

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 June 2011

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

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

Public Redacted Version

**Report on the implementation of the Chamber's Order instructing the Registry to
start consultations on the organisation of common legal representation**

Source: Registry

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

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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**Victims Participation and Reparations
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The Registrar of the International Criminal Court (“the Court”);

NOTING rules 16(1)(b) and 90 of the Rules of Procedure and Evidence; regulations 23bis, 79 , 80 and 86(8) of the Regulations of the Court; and regulations 112 and 113 of the Regulations of the Registry;

NOTING Pre-Trial Chamber I’s Decision on the Confirmation of Charges¹ and the Presidency’s Decision constituting Trial Chamber IV and referring to it the case of *The Prosecutor v. Abdallah Abakaer Nourain and Saleh Mohammed Jerbo Jamus*;²

NOTING the Chamber’s Order instructing the Registry to start consultations on the organisation of common legal representation;³

CONSIDERING that the Registry has now held preliminary consultations with the current legal representatives of the participating victims in order to seek input and information regarding the process for consultations with participating victims;

CONSIDERING that the [REDACTED], for the reasons given in the present report, more time is required;

CONSIDERING that the Registry considers that the disclosure of some of the information in the present filing to the legal representatives of the victims could result in the harassment or intimidation of some of the victims, and that therefore this report is classified as confidential *ex parte*, with a public redacted version to be filed;

TRANSMITS the following report explaining the steps taken to implement the Chamber’s order and requesting an extension of time for the organisation of common legal representation.

¹ ICC-02/05-03/09-121-Conf-Corr.

² ICC-02/05-03/09-124.

³ ICC-02/05-03/09-138.

1 Background and overview of the present report

1. On 15 April 2011 the Registry filed a report to the Chamber recommending that it issue requests under rule 90 for the organisation of common legal representation.
2. On 19 April 2011 two filings were made in response to the Registry's report, each by two of the legal representatives of participating victims.⁴
3. On 21 April 2011 the Chamber issued its Order instructing the Registry to start consultations on the organisation of common legal representation (the "Order"), which required the Registry to assist the victims to choose common legal representation and, if the victims were unable to do so by 23 June 2011, to submit a proposal on common legal representation to the Chamber by 28 June 2011. The Chamber also ordered that consultations with victims be conducted in the presence of the legal representatives currently representing the victims in the case and that Registry shall liaise and consult with those legal representatives.
4. The purpose of this report is to inform the Chamber of the steps taken, and of the Registry's proposals concerning options for organizing common legal representation and their respective timeframes, advantages and disadvantages.

2 Steps taken to implement the Chamber's Order

5. The Registry held a consultation meeting on 20 May 2011 with the current legal representatives in order to exchange information and seek input on various issues. Of the five legal teams involved to date in representing victims in the case, three⁵ participated in the 20 May meeting in person while a further one⁶ participated in part of the meeting by telephone. Additionally, email input has been received from all five legal teams.
6. Based on the input received, as well as previous communications with victims, the Registry has reached some conclusions regarding common legal

⁴ ICC-02/05-03/09-135, ICC-02/05-03/09-136.

⁵ Mr Brahim Koné; Ms Hélène Cissé; Sir Geoffrey Nice and Mr Rodney Dixon.

⁶ Mr Akin Akinbote.

representation, and in particular regarding the appropriate grouping of victims in the case, as set out further below. However further steps will be required in order to assist victims to identify common legal representative(s) or propose such representative(s) to the Chamber. In particular, the Registry has not yet conducted consultations directly with victims, and indeed, as explain below, has been exploring options in this regard. The outcome of this process is it appears to the Registry that the effective implementation of the Order will not be possible before the 23 and 28 June deadlines.

