

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **25 August 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

With public annexes 1 and 3, confidential annex 2, confidential annexes 4, 5, 6 and 7 *ex parte* only available to the Registry and public redacted version of confidential annex 2

Proposal for the common legal representation of victims

Source: Registry

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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REGISTRY

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Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

The Registrar of the International Criminal Court (“the Court”);

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 Registry Report recommending a decision concerning the common legal representation of victims participating in the case;³

NOTING the Requête Conjointe de Me Hélène CISSE et Me Brahim KONE représentants légaux des victimes en réponse au rapport du Greffe recommandant une décision concernant la représentation légale commune des victimes participant à l’affaire 02/05-03/09 ;⁴

NOTING the JOINT SUBMISSIONS ON BEHALF OF VICTIMS Legal Representative of 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 AND a/0552/09, a/0553/09, a/0554/09, a/0555/09, a/0556/09, a/0563/09, a/0564/09, a/0565/09, 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 Registrar's Report Recommending a Decision on Common Legal Representation of Victims Participating in the Case;⁵

NOTING the Chamber’s Order instructing the Registry to start consultations on the organisation of common legal representation;⁶

¹ ICC-02/05-03/09-121-Conf-Corr.

² ICC-02/05-03/09-124.

³ ICC-02/05-03/09-134.

⁴ ICC-02/05-03/09-135.

⁵ ICC-02/05-03/09-136.

⁶ ICC-02/05-03/09-138.

NOTING the Registry's Report on the implementation of the Chamber's Order instructing the Registry to start consultations on the organisation of common legal representation (the "Registry Report");⁷

NOTING the Submission 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/0565/09, 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/0575/0;⁸

NOTING the extension of time to 8 August 2011 and 15 August 2011 granted by the Chamber in an email of 22 June 2011⁹ and confirmed during the status conference held on 12 July 2011;¹⁰

NOTING the extension of time to 25 August 2011 granted by the Chamber in an email of 11 August 2011;¹¹

NOTING the Chamber's instructions given by email on 4 July 2011, where it approved the approach proposed in paragraphs 26 to 29 of the Registry Report and requested that the Registry inform the legal representatives of victims of the extension of deadline granted on 22 June 2011;¹²

NOTING the Submission 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/0565/09, 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,

⁷ ICC-02/05-03/09-164-Conf-Exp and ICC-02/05-03/09-164-Red.

⁸ ICC-02/05-03/09-177.

⁹ Email from Legal Officer, Trial Chamber IV to Associate Legal Officer, Division of Court Services, 22 June 2011.

¹⁰ ICC-02/05-03/09-T-12-ENG, p26.

¹¹ Email from Legal Officer, Trial Chamber IV to Director, Division of Court Services, 11 August 2011.

¹² Email from Legal Officer, Trial Chamber IV to Associate Legal Officer, Division of Court Services, 4 July 2011.

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;¹³

NOTING the Joint Observations of Victims' Legal Representatives on Common Legal Representation (the "Joint Observations of 19 July 2011");¹⁴

NOTING the Registry's Report on the organization of common legal representation;¹⁵

NOTING the Joint Victims' Observations on the Registry "Report on the organisation of common legal representation" and Request for the Joint Agreement on Common Legal Representation to be adopted pursuant to the Trial Chamber's Order (the "Joint Observations of 22 August 2011");¹⁶

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;

CONSIDERING that the Registry considered that the victims were unable to chose a common legal representative in the present instance, and that therefore the Registry is required to submit a proposal on common legal representation;

CONSIDERING that Annexes 4, 6 and 7 to the present document are classified as confidential *ex parte*, Registry only, as they concern communication between the Registry and the legal representatives of victims in the case; and Annex 5 to the present document is classified as confidential *ex parte*, Registry only in order to preserve the anonymity of the candidate(s) for common legal representative(s)

¹³ ICC-02/05-03/09-177.

¹⁴ ICC-02/05-03/09-182.

¹⁵ ICC-02/05-03/09-187.

