



Original: French

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

Date: 8 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 MOHAMED JERBO JAMUS**

**Public Document**

**Observations of the Legal Representative on the agreement as to evidence  
pursuant to rule 69 of the Rules of Procedure and Evidence**

**Source:** Ms Hélène Cissé, Legal Representative of Victims  
a/0434/09, a/0435/09, a/0457/09, a/0458/09, a/0655/09 and a/0656/09

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**

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Ms Hélène Cissé

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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**Office of Public Counsel for Victims**

**Office of Public Counsel for the  
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**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. The confirmation of charges hearing in the case of *The Prosecutor v. Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus* took place before Pre-Trial Chamber I on 8 December 2010. On 7 March 2011, the Pre-Trial Chamber confirmed the charges against the suspects.
2. The first status conference was held on 19 April 2011, during which the Chamber requested the Prosecutor and the Defence to file a joint submission providing an update on the discussions on a possible agreement, if at all, as to facts and evidence.
3. On 16 May 2011, the Office of the Prosecutor and the Defence filed a joint submission setting out the limited issues which would be contested at trial along with a challenge, indicating that the participation of victims would be confined within such limits. They annexed the agreement as to the uncontested evidence pursuant to rule 69 of the Rules of Procedure and Evidence.
4. By further joint observations dated 23 May 2011, the Office of the Prosecutor and the Defence requested that the annex not be notified to the anonymous victims for observations, arguing that doing so would violate the fundamental principle prohibiting anonymous accusations.
5. By decision of 22 June 2011, Trial Chamber IV indicated that it would consider only those observations submitted on behalf of non-anonymous victims, and instructed the Legal Representatives of Victims to consult with their clients to ascertain whether they would agree to the disclosure of their identities to the public or, at the very least, to the parties and participants in the trial proceedings. Furthermore, the Chamber requested the Office of the Prosecutor and the Defence to prepare a redacted version of the annex containing their

agreement as to evidence, and requested the Legal Representatives to file their observations on the joint submission by the Office of the Prosecutor and the Defence on the issues which remained in dispute and on the agreement as to evidence annexed thereto.

6. Trial Chamber IV further instructed the Legal Representatives to set out the detailed outcome of the consultations with their clients on disclosure of the victims' identities.
7. Having perused the joint submission by the Office of the Prosecutor and the Defence of 16 May 2011 restricting and listing only those issues which, in their view, would be contested, as well as the redacted version of the annex containing their agreement as to evidence, the Legal Representative considers that, given the nature of the observations which might be required in relation to the said documents, lifting of anonymity would primarily be in the interests of those victims she represents who have dual victim/witness status as set out in the joint list of the Office of the Prosecutor and the Legal Representatives of Victims of 9 May 2011. Moreover, these victims have a different status from those victims who are not also witnesses.
8. Furthermore, the limited issues set out in the joint submission by the Office of the Prosecutor and the Defence of 16 May 2011 essentially question the nature of peacekeeping missions and the conditions under which they fall under the protection of the international law of armed conflict. They also include an assessment of the awareness and knowledge of the parties involved in missions of this type, that is, the members participating in such a peacekeeping mission and the belligerents in the field.

9. For this reason, in regard to the lifting of anonymity, the Legal Representative of Victims for the most part consulted those victims she represents who have dual victim and witness status and are included in the list of 9 May 2011.
10. The Legal Representative of Victims wishes to state that she preferred to wait for the Office of the Prosecutor's final list of witnesses, given the developments which occurred between 9 May 2011 and 1 August 2011 indicating that the Prosecutor wished to amend his list of witnesses.
11. Furthermore, the contact details of some of these victim/witnesses had changed. One had been promoted from the rank of captain to colonel and then to general and taken on sensitive duties. Another had retired and was only checking his mailbox infrequently but, after the various working sessions with the Legal Representative, was able to provide valuable evidence on the participation of one of the Accused owing to the positions he held and his relations with his fellow military observers who were responsible for preparing field reports. Such changes extended the time required for contact. The latter client finally gave his consent at 11.35 p.m. on Saturday, 6 August 2011 after a long telephone conversation.
12. The list of victims on whose behalf the Legal Representative is submitting the present observations includes one victim who does not have witness status but who, after being consulted and upon reflection, indicated in the evening of Sunday, 7 August 2011 his wish for his anonymity to be lifted. It also includes one victim who, despite having witness status and being included on the Prosecutor's list, has always lived in Senegal, has never been to Darfur, and is a child of one of the police officers killed in cold blood by the attackers in spite of his having taken refuge, unarmed, under his bed. Since May 2011, this client has repeatedly stated to the Legal Representative that he did not

understand why he was being called as a witness because he did not see what evidence he could provide in relation to the events. He nevertheless agreed to his anonymity being lifted.

**13. However, after discussion with the Legal Representative, the victims stressed that they wished their anonymity to be lifted solely with respect to the Office of the Prosecutor and the Defence, and absolutely not to any other person.**

14. As for observations on the joint submission by the Office of the Prosecutor and the Defence and on the annex containing a redacted version of their agreement as to evidence, the Legal Representative specifically wishes to express her reservations with regard to the chronological order in which the contested issues are presented and on the substance of the restrictions themselves, both with respect to the issues to which discussion was limited – including in relation to the victims – and the terms in which the evidence presented in the annex to the said agreement was couched.

15. The Legal Representative of the Victims considers that such restrictions cause serious prejudice to the victims' participation rights, and fail to reflect charges and factual evidence which are crucial to their right to know, in all transparency, the full facts of what occurred and the extent of the accused persons' responsibility.

16. These restrictions are clearly detrimental to the interests of justice, in particular the need for a comprehensive elucidation of the elements of the crime.

17. It is astonishing that no reference is made to the actually unarmed persons killed and injured and the circumstances in which some of those persons were

killed and injured when their status prohibited them from being armed. The victims include those on behalf of whom the Legal Representative is making the present observations. One of them was lying prone in a trench where he had taken refuge when the attackers shot him in the back, and another was under his bed when the same attackers went to kill him with a burst of gunfire. Even in military combat between belligerents (which does not apply in this case, since members of the peacekeeping mission absolutely do not have the status of a belligerent in a conflict), international humanitarian law considers such acts to be a war crime.

Similarly, no reference is made to the pillaging of strictly personal and civilian property entirely unrelated to the functioning of the mission (salaries, shoes, etc.)

18. The Legal Representative wishes to recall the wording and purpose of rule 69 of the Rules of Procedure and Evidence, pursuant to which the agreement as to evidence between the Office of the Prosecutor and the Defence was prepared:

The Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, *unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular in the interests of the victims.*

19. The Legal Representative considers that, in light of the joint agreement as to the facts and charges of 19 October 2010 between the Office of the Prosecutor and the Defence in which the Defence clearly indicated that it was not contesting the facts as set forth in the Document Containing the Charges, and in light of the drastic truncation in the facts and evidence set out in the agreement as to evidence annexed to the joint submission restricting the contested issues, it is crucial for the interests of justice – which clearly include

all the interests of the victims – that the Chamber request the Office of the Prosecutor and the Defence to set out more comprehensively both the contested issues and the facts and evidence.

20. As for the chronology of the issues themselves, point (iii) – whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations – should be listed first; moreover, in paragraph 5 of the joint submission of 16 May 2011, it does appear in first place. The two other issues are contingent upon the finding as to the first issue.

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[signed]

Ms Hélène Cissé

Dated this 8 August 2011

At Paris