3 Observations regarding the consultation process

7. The Registry notes the Chamber's Order requiring it to implement rule 90 by conducting consultations with the participating victims. The Registry also recognizes the central role of victims' views in the process as foreseen by rule 90.
8. However, based on information gathered through preliminary consultations, previous experiences with victims in the present case, and insights gained from the organization of common legal representation in other cases, and bearing in mind budgetary issues, the Registry considers that:
 - Meaningful consultations of the kind required by the Order, can only be achieved through face-to-face meetings with the victims, assisted by interpretation, and allowing adequate time for explanations and discussion;
 - Missions for the purpose of implementing the Order are likely to require authorizations from state authorities, given the involvement of members of security forces. In particular, meetings with Nigerian military personnel and other victims residing in Nigerian Army premises will require significant time to arrange, given the need for advance permission from Nigerian authorities;⁷
 - A total of approximately four to five weeks of travel, involving two Registry staff of at least P-2 level, would be required to complete the consultations.

⁷ This assessment is based on information provided to the Registry by Frank Adaka, as well as on the Registry's previous experience of meeting with the Nigerian victims in August 2009.

9. Additional timing constraints are introduced by limitations on the resources of the Registry, as well as the need to accommodate the schedules and existing commitments of the current legal representatives. Bearing these factors in mind, the effective implementation of the Order has not possible been possible by 23 or 28 June 2011. The Registry anticipates that it could be in a position to complete such consultation and report to the Chamber within a period of three months from the date on which it receives the Chamber's instructions.
10. The Registry notes that the Order reflects the approach of rule 90, according to which victims shall first have an opportunity to arrange their own common legal representation, albeit with the "assistance of the Registry" if necessary. The Registry considers that this approach is based on a more fundamental principle, namely that to the extent possible victims' preferences and interests should be the paramount consideration in organizing common legal representation. The existence of such a principle is supported by regulation 79(2) of the Regulations of the Court, as well as by the jurisprudence of the Court.⁸ The Registry also considers that consultations with victims regarding common legal representation are important for reasons of transparency and accountability and for maximizing victims' understanding of and support for the process and its outcome.
11. However the Registry also considers that a practical approach must be taken. Consultations should be implemented and relied on when they can be conducted so as to involve genuine and meaningful communication with and input from victims. If it seems unlikely that a proposed consultation will be effective in this regard, alternative approaches could be considered in order to uphold the principle of prioritizing victims' preferences and interests.
12. It is noted that holding direct consultations with victims would have the advantages of providing an opportunity for victims to provide input on their preferences regarding legal representation, and for Registry staff to meet directly

⁸ ICC-01/04-06/06-1119, paragraph 126; ICC-01/05-01/08-322, paragraph 9; ICC-01/05-01/08-1005, paragraph 14.

with the victims, to answer their questions and to develop a sense of their situation and concerns. Discussions with Registry staff may also assist victims to understand the reasons for the imposition of common legal representation and thus why their legal representation might change without their consent. The Registry notes the legitimate concern that a change in legal representation imposed at this stage by the Court may undermine victims' trust or confidence in the proceedings. Interaction by the Registry with the victims may reduce such difficulties by providing a forum for their input as well as an opportunity for them to receive explanations about this process. However such explanations could also be provided to the victims by their current legal representatives.

13. On the other hand, the following factors put in question the usefulness of conducting further consultations with victim at the current stage in the present case:

- Individual discussions have already been held by Registry staff with 75 of the 89 victims regarding their views and preferences in respect of their legal representation. This was undertaken pursuant to rule 16(1)(b) when assisting applicants to complete application forms and/or provide supplementary information. The victims were asked at that stage to identify the criteria that were important to them in the selection of legal representatives. While recognizing that the views then expressed may have since changed, particularly in the light of their experience of participation to date, the Registry also considers it significant that already has some general information regarding the preferences of the victims as regards their legal representation.
- The meaningfulness of any further consultations with victims may be limited. It is evident from the Registry's contact with the victims to date that the victims did not already know lawyers qualified to represent them at the Court. Their preference will inevitably be guided by their sense of what criteria are important to them in a legal representative, and their experience of

the lawyers who have represented them in the proceedings to date. The Registry has already asked for their views on the first factor, and as regards the second, they may be inhibited in giving their views in the presence of their current legal representatives. In the Registry's view, this situation is not *per se* related to the *bona fides* or proper conduct of counsel, and pertains regardless of the particular case or the counsel involved. However the Registry does also have specific concerns in the present instance that pressure *might in fact* be brought to bear on some participating victims. [REDACTED]⁹ [REDACTED]

