

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 17 October 2011

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

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

Public

**Decision on the Registry Report on six applications to participate in the
proceedings**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Counsel for the Defence

Mr Karim A.A. Khan

Mr Nicholas Koumjian

Legal Representatives of Victims

Ms Hélène Cissé

Mr Jens Dieckmann

Unrepresented Victims

Legal Representatives of Applicants

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Others

Mr Akin Akinbote

Sir Geoffrey Nice &

Mr Rodney Dixon

Trial Chamber IV (“Chamber”) of the International Criminal Court (“Court” or “ICC”) in the case of the *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (“Banda and Jerbo case”), issues the following Decision on the Report on six applications to participate in the proceedings.

I. Background and Submissions

1. By decision of 29 October 2010, Pre-Trial Chamber I authorised 89 victims to participate in the proceedings in the *Banda and Jerbo* case.¹
2. On 7 March 2011, the Pre-Trial Chamber issued the Decision on the Confirmation of the Charges.²
3. On 5 September 2011, the Registry transmitted to the Chamber a proposal for the individual reports it intended to submit pursuant to Regulation 86(5) of the Regulations of the Court (“Regulations”), with an explanation of its content for the Chamber's consideration and approval. The Registry also sought guidance from the Chamber on the procedure to follow with regard to incomplete applications.³
4. On 6 September 2011, the Chamber approved the proposed template for the individual reports and the related explanation. It also instructed the Registry not to file any incomplete application unless ordered to do so.⁴

¹ Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, 29 October 2010, ICC-02/05-03/09-89.

² Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Conf-Corr.

³ Email communication from the Registry to the Chamber through a legal officer sent on 5 September 2011 at 17.47 hours.

⁴ Email communication from a legal officer of the Chamber to the Registry sent on 6 September 2011 at 10.13 hours.

5. On 14 September 2011, the Registry appointed one team of common legal representatives to represent all victims authorised to participate in the current proceedings.⁵
6. On 16 September 2011, the Registry filed with the Chamber six applications to participate in the proceedings.⁶
7. On the same day, the Registry filed its confidential *ex parte* "Report on six applications to participate in the proceedings" ("Report"),⁷ informing the Chamber that it had received 5 applications which appeared to be linked to the present case, as well as supplementary information on one application previously rejected by Pre-Trial Chamber I in the case *The Prosecutor v. Bahar Idriss Abu Garda*, as it was considered to be incomplete.⁸ The Report provides an overview of the six applications, including on issues such as the Registry's initial assessment of the applications' compliance with the requirements of Rule 85 of the Rules of Procedure and Evidence ("Rules"), the existence of dual status applicants, the legal representation of the applicants, and the proposed protective measures vis-à-vis the applicants for the purpose of transmission of the applications to the parties.⁹ It also provides an individual assessment report for each of the six applications in accordance with the template approved by the Chamber.¹⁰

⁵ Notification of appointment of common legal representatives, 14 September 2011, ICC-02/05-03/09-215 with confidential annexes 1 and 2.

⁶ Transmission to the Trial Chamber of applications for participation in the proceedings, 16 September 2011, ICC-02/05-03/09-216, with confidential and *ex parte* annexes 1 to 6.

⁷ Report on six applications to participate in the proceedings, 16 September 2011, ICC-02/05-03/09-217-Conf-Exp. The Report contains three annexes: Annex 1 provides an explanation of the contents of the individual assessment reports under Regulation 86(5), which are included in Annex 2 (ICC-02/05-03/09-217-Conf-Exp-Anx1; ICC-02/05-03/09-217-Conf-Exp-Anx2). Annex 3 contains a letter sent by Sir Geoffrey Nice and Mr. Rodney Dixon in relation to two applications (ICC-02/05-03/09-217-Conf-Exp-Anx3).

⁸ ICC-02/05-03/09-217-Conf-Exp, page 3.

⁹ *Ibid.*, paragraphs 4 to 17.

¹⁰ *Ibid.*, paragraphs 8 to 11.

8. The Registry did not submit for the Chamber's consideration the applications of the 89 victims the Pre-Trial Chamber had authorised to participate in the proceedings. Rather, it assumed that, unless the Chamber ordered otherwise, these victims are authorised to participate during the trial phase.¹¹
9. The Registry further informed the Chamber that it has received a number of other applications which are currently incomplete and for which missing documents or information have been requested and are awaited. The Registry submits that, unless otherwise instructed by the Chamber, it will continue to file completed applications received on a regular basis.¹²

II. Relevant Provisions

10. For the purposes of this decision, the Chamber has considered to Article 68(1) and (3) of the Statute, Rules 89(1) and 91(1) of the Rules and Regulations 23 *bis*, 24, 34, 86(5) and 86(8) of the Regulations.

III. Analysis

11. At the outset, the Chamber notes that the Report raises a number of issues concerning victims' participation and the treatment of applications for participation in the present case, namely issues related to (i) the status of applications which the Pre-Trial Chamber has already decided upon, (ii) the criteria for the filing of new applications, and (iii) the scope of redactions to be applied to victims' applications before transmission to the parties. The Chamber considers these issues before dealing more specifically with the applications of

¹¹ *Ibid.*, paragraph 3.

