

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 June 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

With Confidential *Ex Parte* - Prosecution and Defence only Annexes A and B

**Prosecution's Submission of Additional Details and Information on the Evidence
Disclosed to the Defence Pursuant to Article 67(2) of the Statute or Provided
Pursuant to Rule 77 of the Rules of Procedure and Evidence**

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

Counsel for the Defence

Mr. Karim A. A. Khan QC

Mr. Nicholas Koumjian

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. In compliance with Trial Chamber IV's ("Chamber") "Order to the prosecution for information on potentially exculpatory evidence or Rule 77 material" of 24 May 2012",¹ the Office of the Prosecutor ("OTP" or "Prosecution") submits to the Chamber additional details and information on the evidence disclosed to date to the defence for Messrs Abdallah Banda Abakaer Nourain and Saleh Mohamed Jerbo Jamus ("Defence") pursuant to Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence ("Rules").

I. Background

2. On 24 May 2012, the Chamber ordered the Prosecution to submit, no later than 4 June 2012, a list of items of evidence provided to the defence under Article 67(2) or Rule 77. The Chamber's order was to enable it to fully assess the overall position as regards disclosure.²

II. Organization of the Materials being Submitted

3. The Prosecution attaches as Annex "A" to this filing a chart containing details of the material disclosed to the defence to date pursuant to Article 67(2). A further chart containing the material provided to the defence to date pursuant to Rule 77 is attached as Annex "B".
4. For ease of reference, the charts attached as Annex A and Annex B identify:
 - (i) In column 1, the sequential number of the document in the chart;
 - (ii) In column 2, the ERNs of the disclosed documents;
 - (iii) In column 3, the title of the disclosed documents;
 - (iv) In column 4, the date of the document;
 - (v) In column 5, the concise summary of the document;
 - (vi) In column 6, the disclosure batch number and date;
 - (vii) In column 7, redactions, if any;

¹ ICC-02/05-03/09-336

² ICC-02/05-03/09-336 at para. 2

- (viii) In column 8, the relevance: information that shows or tends to show the innocence of the accused, mitigate the guilt of the accused, or affect the credibility of prosecution – contained in Annex A (“Article 67 (2)” or “PEXO material”) and the relevance: material for the preparation of the defence- contained in Annex B (“Rule 77 material”);
- (ix) In column 9, translation status³;
- (x) In column 10, the level of confidentiality.

III. Prosecution’s General Observations on the Article 67(2) and Rule 77 Disclosure

5. In addition to the information provided in the annexes, the Prosecution informs the Chamber of the following:
6. First, in addition to the material that has already been disclosed to the Defence and clearly marked as falling under Article 67(2) and Rule 77, the Prosecution has also disclosed a considerable amount of incriminatory material⁴ - i.e. material which the Prosecution proposes to rely on at the trial. This incriminatory material also contains information that falls under Article 67(2) and Rule 77. This information has not been so identified because the material was also deemed to contain incriminatory material.⁵
7. Second, the Prosecution no longer seeks to rely on certain material already disclosed to the Defence as incriminatory material⁶. However, these items remain disclosed to the Defence with the classification “INCRIM”⁷ and in the Prosecution’s assessment, also contain information that falls under Article 67(2) or Rule 77. In the week

³ With minor exceptions (e.g. where the Prosecution obtained a translation of the document when it was anticipated that it would rely on it at the trial), all of the material disclosed pursuant to Article 67(2) or Rule 77 has been disclosed in the original language in which the material was obtained – usually English. Transcripts of witness interviews have been disclosed in the languages in which the interviews were conducted – usually English and the language used by the witness. The Prosecution notes that its obligation to disclose material in a language that the Accused persons speak and understand (pursuant to Rule 76) does not extend to material disclosed pursuant to Article 67(2) and Rule 77.

⁴ To date, the Prosecution has disclosed to defence approximately 860 items (6259 pages) of incriminatory evidence through 23 batches.

⁵ For instance, see the statement of Witness DAR-OTP-P-0419 (the first statement of witness DAR-OTP-P-0419; DAR-OTP-0165-0489 disclosed through INCRIM package 2 on 8 July 2010); the PEXO elements in the statement DAR-OTP-0165-0489, inter alia, at page DAR-OTP-0165-0498 para. 45; page DAR-OTP-0165-0500 at paras: 53-55.

⁶ See: ICC-02/05-03/09-189-AnxA - Prosecution’s Updated List of Witnesses filed on 5 August 2011; ICC-02/05-03/09-T-12-ENG page 5 lines 19 to 25 and page 6 lines 1 to 19.

⁷ These include the statements of certain witnesses, including Witnesses DAR-OTP-P-0447 and DAR-OTP-P-0421.

commencing 4 June 2012, the Prosecution will re-disclose the relevant material to the Defence, now re-classified as disclosure pursuant to Article 67(2) or Rule 77, as the case may be.

8. Third, 10 documents that have been identified as falling under either Article 67(2) or Rule 77 have not yet been disclosed because they are the subject of an outstanding determination by the Chamber.⁸
9. Fourth, the Prosecution has conducted a further review of the material in its possession specifically in light of a request by the Defence (dated 19 July 2011) for the disclosure of certain information. While the Prosecution has disclosed a number of items pursuant to this request, the Prosecution is following up a number of other items with third parties. It is anticipated this effort will also generate further disclosure to the Defence pursuant to Article 67(2) and/or Rule 77.⁹
10. Fifth, some of the material already disclosed to the Defence (either as incriminatory, Article 67(2) or Rule 77 material) contains certain redactions which have been authorized by the Chamber pursuant to Rules 81(2) or 81(4) of the Rules¹⁰. The Prosecution is aware that these redactions may also conceal information which falls under Article 67(2) or Rule 77 and has been reviewing the redactions in order to determine whether there are any changes in the circumstances that led to them being authorised by the Chamber. Where such redactions are no longer deemed necessary, the Prosecution will apply to the Chamber for them to be lifted and proceed to re-disclose the material to the Defence in unredacted form. In this regard, the Prosecution refers the Chamber to its *ex parte* filing also of 4 June 2012.
11. Sixth, the amount of information disclosed pursuant to Article 67(2) and Rule 77 must be assessed in relation to the narrow scope of the case as well as the agreement between the parties narrowing the issues to be tried.

⁸ ICC-02/05-03/09-259; ICC-02/05-03/09-276-Red and ICC-02/05-03/09-277-Red

⁹ Email communication from Prosecution to defence sent on 30 September 2011 at 17:59:05 and the appended Annex "OTP RESPONSE TO DEFENCE'S DISCLOSURE REQUEST 19 JULY 2011- ANNEX 'A' – GENERAL".

¹⁰ Some of these redactions are of a temporary nature.

12. Finally, the Prosecution continues to review the entire material in its possession in order to determine whether there is any further information that falls under Article 67(2) or Rule 77. Where such material is identified, it will be promptly disclosed to the Defence.

IV. Request for Receipt of the Annexes to the Present Filing as Confidential

13. The Prosecution submits that the classification of Annexes “A” and “B” to the present filing as “Confidential, *Ex Parte* available to the Prosecution and Defence Only” is necessary as they contain information of a confidential nature and concern materials that are currently subject to confidential restrictions.



Luis Moreno -Ocampo
Prosecutor

Dated this 4th day of June 2012
At The Hague, The Netherlands