- Time constraints would also limit the quality of the consultations. Such constraints would likely require that not every victim could be met individually or for a significant period of time. Time constraints would also likely limit the extent to which consultations could be carefully designed so as to maximize the usefulness of information received and minimize the possible harm caused to the victims (for example through re-traumatization).
- The process would involve significant costs, not only in terms of financial¹⁰ but also human resources. The consultation would require at least two professional-level staff to be absent from headquarters for approximately one month at a time when the Registry has significant filing obligations on victims' issues in a number of other proceedings.¹¹

14. Taking into account all of the above, the Registry concludes that, on balance, conducting further meetings with the victims at this stage will not in practice enable the victims themselves, as a group, to choose common legal representatives, so the Registry in any event will need to submit a proposal in accordance with the second option in the Chamber's order. It would therefore be preferable to rely on input received already as regards their wishes relating to legal representation and to apply objective criteria aimed at achieving quality

⁹ [REDACTED]

¹⁰ The Registry estimates the likely cost of the missions, including travel costs and DSA for staff and interpreters, at approximately €35,000.

¹¹ The Registry notes that the VPRS has, in addition to its Chief, only five established legal posts at P level. Funding for temporary staff past the end of June is yet to be confirmed.

legal representation in the best interests of the victims. These criteria are described below and in the attached Annex.

4 Identification of issues and the Registry's preliminary views

15. Before explaining its proposal on an approach to completing the rule 90 process, the Registry wishes to set for the Chamber the extent to which it has already been able to identify the relevant issues and form preliminary views. It is hoped that this will clarify which issues remain to be resolved in this process, and assist in identifying the best procedure by which the process can be completed.

16. The Registry understands the rule 90 process as involving two steps:

- (1) determining appropriate victim groupings, taking into account rule 90(4); and
- (2) for each group, selection of an appropriate lead counsel or legal team.

4.1 Victim groupings

17. The rule 90 process is intended to promote efficiency in the proceedings.¹² As each legal team representing a victim group may separately seek to make submissions (written or oral), question witnesses and lead evidence, efficiency is most likely to be achieved by minimizing the number of groupings and teams. Representation through one legal team would also maximise the prospects of coherent strategy. Finally, as the most significant cost in a legal team relates to its lead counsel, it is financially more efficient to constitute one large team (under one lead counsel) than to appoint multiple small teams (each led by separate lead counsel). These factors all indicate advantages in arranging victims' representation through as few groupings and corresponding legal teams as are appropriate in a given case.

18. However the Registry also takes note of the important principle enshrined in rule 90(4), namely that common legal representation should be organized so as to protect the "distinct interests of the victims" and ensure that "any conflict of

¹² ICC-01/04-01/06-1119, paragraph 125; see also ICC-01/04-01/07-1328, paragraph 10(b); ICC-01/05-01/08-1005, paragraph 9.

interest is avoided.” The Registry’s approach to the grouping of victims for the purpose of rule 90 is therefore to seek to identify whether the participating victims appear to have, among themselves, any conflict of interest or other “distinct interests” such as would justify arranging them into multiple groupings for the purposes of legal representation. Where no such conflict or distinct interests exist the Registry considers it appropriate that all participating victims should share one legal team for the purpose of representation in proceedings.