¹⁶ ICC-02/05-03/09-200.

proposed by the Registry so that the Chamber is in a position to freely decide on the current proposal without prejudicing the candidate(s)' reputation;

CONSIDERING that Annex 2 to the present document is classified as confidential, unless otherwise decided by the Chamber, because it includes information previously mentioned in a confidential filing of the Office of the Prosecutor, as well as information provided by the legal representatives of victims which the Registry considers they may wish to maintain as confidential although it has not yet been in a position to verify this with the counsel in question;

CONSIDERING that a public redacted version of Annex 2 is also provided with the present document;

CONSIDERING that the Registry has now taken the steps that were set out in the Registry Report at paragraphs 26 to 29 and which were subsequently endorsed by the Chamber;

TRANSMITS the following proposal on common legal representation.

1 Introduction

1. The present document reports on the steps taken and the arrangements proposed by the Registry for the common legal representation of victims, in accordance with the Chamber's instructions¹⁷ and rule 90 of the Rules of Procedure and Evidence.

2 The Registry's approach to organising common legal representation

2. The Registry takes note of its mandate in respect of the organisation of legal representation, as set out in rule 16(1)(b) and 90 of the Rules of Procedure and Evidence. The established practice of the Registry in this regard is explained in Annex 1 to the present report.
3. Annex 1 explains that the Registry has recently developed an approach to implement its responsibilities in relation to common legal representation. As part of the Registry's new approach to the organisation of common legal representation for participating victims, the Registry will recommend in all cases an open and transparent selection of legal representatives. This process will take into account and provide due recognition to the established role of current legal representatives, but this will not be considered to be determinative in itself. Accordingly, the Registry recommends that the Chamber adopt the recommendations set out below, which have been reached following a systematic selection process including the current legal representatives with a view to proposing victims' representation appropriate to the present case.
4. The Registry notes that in the present case it has yet to fully realise this approach, particularly because of the short period of time and the resources which were

¹⁷ ICC-02/05-03/09-138 and emails from Legal Officer, Trial Chamber IV to Associate Legal Officer, Division of Court Services, 22 June 2011 and 4 July 2011.

available. However the basic elements of the approach taken in this case have been:

- a. Victim grouping has been determined taking into account views and information provided previously by victims and bearing in mind the advantages of minimising the number of groups.
 - b. Selection criteria and the respective weight accorded to them have been established, taking into account the views and information provided by victims as well as the previous experience of the Registry.¹⁸
 - c. An invitation was distributed through the Registry's list of counsel inviting lawyers on the list to express their interest in representing victims in the case (included with the present report as Annex 3).
 - d. The work performed to date by legal representatives already involved in the case has been taken into account, according to the approach explained in Annex 1.
5. The Registry notes the concerns raised by the current legal representatives regarding the limited nature of the consultation which has taken place with the participating victims in the present case.¹⁹ As indicated previously,²⁰ this is also a matter of concern to the Registry. It is recognised that the present process did not include a tailored and specific consultation on the organisation of common legal representation. However victims' views as presented to the Registry in previous meetings have been taken into account in accordance with regulation 79(2) of the Regulations of the Court. The Registry's reasons for not undertaking further consultations at this time were detailed in the Registry Report.

¹⁸ See ICC-02/05-03/09-164-Anx2.

¹⁹ ICC-02/05-03/09-182, ICC-02/05-03/09-200.

²⁰ ICC-02/05-03/09- 187.

3 The organisation of common legal representation in the present case

3.1 Identification of victim groups

6. For reasons explained previously²¹ the Registry considers that there are a number of advantages in arranging victims' representation through as few groupings and corresponding legal teams as are appropriate in a given case. For this reason the Registry will only recommend multiple victim groups where this is required because of some identified conflicting or distinct interest or where this is otherwise necessary for the fair and effective conduct of the proceedings. Therefore, the Registry has sought to identify whether victims appear to have, among themselves, any conflicting or substantially "distinct interests" such as would justify their separate representation, or whether there existed any other factor that would also provide a basis for arranging the representation of victims through two or more groupings.
7. The considerations which arose in this process are detailed in Annex 2 to the present document. Although some relevant information was brought to its attention, including by the current legal representatives, the Registry concludes that it has not been made aware of any conflicting, significantly distinct interests or other factor that would require victims to be grouped separately for representation in the present case.
8. The Registry therefore concludes that on the basis of information available to it at this point, there is no reason why all participating victims could not be represented by a single legal team. Should any conflict or significant divergence of interest be reported, either immediately or during the course of proceedings, the Registry could propose the arrangement of legal representation for a separate victim group or groups. Likewise, should any difficulties be encountered in

