02/05-03/09-131, paragraph 18.

<sup>7</sup> ICC-02/05-03/09-131, paragraph 18.

<sup>8</sup> ICC-02/05-03/09-T-10, page 26, line 4 to page 27, line 17.

<sup>9</sup> ICC-02/05-03/09-T-10, page 26, lines 4 – 21.

<sup>10</sup> ICC-02/05-03/09-T-10, page 26, lines 12 – 24.

reaffirmed that the information provider was, in principle, agreeable to the lifting of the restrictions.<sup>11</sup>

5. On 9 May 2011 the prosecution informed the Chamber that consultations with the First Provider concerning the full disclosure of eight documents were still ongoing and that it was still awaiting a response from the provider of the additional two documents ("Second Provider").<sup>12</sup> In respect of the latter, it indicated that it sent a formal letter requesting the lifting of the restrictions imposed pursuant to Article 54(3)(e) of the Statute, followed by a series of reminders.<sup>13</sup>
6. On 13 June 2011, pursuant to the Chamber's 30 May 2011 order,<sup>14</sup> the prosecution stated that consultations with the First Provider concerning the lifting of the Article 54(3)(e) restrictions on the eight documents were ongoing.<sup>15</sup> In respect of the two documents from the Second Provider, the prosecution appended a written response from the information provider.<sup>16</sup> The prosecution indicated its intention to make a separate filing to the Chamber proposing a solution to the matter.<sup>17</sup>
7. On 8 July 2011, the prosecution informed the Chamber that while it continued its efforts to persuade the providers to lift the restrictions, as of that date, the

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<sup>11</sup> ICC-02/05-03/09-T-10, page 26, line 4 to page 27, line 1.

<sup>12</sup> Prosecution's Consolidated Filing, Pursuant to the Chamber's Oral Decisions dated 19 April 2011 on (i) evidence to be relied on at trial, (ii) an update on article 54(3)(e) lifting procedures and (iii) an update on issues concerning witnesses Protection, 9 May 2011, ICC-02/05-03/09-142, paragraph 9.

<sup>13</sup> ICC-02/05-03/09-142, paragraph 9.

<sup>14</sup> Order requesting submissions on procedures to facilitate the fair and expeditious conduct of the proceedings following the Joint Submission of 16 May 2011, 30 May 2011, ICC-02-05-03/09-155, paragraph 5.

<sup>15</sup> Prosecution's Update as Regards the Ongoing Consultations Concerning the Article 54(3)(e) Documents , 13 June 2011, ICC-02-05-03/09-161, paragraph 3.

<sup>16</sup> ICC-02-05-03/09-161, paragraph 4; ICC-02-05-03/09-161 Conf-ExpAnx A; 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.

<sup>17</sup> ICC-02-05-03/09-161, paragraph 5.

restrictions are still applicable.<sup>18</sup> The prosecution indicated that in the event that both providers ultimately decided not to lift the restrictions, it would explore the possibility of them agreeing to counter-balancing measures “such as disclosing relevant documents in a redacted or anonymously summarized form or disclosing verbatim excerpts of the effected values from the non-disclosable documents.”<sup>19</sup> Nonetheless, the prosecution provided the Chamber with what it considered “analogous or alternative” evidence previously disclosed to the defence in lieu of the ten documents subject to the Article 54(3)(e) restrictions and requested that the Chamber authorise their use (“Request”).<sup>20</sup>

8. On 9 August 2011, the defence filed its joint response to the Request (“Joint Defence Response”). It recalled the Appeals Chamber’s jurisprudence that if an information provider does not consent to disclosure to the defence, the Chamber “[...] ‘will then have to determine whether and, if so, 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.’”<sup>21</sup> Furthermore, it stressed that according to the Appeals Chamber the alternative evidence “[...] ‘require(s) an assessment by a Chamber of the adequacy of the alternative evidence proposed by the Prosecutor [...]’”<sup>22</sup> Finally, the defence recalled that when presented with the same documents provided by the First Provider in the *Abu Garda* case, the Single

<sup>18</sup> 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, 8 July 2011, ICC-02-05-03/09-176-Red, paragraph 17.

<sup>19</sup> ICC-02/05-03/09-176-Red, paragraph 26.

