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

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TRIAL CHAMBER IV

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

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF THE PROSECUTOR

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALIH MOHAMMED JERBO JAMUS

Public Document

SUBMISSIONS ON BEHALF OF VICTIMS a/552/09, a/0553/09, a/0554/09, a/0555/09, a/0556/09, a/0563/09, a/0564/09, a/565/09, a/0566/09, a/0567/09, a/0568/09, a/0569/09, a/0570/09, a/0571/09, a/0572/09, a/0573/09, a/0574/09, a/0575/09, a/0576/09, a/0577/09, a/0578/09 in response to the Interim Report of the Registrar regarding the issue of Common Legal Representation of Victims Participating in the Case

Source: *[Frank Adaka Legal Representative of the Victims]*

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 Victims

The Office of Public Counsel for the Defence

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REGISTRY

Registrar
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Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

CONSIDERING THE RIGHT OF VICTIMS TO FILE A RESPONSE TO ANY DOCUMENT PURSUANT TO REGULATION 24(2) AND IN THIS INSTANCE A RESPONSE TO THE REGISTRARS REPORT FILED ON 20 JUNE 2011

INTRODUCTION

This written submission is necessitated by:

1. The need to clarify some important issues arising from the Report of the Registrar filed on 20 June 2011, particularly the need to notify the Chambers on some factual inaccuracies in that Report as it affects the above victims and their Legal Representative.
2. The need to give true, effective and equitable meaning to Rule 90(1), 90(2) and 90(3) of the Rules of Procedure and Evidence, as well as Articles 68(1) and 68(3) of the Rome Statute.
3. The need to ensure that ultimately legal representation in this case is meaningful and beneficial to the victims as guaranteed by the Rome Statute.

A. Factual Inaccuracies in the Registrar's Report

It is submitted that the Report by the Registrar contains material inaccuracies. In order to put these in proper perspective, perhaps, it will be useful to briefly relate the circumstances that led to my being selected by the victims to represent them in this case. Shortly, after the occurrence of the unfortunate events of 27 September 2007, which resulted in the charges currently before the Chambers, some active duty Nigerian Military personnel, who were victims of the attack on MGS Haskanita, approached me in a private capacity, as it is the practice in our jurisdiction in Nigeria, to advise them on their legal rights under Nigerian Military Law, during the process of the Board of Inquiry, which was ordered by the Nigerian Military Authorities to investigate the circumstances surrounding the incident. Through this means, a number of the victims became well acquainted with me. And therefore much later in the year 2009, when the ICC became seised of the matter, I was the person who formally introduced the Nigerian victims to representatives of the VPRS who came on a mission to

Nigeria. As a matter of fact, the initial interview of most of the active duty military personnel victims from Nigeria was done in my office in Abuja, Nigeria in 2009. Having interviewed the victims in my office, the representatives of the VPRS knew, or were reasonably expected to know that I do not hold the Office of the Director Army Legal Services of the Nigerian Army. While it is true that I am a Military Lawyer, during their visit to Nigeria, the VPRS representatives were duly introduced to the Director Army Legal Services of the Nigerian Army and some other authorities of the Nigerian Army by my humble self. Given these facts, it is submitted that there are reasonable grounds to believe that the statement in the Registrar's Report, which erroneously claimed that I am the Director Army Legal Services was made *mala fide* and is aimed at misleading the Chambers into believing that I hold a high position of authority in the Nigerian Army, and would therefore be bound to protect what they perceive to be a negative interest of the Nigerian Army in this case.

Turning particularly to the issue of perceived conflict of interest, it is submitted that it is inaccurate to state that there is a conflict of interest between my clients and the Nigerian Army. In this regard, the Chambers is humbly invited to please note that most of my clients are active duty military personnel of the Nigerian Army. As at the date of this filing, they are still employed by the Nigerian Army. If indeed there was any conflict of interest between them and the Nigerian Army, especially in regard to the events that occurred at Haskanita in September 2007, they would most probably have resigned from the Nigerian Army in bitter disappointment by this time. As a matter of fact, from my most recent interaction with them regarding this issue of supposed conflict of interest, the victims are very apprehensive that the position of the Registry on the issue could unwittingly introduce avoidable problems and schisms between them and their employees (the Nigerian Army authorities), if the Registry's position on this issue is formally or officially communicated to the Nigerian Army authorities. Further, in this regard, the victims who are active duty military personnel have assured and I verily believe them that at no point during the interview with the VPRS in 2009