²¹ ICC-02/05-03/09-164-Red, paragraphs 17 to 18.

accessing participating victims,²² appropriate action could be taken, whether in the form of cooperation requests, other measures or the reorganisation of legal representation if appropriate.

3.2 Identification of common legal representatives

9. Given its view that all victim participants in the present case could be represented by a single legal team, the Registry has endeavoured to select candidate(s) to recommend as common legal representative(s).

3.2.1 Criteria applied

10. As explained in Annex 1 to the present document, the Registry has sought to establish an open, transparent and objective approach to selecting candidates to recommend as common legal representatives.
11. In the present case, the Registry has taken into account the views and preferences expressed by the victims at the time they first selected their current lawyers. The following factors were taken into account by the Registry in according the appropriate levels of weight to the identified selection criteria in the present case. The Registry recalls that:
 - For most of the victims a priority was to have a highly committed and skilled lawyer, with appropriate international experience. Some expressed a preference for a multilingual lawyer.
 - It was considered important for the victims that the lawyer be able to meet with them often enough and to communicate well with them and understand them. In order to maximise this, most of the victims requested a lawyer from their own country or one nearby. Some expressed a preference for a lawyer who spoke their language, although these factors were indicated as not overriding the need for appropriate skills and experience.

²² See Annex 2 to the present document.

- Some of the victims expressed a preference for a lawyer with experience in dealing with military and police forces, which appeared to be particularly important given the background of the victims and the nature of the case.
- Most of the victims expressed a preference to share a lawyer with the other victims whom they knew, at least from their own country.
- Among the Nigerian victims, some particular issues arose. A number of the victims serving in the Nigerian Army, or who continue to receive benefits from the Army as widows of servicemen, indicated that they believed the Army would oblige them to appoint a military lawyer (although it was explained to them that according to the rules of the ICC they had free choice regarding their lawyer). For some of the victims the apparent requirement by the military that they appoint an Army lawyer was acceptable. Others clearly indicated that they wanted a civilian lawyer but were fearful to appoint one because of possible ramifications.

3.2.2 *Current legal representatives*

12. The 89 victims currently participating in the present case have been represented to date by five separate legal teams.²³
13. As explained in Annex 1 to the present document, notwithstanding the benefits in maintaining continuity of legal representation, the prior representation of applicants in a case is not *of itself* a determinative factor in choosing a common legal representative. Rather, the Registry has taken the view, based on its new approach, that the possible benefits of maintaining existing counsel must be assessed through the framework of the same criteria applied to other counsel.
14. The Registry notes the legal representatives' statement that they were never made aware of any concerns in relation to their legal representation.²⁴

The Registry emphasises that the procedure followed in this case represents the implementation of a new Registry policy which is to be used consistently in the organisation of common legal representation, whether or not concerns exist about current counsel. Where current legal representatives express an interest in selection as common legal representative their performance to date (both strengths and weaknesses) is a relevant consideration, among others.

15. In the present case, the Registry notes that in fact some concerns regarding the performance of some of the current legal representatives have arisen. These were mentioned to the Chamber in the Registry Report.²⁵ The Registry also notes that in addition to having been raised with the counsel in question in a confidential manner when they arose, relevant issues were also raised in formal confidential correspondence during the course of the selection process, where relevant (included as Annex 4 to the present report). Counsel's responses to these communications were taken into consideration.²⁶ The Registry emphasises that such concerns do not affect all of the current legal representatives.

3.2.3 Selection process

16. On 11 July 2011 a document was sent to lawyers on the Registry's list of counsel²⁷ informing them of the rule 90 process under way, and inviting persons wishing to represent victims in the present case to express their interest. Counsel were informed of the criteria to be used and asked to provide, by 22 July 2011, a *curriculum vitae* and information indicating their suitability in relation to the

²³ ICC-02/05-03/09-134, paragraphs 3- 7.