¹² *Ibid.*, paragraph 18.

a/0543/09, a/0657/09, a/0658/09, a/2868/10, a/0601/11, a/0602/11 and their communication to the parties for observations.

A. Status of victims' applications for participation determined by the Pre-Trial Chamber

(i) Status of victims authorised to participate during the confirmation of charges phase

12. The Registry did not submit to the Chamber for consideration the applications of the 89 victims authorised to participate by the Pre-Trial Chamber, as it assumed that these victims are authorised to participate during the trial phase.¹³

13. The Chamber notes that by decision issued on 27 July 2010, the Single Judge ordered, *inter alia*, the Victims Participation and Reparations Section ("VPRS") to file "any complete victims' applications for participation" by 20 October 2010.¹⁴ The Chamber notes the information that Pre-Trial Chamber I deemed necessary for an application to be considered complete (see paragraphs 21 and 22 below)¹⁵.

14. Furthermore, the Chamber notes that Pre-Trial Chamber I considered that an applicant is to be authorised to participate in the proceedings in a case when (i) the applicant's identity as a natural person appears to be duly established; (ii) the applicant has suffered harm; (iii) the events described in the application for

¹³ *Ibid.*, paragraph 3.

¹⁴ Decision Setting a Time Limit for the Parties' Replies to 87 Applications for Victims' Participation in the Proceedings and a Deadline for the Filing of Applications for Participation, 27 July 2010, ICC-02/05-03/09-56, page 6.

¹⁵ ICC-02/05-03/09-89; Report on applications for participation in proceedings from victims accepted in the case of *The Prosecutor v. Bahar Idriss Abu Garda*, 6 July 2010, ICC-02/05-03/09-50-Conf-Exp, paragraph 24; Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 25 September 2009, ICC-02/05-02/09-121, paragraph 7; Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, 17 August 2007, ICC-01/04-374, paragraph 12.

participation constitute the crime(s) within the jurisdiction of the Court with which the suspect is charged; and (iv) the harm suffered by the applicant appears to have arisen "as a result" of the crimes charged.¹⁶ The Pre-Trial Chamber further indicated that at that stage of the proceedings, the scope of the case was delineated by the charges presented by the Prosecutor in the Document containing the charges, wherein it was alleged that on 29 September 2007, the suspects Mssrs Banda and Jerbo, jointly and with rebel forces under their command and control, committed the war crimes of violence to life through acts of murder (and attempted murder), of intentionally directing attacks against personnel, installations, materials, units or vehicles involved in a peacekeeping mission and of pillaging at the Military Group Site Haskanita ("MGS Haskanita"), in Haskanita village, Um Kadada Locality, in North Darfur, the Sudan.¹⁷

15. In light of the above, and in accordance with Rules 89 and 91(1) of the Rules as well as Regulation 86(8) of the Regulations, the Chamber is of the view that victims authorised to participate in the proceedings at the pre-trial stage are, in principle, and subject to the considerations set forth below, authorised to participate in the proceedings at the trial stage, without the need for their applications to be filed and assessed anew.¹⁸ The Chamber considers that the analysis of the Pre-Trial Chamber, in particular with respect to the criteria set forth in Rule 85 of the Rules with reference to the confirmation of charges remains valid in principle and does not need to be revisited at subsequent stages of the proceedings.¹⁹

¹⁶ ICC-02/05-03/09-89, paragraph 2.

¹⁷ *Ibid.*, paragraph 4.

¹⁸ See also, Decision on the treatment of applications for participation, 26 February 2009, ICC-01/04-01/07-933-tENG, paragraphs 9 and 10; Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, 22 February 2010, ICC-01/05-01/08-699, paragraphs 17, 18 and 22.

¹⁹ See also, ICC-01/04-01/07-933-tENG, paragraph 10.

16. Notwithstanding the above, the Chamber may rule on applications for participation previously accepted by the Pre-Trial Chamber (1) where the victim concerned was authorised to participate solely on the basis of the commission of a crime corresponding to a charge which was not confirmed by the Pre-Trial Chamber;²⁰ and (2) where new information has emerged since the original decision authorising the victim to participate in the proceedings.²¹

17. In the instant case, the Chamber notes that each of the 89 victims authorised to participate in the proceedings have suffered harm as a result of the commission of at least one crime within the charges confirmed by the Pre-Trial Chamber. The Chamber will therefore not re-examine previously accepted applications for participation unless a request in this sense is made by one of the parties or the Registry based, on new information that has emerged since the original decision.

(ii) Review of applications rejected by the Pre-Trial Chamber

18. With regard to applications previously rejected by the Pre-Trial Chamber on the grounds that they were incomplete, the Chamber will assess them if a new application is filed, duly completed, and in accordance with the criteria set out in paragraph 21 below.

19. In addition, concerning the other applications rejected by the Pre-Trial Chamber, the VPRS should review them to establish whether, in view of information subsequently received, the application should be filed for consideration by the Trial Chamber.²²

²⁰ ICC-01/04-01/07-933-tENG, paragraph 11; ICC-01/05-01/08-699, paragraph 19.