<sup>20</sup> ICC-02-05-03/09-176-Red, paragraph 32.

<sup>21</sup> 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, paragraph 7, citing *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, paragraph 48.

<sup>22</sup> ICC-02/05-03/09-196, paragraph 9, citing ICC-01/04-01/06-1486, paragraph 95.

Judge noted that ‘the so-called principle of analogous information, represents the very last resort’.<sup>23</sup>

9. In view of the cited jurisprudence, the defence submitted that the prosecution has not diligently pursued a counter-balancing strategy that has the “least negative impact on the rights of the accused”.<sup>24</sup> In support of this assertion, the defence recalls that the prosecution has had “extremely limited success” since 2009 in the context of the *Abu Garda* case in obtaining the consent of the First Provider to lift the Article 54(3)(e) restrictions. Similarly, the prosecution has had an equivalent lack of success since 2010 in obtaining consent from the Second Provider with regards to the other two documents. The prosecution should have commenced negotiations with the information providers on the possibility of using the counter-balancing measures set out in paragraph 26 of the Request.<sup>25</sup> The defence observed that rather than taking this step, the prosecution proceeded to request authorisation for the “last resort option” of reliance on analogous alternative evidence.<sup>26</sup> It is submitted that this course of action bypasses a “clear hierarchy of counter-balancing measures”.<sup>27</sup>

10. The defence asserted that the significant difficulties in conducting investigations in this case have a bearing upon the Request. First, given the said difficulties, the information contained within the two Article 67(2) documents is potentially of

<sup>23</sup> ICC-02/05-03/09-196, paragraph 9, citing ICC-02/05-02/09-T-6-ENG, 26 August 2009, page 23, lines 15-22.

<sup>24</sup> ICC-02/05-03/09-196, paragraph 14.

<sup>25</sup> ICC-02/05-03/09-196, paragraph 12. The counter-balancing measures identified in paragraph 26 of the Request are “disclosing relevant documents in a redacted or anonymously summarized form or disclosing verbatim excerpts of the effected values from the non-disclosable documents.”

<sup>26</sup> ICC-02/05-03/09-196, paragraph 13.

<sup>27</sup> ICC-02/05-03/09-196, paragraph 13.

greater value in the case.<sup>28</sup> Second, the contextual information contained within the ten documents may provide the defence with new investigative leads.<sup>29</sup>

11. The defence requests the Chamber to: (i) reject the prosecution request to rely on analogous alternative material; (ii) order the prosecution to immediately engage in discussion with the information providers as to the possibility of providing redacted versions, anonymous summaries and/or verbatim excerpts of the ten documents and update the Chamber as to the status of these documents; and (iii) order the prosecution to prepare stipulations, for consideration by the defence, as to the relevant information arising from the two documents of a potentially exculpatory nature.<sup>30</sup>

12. On 11 August 2011, the prosecution informed the Chamber that the First Provider confirmed that it “is not in a position to consent to disclosure”.<sup>31</sup> Hence, the prosecution reiterated its request that analogous evidence previously disclosed to the defence is considered sufficient to comply with its disclosure obligations.<sup>32</sup>

13. In its response filed on 27 September 2011, the defence submitted that the Chamber should reject the prosecution’s request to rely on alternative information as premature. In addition, it requested the Chamber to order the implementation of any other counter-balancing measures to ensure that the rights of the accused are protected and that the trial is fair.<sup>33</sup>

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<sup>28</sup> ICC-02/05-03/09-196, paragraph 15.

<sup>29</sup> ICC-02/05-03/09-196, paragraph 14.

<sup>30</sup> ICC-02/05-03/09-196, paragraph 17.

<sup>31</sup> Prosecution’s Further Update on Article 54(3)(e) Documents, 11 August 2011, ICC-02/05-03/09-197-Red, paragraph 4.

<sup>32</sup> ICC-02/05-03/09-197-Red, paragraph 6.

<sup>33</sup> Defence Response to the “Public Redacted Version of “Prosecution’s Further Update on Article 54(3)(e) Documents”, filed on 11 August 2011”, 27 September 2011, ICC-02/05-03/09-225, paragraph 12.