19. For reasons that will be set out in its report on common legal representation, the Registry has formed the preliminary view that the 87 victim participants who are not Darfuris but rather are the former AU peacekeepers and their family members (“the non-Darfuri victims”) should not be separated into multiple groups for the purpose of common legal representation. Rather, it would be preferable to arrange one team with sufficient and appropriately qualified members to represent the non-Darfuri victims. Regarding the 2 Darfuri victims, the Registry considers that more information is required in order to determine whether there is indeed a sufficient justification for the separate representation of this group. The Registry therefore considers that in the present case it is advisable to arrange common legal representation through either one or two groups. The Registry proposes to take the further steps set out below to resolve this question.

4.2 Selection of common legal representatives

20. Once appropriate victim groupings have been identified, the Registry will assist victims to choose a lead counsel to represent each victim group in accordance with the Chamber’s Order.
21. Based on the experience of previous cases, as well as existing jurisprudence, the Registry has developed a set of basic general criteria for the identification of appropriate legal representatives. These criteria are set out in the Annex to this report. The Registry notes that these criteria need to be adapted according to the circumstances of a specific case, and especially in the light of the preferences indicated by victims. In addition to the possibility of introducing different

criteria, the relative weight or priority given to the identified general criteria may differ depending on the proceedings.

22. The fact that legal representatives have been representing victims in the case to date would be a relevant factor. This reflects the benefits of maintaining some continuity of legal representation, both in terms of enabling established relationships of trust between client and lawyer to continue, and benefiting from pre-established familiarity with the case. However, while these factors are important, the other criteria identified must also be taken into account, and the Registry considers that it has a responsibility to consider information available to it, based on their work to date, which might be relevant in the assessment of the identified criteria. The Registry will seek to do so by reference to objective and observable factors that the Registry is in a position to measure based on the information available to it. In the present case these factors may include, for example:

- Whether submissions have been filed and appearances made at key stages when possible;
- Whether submissions filed or appearances made have involved any patent and significant errors or breaches of applicable regulations;
- Completeness of applications for participation or reparations presented and supplementary information submitted;
- Number of meetings held with clients;
- Steps taken to seek assistance and support;
- Adherence to ethical standards, as observed through interactions with the Court.

The Registry has begun a preliminary review of these factors and draws to the Chamber's attention that it has concerns regarding some of the current legal representatives of victims. The Registry is in the process of completing its analysis of the available information regarding these issues. It then proposes to provide an

opportunity to each counsel affected by such information to provide their views. The Registry will present the information and views received as well as its own analysis in its eventual report on common legal representation.

23. The Registry has also given consideration to conflicts of interest which may arise between counsel and the participating victims. Two such potential conflicts exist:

- A possible conflict between Colonel Frank Adaka, a member of the Nigerian Army and Director of its Army Legal Services, and the participating victims. Such a question arises in part from allegations made by the defence during the case of *The Prosecutor v Bahar Idriss Abu Garda* that the severity of the harm caused during the attack on the Haskanita base was in part due to omissions by the Nigerian Army. It is also suggested by comments made to the Registry by some of the victims participating in the present case which indicate their concern about the conduct of the Nigerian Army during and after the attack. Whether or not such concerns are well-founded, their existence raises questions about the appropriateness of a Nigerian Army officer representing such victims. The possibility of a conflict of interest is also raised by the fact that the Nigerian Army itself applied to participate as a victim,¹³ thus indicating its own view that it has an interest in these proceedings.
- A possible conflict affecting Geoffrey Nice and Rodney Dixon, based on their role as representatives of *amicus curiae* acting in the case of *The Prosecutor v Omar Al Bahir*, as argued by the defence and Prosecution at pre-trial in the present case. In proceedings to date this issue has been considered in relation to those persons already represented by these counsel.¹⁴ Different considerations may arise if they were appointed as common legal representatives for other participating victims.

24. The views of the counsel in question regarding these issues, and the Registry's analysis, will be presented in the report on common legal representation.