²⁴ ICC-02/05-03/09-200, paragraph 7.

²⁵ ICC-02/05-03/09-164-Red, paragraph 22.

²⁶ Individual communications were sent to legal representatives, as indicated would occur in the Registry Report: ICC-02/05-03/09-164-Red, paragraph 22.

²⁷ See Annex 3 to the present document.

criteria. By the deadline set, the Registry received 50 responses.²⁸ Of these 39 included the information requested.

17. An initial review of these 39 responses was carried out to ascertain whether, at a minimum level, they met the requirements and criteria.
18. The 11 counsel shortlisted were requested to provide written answers to two follow-up questions concerning their proposed approach to the legal representation of victims. A further assessment taking into account these responses was then made against the identified selection criteria.
19. Lastly, 5 counsel were invited to undertake a telephone interview. These were conducted using standardised questions and carried out by a panel of Registry staff designated by the Counsel Support Section and Victims Participation and Reparations Section (the "VPRS").
20. The Registry notes that although only one of the current legal representatives responded directly to the Registry's notice sent on 11 July 2011, five of the six current legal representatives have expressed in some other form an interest in being selected as common legal representative (and/or, in some cases, working as a team member for the person selected as common legal representative). On this basis, the Registry included the current legal representatives in the selection process.²⁹
21. Final deliberations were undertaken using all information supplied by the interested counsel. At the end of the overall process, and having considered both current counsel and others who expressed an interest, it appeared to the Registry that the candidates appeared to demonstrate different strengths,

²⁸ This is in addition to the current legal representatives whom had also expressed an interest.

²⁹ Core standard questions were used for all counsel interviewed, but some of the questions put to the current legal representatives differed from those put to other counsel, to reflect their different circumstances and the fact that some questions had already previously been put to the current legal representatives.

which are relevant to the present case to varying degrees. The Registry notes that some of these counsel possess skills and experience which would complement each other if combined. Because of this the Registry considers that the victims would benefit from the establishment of a team comprising a counsel and an associate counsel, in order to ensure an understanding of the case and the victims' situation in the field, as well as providing an expertise and experience in international criminal litigation. The expressions of interest and *curriculum vitae* of the recommended counsel are attached as Annex 5 to the present document.

3.2.4 *Appropriate team structure*

22. The Registry considers that the Chamber may be assisted in its decision on common legal representation by information regarding the scope and nature of the support which will be available to the appointed counsel. This factor has been borne in mind by the Registry in considering the proposed counsel's suitability for the position.
23. In the present case the common legal representatives are likely to be reliant on the Court's legal aid scheme pursuant to rule 90(5). The Registry therefore also takes into consideration the resources made available for determining the composition of the legal team.
24. The Registry has taken into account the principles set down by Trial Chamber II and adopted by Trial Chamber III, according to which the victims' legal team structure must, to the extent possible and within the limits available under legal aid, allow the common legal representatives to keep their clients informed and respond to their inquiries (in a language understood by them), receive instructions and guidelines from their clients, maintain files regarding their clients, obtain qualified legal support as necessary, and store and process

confidential material.³⁰ The Registry has also taken into account the factors set out in regulation 113(2) of the Regulations of the Registry, as well as the assistance that will be provided to the team by the Office of Public Counsel for Victims pursuant to regulation 81(4) of the Regulations of the Court.

25. In the present case the Registry has particularly borne in mind that although the number of participating victims is relatively small (if compared to the numbers participating in other cases before the Court) the victims are geographically dispersed across several African countries, with many living a distance from urban centres, and also speak a variety of different languages.

26. The Registry considers that the team could comprise the following³¹:

- (1) A principal counsel;
- (2) An associate counsel;
- (3) A case manager;
- (4) Legal consultants or field assistants, who would, on an *ad hoc* basis, assist the legal representatives in, *inter alia*, maintaining communication with victims who are located in the different countries. However given the geographical distribution of the victims, the team may also benefit from the use of consultants where specific tasks are required to be carried out in the countries where the victims reside. These persons (field assistants or consultants) would preferably have an established relationship with the victims in question or have a background in outreach or victim support.

