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Pénale  
Internationale**

**International  
Criminal  
Court**



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# TRIAL CHAMBER IV

Before:

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

*v.*

*ABDALLAH BANDA ABAKAER NOURAIN*

*&*

*SALEH MOHAMMED JERBO JAMUS*

## Public Document

Joint Observations by the Office of the Prosecutor and the Defence regarding access by Participants to Confidential Annexure "A" of the "Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons"

Sources: Office of the Prosecutor

Defence Team of Abdallah Banda Abakaer Nourain

Defence Team of Saleh Mohammed Jerbo Jamus

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**

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**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  
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**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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Ms. Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Background

1. On 16 May 2011, the Office of the Prosecutor and Defence Counsel for Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus (together the “Parties”) filed a joint submission regarding certain agreements as to evidence under Rule 69 of the Rules of Procedure and Evidence (the “Joint Filing”).<sup>1</sup> The Rule 69 agreement as to evidence was attached to the Joint Filing as “Confidential Annexure A” (the “Annexure”).
2. On 19 May 2011, the Trial Chamber sought the views of the Parties regarding the issue of notification of the Annexure to the legal representatives of the victims.<sup>2</sup> On 23 May 2011, the Parties stated that in accordance with the principle prohibiting anonymous accusations the Annexure should not be notified to any victims for so long as they remain anonymous.<sup>3</sup> The Parties now understand that the Trial Chamber wishes to notify the Annexure to all the legal representatives of victims currently participating in the proceedings.<sup>4</sup> As argued more fully below, the Parties object to the provision of the Annexure to victims for so long as they remain anonymous.

## II. Applicable Law

3. The Parties acknowledge that under Article 68(3) of the Rome Statute victims are entitled to participate in proceedings, and that such participation should be meaningful. However, participation must be in a manner that is not “inconsistent with the rights of the accused and a fair and impartial trial.”<sup>5</sup>
4. Such fair trial rights include “the fundamental principle prohibiting anonymous accusations”.<sup>6</sup>

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<sup>1</sup> ICC-02/05-03/09-148.

<sup>2</sup> Email of 19 May 2011 at 10:20 from the Legal Officer of Trial Chamber IV.

<sup>3</sup> Email of 23 May 2011 at 11:25 from the Office of the Prosecutor to the Legal Officer of Trial Chamber IV sent on behalf of the Parties.

<sup>4</sup> Email of 25 May 2011 at 10:43 from the Legal Officer of Trial Chamber IV to the Parties.

<sup>5</sup> Article 68(3) of the Rome Statute.

<sup>6</sup> ICC-01/04-01/06-462-tEN (“*Lubanga* Victim Participation Decision”), p. 7.

5. In acknowledgement of this fundamental principle, distinctions have been drawn in the jurisprudence of this Court in various cases between the rights of non-anonymous and anonymous victims to participate in proceedings.<sup>7</sup> Specifically, this distinction has led the Chambers of this Court to prevent anonymous victims from adding “any point of fact or any evidence at all to the Prosecution’s case file”.<sup>8</sup>

### III. Submissions

6. As stated in the Joint Filing, “[t]he agreement reached by the Parties will significantly shorten the trial proceedings by focusing the trial only on those issues that are contested between the Parties.”<sup>9</sup>
7. Therefore, where an anonymous victim disagrees with the Rule 69 agreement and requests “a more complete presentation of the alleged facts”,<sup>10</sup> the Parties submit such a request effectively seeks to add points of fact or evidence to the case-file against the accused. Allowing such requests would violate the fundamental principle prohibiting anonymous accusations. On this basis, the Annexure should not be notified to anonymous victims in order to obtain their observations.
8. Moreover, the Parties submit that as proceedings move closer to the hearing on the merits, when the actual contested issues are put to proof, the importance of the aforementioned principle only increases. Indeed, Trial Chamber I has observed in relation to victim participation at the trial stage that “extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused” and

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<sup>7</sup> In relation to the pre-trial phase, see *Lubanga* Victim Participation Decision and in the *Katanga* case ICC-01/04-01/07-474, paras. 124-152. In relation to participation at the trial phase, for the *Lubanga* case see ICC-01/04-01/06-1119, paras. 130-131, for the *Bemba* case see ICC-01/05-01/08-807-Corr., paras. 61-69 and for the *Katanga* case ICC-01/04-01/07-1788-tENG, paras. 92-93.

