

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 5 December 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**

Public

Order for lesser redacted version of ICC-02/05-03/09-517-Conf-AnxA-Red

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

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 (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, after considering Rule 77 of the Rules of Procedure and Evidence and Regulation 28 of the Regulations of the Court, issues the following Order for lesser redacted version of ICC-02/05-03/09-517-Conf-AnxA-Red.

1. On 28 August 2013, the Appeals Chamber rendered the “Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January entitled ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”,¹ reversing the decision of the Chamber and directing the Chamber to decide anew on the “Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor” of 20 October 2011 (“Disclosure Request”).²
2. On 25 September 2013, the Chamber directed the Office of the Prosecutor (“prosecution”) to file a table setting out the documents and other objects in the *Al Bashir* Material,³ which contain information sought by the defence in the Disclosure Request, identifying such information by means of “verbatim quotations, summaries or appropriate accompanying explanations”.⁴

¹ Appeals Chamber, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, 28 August 2013, ICC-02/05-03/09-501, OA 4.

² ICC-02/05-03/09-235.

³ The “*Al Bashir* Material” stands for documents that were confidentially submitted by the prosecution in support of its application for a warrant of arrest against Omar Hassan Ahmad Al Bashir.

⁴ Order to the prosecution following the Appeals Chamber’s “Judgment of 28 August 2013 against Trial Chamber IV’s ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”, 25 September 2013, ICC-02/05-03/09-507, paragraph 2(b)(i). This order excluded material for which the prosecution was to seek re-classification before Pre-Trial Chamber II. See ICC-02/05-03/09-507, paragraph 2(a).

3. On 21 October 2013, the prosecution filed the table sought by the Chamber (“prosecution Submission” or “Submission”).⁵ This table was filed as an annex *ex parte*, Prosecution only (“Table”).⁶
4. On 18 November 2013, the Chamber sent an email directing: (i) the prosecution to file confidential versions of Annexes A, B and C of the prosecution Submission and (ii) the defence to file by 9 December 2003 its observations on these annexes, “including an explanation as to why each document sought by the defence would be relevant as well as material to the contested issues in the case”.⁷
5. On 20 November 2013, the prosecution filed confidential redacted versions of Annexes A, B and C of the prosecution Submission.⁸ The redacted version of Annex A of the Submission (“Redacted Table”)⁹ redacts every word of the column entitled “verbatim quotations / summaries / appropriate accompanying explanations”.
6. On 25 November 2013, the Chamber instructed the prosecution, by way of an email,¹⁰ to set out the legal and factual basis for the application of redactions to Annexes A, B and C of the Table Submission.
7. On 27 November 2013, the prosecution sent two emails with the legal and factual bases requested by the Chamber.¹¹ As regards the Redacted Table, the prosecution submitted that: (i) this material is contained in submissions made *ex parte* or under seal before Pre-Trial Chamber I and this information, even in summary form, cannot be disclosed to the defence, (ii) this table contains information which, if

⁵ Prosecution’s Submission of Information pursuant to the Trial Chamber’s order of 25 September 2013, 21 October 2013, ICC-02/05-03/09-517-Conf-Exp (with three confidential *ex parte* annexes).

⁶ ICC-02/05-03/09-517-Conf-Exp-AnxA.

⁷ Email from a Legal Officer of Trial Chamber IV to the parties, 18 November 2013 at 12:17.

⁸ ICC-02/05-03/09-517-Conf-AnxA-Red; ICC-02/05-03/09-517-Conf-AnxB-Red; ICC-02/05-03/09-517-Conf-AnxC-Red.

⁹ ICC-02/05-03/09-517-Conf-AnxA-Red.

¹⁰ Email from a Legal Officer of Trial Chamber IV to the parties, 25 November 2013 at 17:41.