did they express any misgivings about the Nigerian Army. It is further submitted that the position taken by the Registry in the Report, which is clearly capable of damaging the good relations between the victims and their employers is not in tandem with Article 68(1) of the Rome Statute, which enjoins the Court to take appropriate measures to protect the physical and psychological wellbeing of the victims among others. And even if it were to be assumed without conceding that victims from other countries could have expressed negative sentiments about the role played by either my clients or the Nigerian Army in the unfortunate events at MGS Haskanita at the material time, would it not equally amount to conflict of interest if Counsel representing such victims who are supposedly opposed to a Nigerian Army personnel participating in the case, is eventually imposed as a common legal representative on victims who are Nigerian military personnel and who by virtue of their current disposition and employment remain absolutely loyal members of the Nigerian Army? Furthermore, would basic rules of natural justice and fairness not have required that the Registry or the VPRS acting on their behalf disclosed to the affected Legal Representative of victims the statements of other victim(s) who are supposedly opposed to their participation in the case as Counsel? It is submitted that at the very least, such information should have been sufficiently disclosed to the affected Counsel even if it meant seeking the leave of the Chambers to do so in a redacted form. Such a disclosure would have given the affected Counsel an opportunity to respond appropriately. It is further submitted that in the absence of such disclosure, the statement by the Registry in their Report, that some other victims are not comfortable with the participation of Nigerian military personnel in the case, remains in the realm of speculation, which is not supported by concrete facts.

Still on the issue of supposed conflict of interest, it is humbly submitted that it is misconceived to state that the Nigerian military personnel who are victims have an interest which conflicts with that of the Nigerian Army. This is because it is an undisputed fact that neither the victims nor the Nigerian Army is a party to the conflict in Darfur, Sudan. The Nigerian Army is also not participating in this case,

in any manner whatsoever. Again, the position taken by the Registry appears to betray a misunderstanding or misconception about the command and control structure of the African Union Mission in Darfur, Sudan at the material time. For the avoidance of doubt, it is necessary to humbly submit here that at the material time and in relation to the circumstances surrounding the attack on MGS Haskanita; my clients were not operationally answerable to the Nigerian Army authorities back home in Nigeria. Rather, in their day to day operations in Darfur, they were answerable to the African Union authorities in that mission. It is an undisputed fact that the African Union Force stationed in Darfur at that time comprised military and police personnel from various African Countries. At the tactical level, it was the understanding of my clients that the command responsibility for the safety and other similar military operations at MGS Haskanita, lay with the MGS Commander, who was not a Nigerian Army Officer. At the more strategic level, responsibility for the operations and the safety of the MGS lay with the Force Commander and the Special Representative of the Secretary General and not the Armed Forces of any particular country. In another vein, it is further submitted that the allusions made in the Registry's Report to the submission made by the Defence during the Confirmation of Charges hearing in the Abu Garda Case was made *mala fide*. This is because the context in which that submission was made by the Defence at that time was totally unrelated to the issue of common legal representation. And even then, at that time, I responded appropriately to the submissions by the Defence and the Pre-Trial Chamber did not uphold the submissions of the Defence. The matter was therefore rested at the time. It is rather perplexing that the issue has now reared its head again in the totally unrelated context of common legal representation. It is also important to clarify here that even when personnel of the VPRS tried to raise this issue in e-mail correspondences after the first Status Conference in this case in April 2011, it was made unequivocally clear that the views were "not intended in any way to indicate a view of the Registry".¹ It is therefore unusual that this issue which initially

¹ Please refer to Exhibit 1, which is a copy of e-mail exchange between Ms Megan Hirst of VPRS and Colonel

did not reflect the views of the Registry in any way has now somehow transmuted into the official views of the Registry.