<sup>8</sup> *Lubanga* Victim Participation Decision, p. 7.

<sup>9</sup> Joint Filing, para. 8.

<sup>10</sup> Rule 69 of the Rules of Procedure and Evidence.

that “[t]he greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself.”<sup>11</sup>

9. Included in the right of victims to participate in proceedings is the right to make submissions on agreed facts.<sup>12</sup> However, as stated above, the manner in which this is done must be consistent with the right of the accused to a fair trial. In addition, in view of the extent to which the Parties have reached agreement under Rule 69, any participation by way of observations on the agreed facts by victims must be considered of significance. In these circumstances, the balance of fairness lies in restricting the provision of the Annexure to non-anonymous victims. Such restriction would fall away immediately upon a victim agreeing to be identified.<sup>13</sup>

10. Indeed, the restriction requested by the Parties should have minimal impact in the present proceedings as it appears, from the information available to the Parties, that the great majority of the victims likely do not have concerns with their identities being provided to the Defence.<sup>14</sup>

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<sup>11</sup> ICC-01/04-01/06-1119, para. 131. This approach has been adopted broadly by Trial Chambers II and III (see ICC-01/04-01/07-1788-tENG, paras. 92-93 and ICC-01/05-01/08-807-Corr., paras. 61-69).

<sup>12</sup> ICC-01/04-01/07-1788-tENG, para. 125. In relation to the provision of the Rule 69 agreements to the legal representatives of the victims in this *Katanga* decision, the Parties note that no information is provided as to which victims access was provided to (i.e. anonymous, non-anonymous or both) and it would appear that access was granted in the face of no opposition.

<sup>13</sup> As noted in para. 8 above and related footnotes, where anonymous victims wish to participate to a significant extent during trial, such participation may be conditional on disclosure of their identities.

<sup>14</sup> Of the 89 victims that have been granted the right to participate in the pre-trial proceedings of the case, the identities of 7 have been revealed to the Defence. Of the remaining 82, the application forms of 44 victims indicate they have no concerns with their identities being revealed to the Defence, and of these, 23 consented to their identities being so revealed in the *Abu Garda* case (victims a/0170/09 to a/0192/09).

The application forms of 36 victims indicate they have concerns with their identities being revealed to the Defence. However, 21 of these consented to their identities being so revealed in the *Abu Garda* case (victims a/0535/09, a/0537/09 to a/0542/09, a/0544/09 to a/0551/09, and a/0557/09 to a/0562/09). Further, the application form of victim a/0741/09, who indicates a concern with the lifting of anonymity vis-a-vis the Defence, states that the victim would consent to their identity being revealed if “necessary”.

Accordingly, it appears to the Parties that the application forms of only 14 victims *prima facie* indicate an unequivocal concern with their identities being revealed to the Defence (victims a/0563/09 to a/0568/09, a/0571/09, a/0573/09 to a/0576/09, a/0578/09, a/0739/09 and a/0740/09). The application forms of the 2 remaining victims (a/1646/10 and a/1647/10) do not appear to address the issue of the lifting of anonymity vis-a-vis the Defence.

## Relief Requested

11. The Parties acknowledge that the Trial Chamber has proposed that redactions might be used in order to notify the Annexure to all the legal representatives of victims currently participating in the proceedings. With respect, and as argued above, the Parties submit that the objection to the provision of the Annexure and the making of comments thereon is based on overarching principle and that such objection is, therefore, not satisfactorily addressed by redactions.

12. Accordingly, the Parties object to the provision of the Annexure to all victims for so long as they remain anonymous.

Respectfully submitted,




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Luis Moreno - Ocampo  
Prosecutor




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Mr. Karim A. A. Khan QC  
Counsel for Abdallah Banda Abakaer Nourain  
and  
Saleh Mohammed Jerbo Jamus

Dated this 26<sup>th</sup> Day of May 2011  
At The Hague, The Netherlands

Dated this 26<sup>th</sup> Day of May 2011  
At Nairobi, Kenya