¹¹ Email from the prosecution to the defence and Chamber, 27 November 2013 at 15:34; Email from the prosecution to the Chamber, 27 November 2013 at 15:41.

revealed to the defence, would “render the current litigation moot” and (iii) disclosure of certain information in this table would create serious security concerns, due to “the nature of the information and/or the identity of the source and/or information provider(s)”.¹²

8. The Chamber is satisfied with the justifications for the prosecution’s redactions to Annex B of its Submission. The Chamber is also satisfied with the prosecution’s explanation as to why extensive redactions of Annex C of the Submission are necessary, bearing in mind that the defence is not requesting the identifying information of victims or witnesses who have expressed security concerns in the *Al Bashir* Material.¹³
9. However, the Chamber does not consider that the fact that the material in the Redacted Table (which is Annex A of the Submission) is *ex parte* or under seal before a Pre-Trial Chamber in another case necessarily makes it non-disclosable to the defence in this case. Though the Chamber understands why disclosure of certain information in the Redacted Table would render the disclosure litigation moot in the present case, the Chamber does not consider that revealing some information about the materials in the Redacted Table would defeat the purpose of the present litigation. Finally, the Chamber accepts the prosecution’s position that some of the information providers and sources would need to remain redacted in the Redacted Table, but this fact also does not mean that a lesser redacted version of the Redacted Table could not be provided to the defence.
10. For these reasons, the Chamber does not consider the prosecution’s explanations for the near total redaction of the Redacted Table to be persuasive. The Chamber’s

¹² Email from the prosecution to the defence and Chamber, 27 November 2013 at 15:34.

¹³ ICC-02/05-03/09-235, paragraph 4. However, it is expected that the prosecution should be positioned to promptly disclose, to the extent possible, the identities of witnesses who provide any information which the Chamber ultimately determines to be disclosable. *See* Email from a Legal Officer of Trial Chamber IV to the parties, 18 November 2013 at 12:17 (referring to witness category (e) of Annex C of the Submission).

email of 18 November 2013 made it clear that the Redacted Table was to be filed precisely to allow for the defence to respond to its contents. The prosecution's inability to provide a working document deprives the defence from filing meaningful observations in accordance with the Chamber's direction of 18 November 2013.

11. The Chamber allows the prosecution to retain some of its redactions. Unless otherwise decided by the Chamber, the prosecution may retain its redactions on the following categories of information, in particular: (i) all verbatim quotations or extracts from the Redacted Table; (ii) all information regarding protective measures and (iii) all information which may reveal the information sources/providers of the materials in the Redacted Table.
12. However, the Chamber does order the prosecution to provide a lesser redacted and/or supplemented version of the Redacted Table where: (i) the information in the "Type" column is not redacted and (ii) at least a rough summary or accompanying explanation of the material is provided in the "verbatim quotations / summaries / appropriate accompanying explanations" column. When providing these rough summaries or accompanying explanations, the prosecution may either provide a redacted version of the existing information or reformulate the information provided in the Redacted Table. Regardless of which approach the prosecution takes regarding any particular item described in the Redacted Table, the prosecution must provide at least some information corresponding to every item in the Redacted Table.
13. The prosecution is to provide the defence with a version of the Redacted Table such that meaningful defence observations can be filed. These observations will assist the Chamber in ruling on the outstanding Disclosure Request, as the defence will be able to provide specific explanations as to which parts of the *Al Bashir* material it

considers to be material to its preparation. Bearing in mind the upcoming winter recess and the time which the parties will require to file with the Chamber the documents sought, an updated schedule appears necessary.

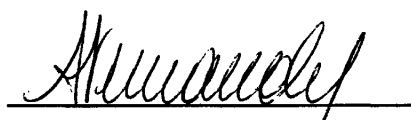
14. For the foregoing reasons, the Chamber hereby:

- (a) **orders** the prosecution to file a lesser redacted version of the Redacted Table in accordance with paragraph 12 above by no later than 10 December 2013; and
- (b) **directs** the defence to file its observations mentioned in paragraph 4 above by no later than 10 January 2014.

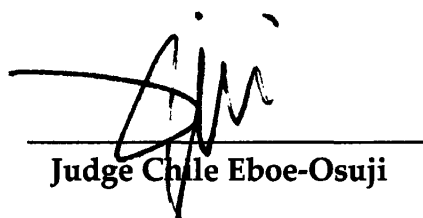
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Silvia Fernández de Gurmendi



Judge Chile Eboe-Osuji

Dated 5 December 2013

At The Hague, The Netherlands