¹³ The application was rejected by the Chamber in its Decision on Victims' Participation at the Hearing on the Confirmation of Charges: ICC-02/05-03/09-89.

¹⁴ ICC-02/05-03/09-T-Red-ENG, pages 4-5.

25. Taking into account the above concerns, the Registry sees it as appropriate to consider various options for the selection of common legal representatives, including the identification of new counsel not previously involved in representing victims in the present case. Doing so in a careful and appropriate manner will take some further time but the Registry anticipates such a process could be completed within three months of receiving the Chamber's instructions.

5 Steps proposed to complete the implementation of the Chamber's Order

26. In light of the above, the Registry proposes to take the following steps in order to implement the Chamber's Order.

27. The Registry proposes that in the interests of efficiency, it finalize recommendations on victim groupings based on information about the case, the victims, and their views which is already known to the Registry; for example from proceedings to date, the victims' applications, previous discussions with the victims, and the input submitted by the current legal representatives.

28. The Registry proposes that it then adopt the criteria set out in the Annex to this report, which take account of established ICC practice, the particulars of the present case, input from legal representatives (including those currently acting in the present case), and the views provided by 75 of the participating victims during discussions held with them on this subject in 2009.

29. A selection could then be made, applying the criteria, either from among the current legal representatives or from other counsel on the Registry's list of counsel, and conveyed to the Chamber together with reasons.

6 Request for instructions and extension of time

30. The Registry respectfully requests the Chamber's instructions on its proposals above.

31. The Registry recognizes that two months have elapsed since the Chamber's Order. During this time the Registry has taken initial steps to implement the

Order but has also encountered the following circumstances and difficulties which have meant that complete implementation of the Order was not possible:

- (1) During the initial period following the Chamber's Order, some time was required to gather preliminary information from the current legal representatives of victims. This information related not only to the logistical considerations involved in implementing the Chamber's order, but also to substantive questions on the grouping of victims and the identification of appropriate representatives. Thus the Registry notes that while it is not yet in a position to comply fully with the Order, it has already taken substantial steps towards doing so.
- (2) The Registry also notes that the current proposal, concerning the appropriate steps for the implementation of the Chamber's order, has been developed within the framework of a broader process in the Registry for the establishment of a new and systematic approach to common legal representation across all situations. This broader process has necessarily required significant time for discussions among various sections of the Registry.
- (3) While the Registry has sought to work consistently on the present proposal since the Chamber's Order of 21 April, it has been constrained by the shortage of resources available to the Victims' Participation and Reparations Section and the existence of a number of significant deadlines relating to victims' participation in other proceedings. The Registry is, however, hopeful that more resources will be available to dedicate to the present case during and after the judicial recess, once the current series of deadlines has ended.

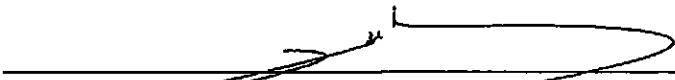
32. Undertaking the steps outlined in the present filing will require further time. The Registry anticipates that it could complete these processes within three months of receiving the Chamber's instructions. The Registry estimates that three months is the minimum time within which, depending on the Chamber's instructions, it could:

- (a) In a systematic and appropriate way, assess the work conducted to date by the current legal representatives (including providing them an opportunity to give their views on any concerns), and if necessary identify a new representative from the list of counsel maintained by the Registry;

And, although not recommended by the Registry, in the event that the Chamber orders it:

- (b) plan, conduct and report on consultations with the victims countries, taking into account the difficulties in accessing some victims (particularly serving Nigerian Army officers and the victims residing in Darfur).

33. The Registry requests that the Chamber extend the deadlines given in its Order, by granting the Registry at least three months to organize and report on common legal representation.



Marc Dubuisson, Director, Division of Court Services
per delegation of Silvana Arbia, Registrar

Dated this 21 June 2011

At The Hague, The Netherlands