## II - Analysis and Conclusion

14. A fundamental component of the right of the accused to a fair trial includes the right to disclosure of potentially exculpatory material. This is established not only by the provisions of Article 67(2) of the Statute, but also by (a review of) the relevant international jurisprudence,<sup>34</sup> and particularly that of the European Court of Human Rights ("ECtHR")<sup>35</sup> and the International Criminal Tribunal for the Former Yugoslavia.<sup>36</sup>

15. As set out by the Appeals Chamber, accepting material on the condition of confidentiality pursuant to Article 54(3)(e) of the Statute may create tensions with the prosecution's disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules. By entering into such confidentiality agreements, the Prosecutor may place himself in a position where he is either unable to disclose material that he normally would have to disclose, or he breaches an agreement entered into with the provider of the material in question.<sup>37</sup>

16. The Appeals Chamber of this Court has set out the approach that is to be taken with regard to material covered by Article 54(3)(e) of the Statute, as follows:

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<sup>34</sup> See for example ECtHR, *V. v Finland*, no 40412/98, Judgment of 24 July 2007, paragraph 74, in which the European Court of Human Rights stated that "both [the] prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party [...] prosecution authorities [must] disclose to the defence all material evidence in their possession for or against the accused." See also ECtHR, *Jasper v United Kingdom*, no 27052/95, Judgment of 16 February 2000.

<sup>35</sup> See for instance ECtHR, *Jespers v Belgium*, no 8403/78, Commission's report of 14 December 1981, DR 27, paragraph 58. See also Article 67 (2) of the Statute.

<sup>36</sup> See for example *The Prosecutor v. Krstić*, IT-98-33-A, Judgment, 19 April 2004, paragraph 180. "The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached".

<sup>37</sup> 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, paragraph 43.

48. In situations such as the present, where the material in question was obtained on the condition of confidentiality, the Trial Chamber (as well as any other Chamber of this Court, including this Appeals Chamber) will have to respect the confidentiality agreement concluded by the Prosecutor under article 54(3)(e) of the Statute and cannot order the disclosure of the material to the defence without the prior consent of the information provider (see article 64(6)(c) of the Statute and rule 81(3), first sentence, of the Rules of Procedure and Evidence). **Instead, the Chamber will have to determine, in *ex parte* proceedings open only to the Prosecutor, whether the material would have had to be disclosed to the defence, had it not been obtained under article 54(3)(e) of the Statute. If the Chamber concludes that this is the case, the Prosecutor should seek the consent of the information provider, advising the provider of the ruling of the Chamber. If the provider of the material does not consent to the disclosure to the defence, the Chamber, while prohibited from ordering the disclosure of the material to the defence, will then have to determine whether and, if so, 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 nondisclosure of the information.**<sup>38</sup>

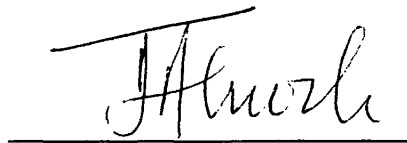
17. Upon review of the ten documents in question the Chamber has concluded that they would indeed have had to be disclosed to the defence, had they not been obtained under Article 54(3)(e) of the Statute. For this reason, the Chamber instructs the prosecution to seek the consent of the information providers, advising the providers of the current ruling of the Chamber. The prosecution is to provide an update to the Chamber concerning the outcome of this consultation no later than 16.00 on 16 January 2012.

18. If the prosecution is unable to secure the agreement of the providers for a more comprehensive disclosure, the Trial Chamber will need to consider whether a fair trial may still be conducted in the absence of the disclosure of the potentially exculpatory or Rule 77 material to the defence.

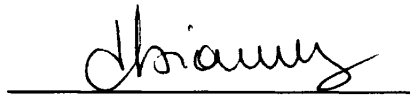
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<sup>38</sup> ICC-01/04-01/06-1486, paragraph 48 [emphasis added].

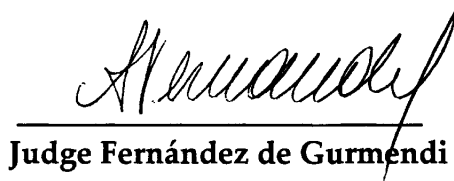
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**Judge Joyce Aluoch**

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**Judge Fatoumata Dembele Diarra**

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**Judge Fernández de Gurmendi**

Dated this 23 November 2011

At The Hague, the Netherlands