Given all the above clarifications, it is submitted that in totality, the statements made by the Registry, regarding the supposed conflict of interest, as they concern my clients and my humble self, constitute unfounded and inaccurate speculations, especially in the light of the clear circumstances surrounding the attack on the base of my clients in Darfur, Sudan at the material time. The Chambers is therefore humbly requested to treat the statements with a good dose of circumspection when taking a decision on the issue of common legal representation.

B. The Need to Give True, Effective and Equitable Meaning to Rule 90(1), 90(2) and 90(3) of the Rules of Procedure and Evidence

It is equally noted that in the Registry's report, it was impliedly admitted that there are chances that the allegations of conflict of interest may not even be well founded. It is humbly submitted that the whole meaning of victim's participation and representation would be severely compromised if not defeated, if Counsel freely chosen by victims to represent them in accordance with Rule 90(1) of the Rules of Procedure and Evidence is rejected by the Chambers on account of speculative statements, inaccurate pronouncements and assumptions, not made by witnesses in the case, but by representatives of the Registry. More so, such statements are not supported by clear and undisputable facts. I dare say that it might well erode the confidence of the victims I represent in the whole process, as it could be taken for granted that a Counsel unknown to them and unfamiliar with their peculiar concerns was imposed on them, while no concrete and verifiable reason was given for the rejection of their own freely chosen Counsel. At this stage, it would have been assumed that in line the proposed arrangement by Mr Akinbote and myself to jointly represent all the Nigerian victims², the

Adaka dated 30 May 2011 (copy attached as Exhibit 1).

² See Joint Submissions on behalf of Victims made by Mr Akinbote and Mr Frank Adaka dated 19 April 2011.

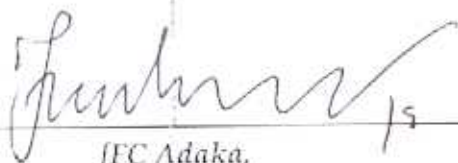
Registry would have been expected to plan a trip to Nigeria to interview the victims in order to ascertain that they have freely agreed to be represented by both Counsel in accordance with Rule 90(1). It is submitted that it is only when the victims have not been able to exercise this prerogative that the Registry can intervene in accordance with Rules 90(2) and (3). This interpretation is more compelling in view of the use of the operative word "may" respectively in Rules 90(2) and (3) as opposed to the use of the compulsive word "shall" in Rule 90(1). In the light of the above, in taking a decision on common legal representation, the Chambers is please requested to disregard any speculative suggestions, pronouncements or assumptions from any quarter especially when such statements are not supported by verifiable and undisputed facts.

C. The Need to Ensure that Ultimately Legal Representation in this case is Meaningful and Beneficial to the Victims as Guaranteed by the Rome Statute

It is submitted that ultimately, the whole aim of victims participation as guaranteed by the Rome Statute will only be meaningful and beneficial to the victims if they are represented by Counsel they are fairly familiar with, and who they can trust and confide in. It is further submitted that this overarching need should not be sacrificed at the alter of common legal representation, which imposes an arrangement on the victims, whereby their supposed common counsel is unknown to them, has no real access to them and is so remote and removed from them that victims' participation becomes an academic exercise. It is humbly submitted the peculiarities of this case, which involves active duty military personnel from various jurisdictions participating as victims should be taken into account in taking a decision on common legal representation. The circumstances of the case are quite unique and do not easily lend themselves to comparison to previous cases before the Court from the Democratic Republic of Congo, where the victims were to a large extent from the same jurisdiction.

CONCLUSION

In the light of all the above, the Chamber is urged to hold that the above submissions are consistent with Rules 90(1), 90(2) and 90(3) of the Rules of Procedure and Evidence, as well as Articles 68(1) and 68 (3) of the Rome Statute. Consequently, the Chamber is urged to disregard the statements made by the Registry concerning conflict of interest as they concern my clients. The Chamber is equally urged to order the Registry to visit Nigeria for the purposes of interviewing the victims to ascertain their choice of legal representation, before a final decision is taken on the issue of common legal representation.



*[FC Adaka,
Legal Representative of the Victims]*

Dated this 7th Day of July 2011

At Abuja, Nigeria