27. The Registry notes that the scope of legal assistance paid by the Court will be subject to the applicable rules and regulations.

³⁰ ICC-01/04-01/07-1328, paragraph 17; ICC-01/05-01/08-1005, paragraphs 25-26.

³¹ The resources allocated to such composition of the team are equivalent to two teams comprising one counsel and one case manager as standard composition. The Registry thus would like to point out that should more than one team be appointed by the Chamber, such composition can not be maintained for multiple teams.

4 Further considerations

4.1 Extent of representation

28. The Registry notes that a number of the victims participating in the present case have also applied for reparations. Unless instructed otherwise by the Chamber, the Registry holds that the common legal representative(s) appointed will represent the participating victims *also* in respect of their reparations applications, at least during the trial phase. The Registry believes that this would best ensure continuity of representation, coherence of legal strategy, and the clear presentation of information to victims.

4.2 Transitional arrangements

29. The Registry recognises that where a change in legal representation is involved, appropriate support will need to be provided to the newly appointed common legal representatives to meet the victims for the purpose of informing them of the changes made and the reasons for such changes. Such meetings may be held, if possible, with the assistance of former legal representatives. Arrangements may be facilitated by the Registry.

30. The Registry notes that until such time as the Chamber orders the appointment of the common legal representative, the current counsel continue to represent their respective clients. Once a common legal representative has been appointed, the currently acting counsel will be required by articles 15(2) and 18(5) of the Code of Professional Conduct for counsel to convey to the common legal representative the complete case file as well as records of communications received in relation to the representation undertaken. Given the length of time for which the current counsel have been representing their clients, the Registry considers that it will be essential for them to assist the common legal representative appointed not only by providing documentation but also by

conducting thorough briefings and wherever possible introductions to the victims.

4.3 Monitoring and review of common legal representation

31. The Registry notes that there will be a need to keep the representation of victims under review throughout trial proceedings. For example:

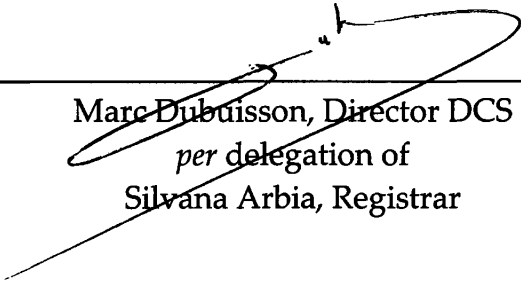
- The question of victim grouping may need to be reopened if litigated questions indicate conflicting or divergent interests among the victims.
- The composition of the legal team supported by the legal aid scheme of the Court may need to be reviewed.
- The Chamber could at any point request the Registry to revisit the common legal representatives' selection should it deem this appropriate.

5 Recommendations

32. For the reasons set out above, the Registry recommends to the Chamber that it:

- (a) appoints the two counsel identified in Annex 5 as, respectively, principal counsel and associate counsel representing all victims authorised to participate in trial proceedings in the present case; and
- (b) orders the Registry to:
 - i) transmit to the common legal representatives all applications for participation or reparations relating to the victims authorised to participate in the present proceedings;
 - ii) transmit to the common legal representatives the redacted versions of those applications which have been transmitted to the parties;
 - iii) grant access to such documents filed in the record of the case as the Chamber permits him/her to access;

- iv) provide the common legal representatives with assistance in identifying appropriately qualified persons to constitute their legal team, in identifying other persons of assistance, and in meeting with their clients;
 - v) keep the arrangement of common legal representatives under review;
- (c) orders all counsel who have represented victims in the present case to date to comply with their obligations under articles 15(2) and 18(5) of the Code of Professional Conduct for counsel and to fully cooperate with the appointed common legal representatives.



Marc Dubuisson, Director DCS
per delegation of
Silvana Arbia, Registrar

Dated this 25 August 2011
At The Hague, The Netherlands