²¹ ICC-01/04-01/07-933-tENG, paragraph 12; ICC-01/05-01/08-699, paragraphs 17 and 18.

²² See also, ICC-01/05-01/08-699, paragraphs 20-21 and 39(ii).

B. Filing of new applications for participation

(i) Link with the charges

20. According to the jurisprudence of the Appeals Chamber, for the purposes of participation in trial proceedings “[...] the harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused.”²³ Hence, the VPRS must transmit to the Chamber only those victim applications that appear, *prima facie*, to be linked with the charges confirmed against the accused persons.

(ii) Criteria for assessing when an application is “complete” and related issues

21. On 6 September 2011, the Chamber instructed the Registry to file only complete applications, unless otherwise ordered.²⁴ In this respect, the Chamber, in light of the relevant case-law on this matter, including the position of Pre-Trial Chamber I in the present case,²⁵ considers that an application may be considered complete if it contains the following information:

- (i) the identity of the applicant;
- (ii) the date of the crime(s);
- (iii) the location of the crime(s);

²³ Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paragraph 65.

²⁴ Email communication from the Chamber through a legal officer of the Chamber to the Registry, sent on 6 September 2011 at 10.13 hours.

²⁵ ICC-02/05-03/09-89; ICC-02/05-03/09-50-Conf-Exp, paragraph 24; ICC-02/05-02/09-121, paragraph 7; ICC-01/04-374, paragraph 12. See also, ICC-01/04-01/07-933-tENG, paragraph 28; ICC-01/05-01/08-699, paragraph 35.

- (iv) a description of the harm suffered as a result of the commission of any crime confirmed in the Decision on the Confirmation of Charges;
- (v) proof of identity;
- (vi) if the application is made by a person acting with the consent of the victim, the express consent of the victim;
- (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim with disabilities, proof of legal guardianship; and
- (viii) a signature or thumb-print of the applicant on the document, at the very least on the last page of the application.

22. With regard to documents accepted in order to establish the identity of applicants, the Chamber notes the positions adopted by Pre-Trial Chamber I and other Trial Chambers,²⁶ and considers that the list should include the following documents (each of which suffices):

- (i) national identity card, passport, birth certificate, death certificate, marriage certificate, family registration booklet, will, driving licence, card from a humanitarian agency;
 - (ii) voting card, student identity card, pupil identity card, letter from local authority, camp registration card, documents pertaining to medical treatment, employee identity card, baptism card;
 - (iii) certificate/attestation of loss of documents (loss of official documents), school documents, church membership card, association or political party membership card, documents issued in rehabilitation centres for children associated with armed groups, certificates of nationality, pension booklet;
- or

²⁶ See also, ICC-02/05-03/09-89, paragraph 3; ICC-01/04-01/07-933-tENG, paragraph 30; ICC-01/05-01/08-699, paragraph 36.

- (iv) a statement signed by two credible witnesses attesting to the identity of the applicant or the relationship between the victim and the person acting on his or her behalf, providing that there is consistency between the statement and the application. The statement should be accompanied by proof of identity of the two witnesses.

23. As regards the credibility of witnesses called upon to sign statements, the Chamber will take into consideration, factors such as the nature and length of the relationship of those witnesses with the applicant, or their standing in the community. In these instances, the Trial Chamber will welcome any information the VPRS considers relevant, which should be included in the reports provided to the Chamber.²⁷

24. With regard to possible discrepancies between the identification documents, the Chamber is of the view that, except where there is a “blatant contradiction,” applications should be accepted if the differences at issue do not call into question the credibility of the information provided by the application on identity and age, and there are documents providing information which, taken together, enable the identity and age of the applicants to be determined on initial scrutiny.²⁸

25. Finally, the Chamber will adopt a flexible approach when assessing applications containing documents presenting similar features as the documents enumerated above.²⁹ In any event, the Chamber stresses that the parties, while submitting their

²⁷ See in this respect, Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, paragraph 88; ICC-01/04-01/07-933-tENG, paragraph 31.

²⁸ See also, ICC-01/04-01/07-933-tENG, paragraph 34.

²⁹ Corrigendum to the Decision on 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims’ applications to the Registry, 21 July 2011, ICC-01/05-01/08-1590-Corr, paragraph 35.

observations on victims' applications, will have an opportunity to challenge documents submitted for the purposes of an application.

(iii) Legal representation

26. The six applicants concerned by the Report have indicated their wish to be represented either by Sir Geoffrey Nice and Mr Dixon or by Mr Akin Akinbote.

27. In light of the Registry appointment of a team of common legal representatives to represent all victims in the proceedings,³⁰ which appointment is currently contested,³¹ should these applicants be authorised to participate, the Registry will appoint the common legal representatives.

28. The Chamber further considers that the Registrar should appoint the Office of Public Counsel for Victims as the legal representative of applicants without legal representation, pending a decision of the Chamber on their application.³²

(iv) Time limit for submission of applications for participation

29. Regulation 86(3) of the Regulations establishes that "victims applying for participation in the trial and/or appeal proceedings shall, to the extent possible, make their application to the Registrar before the start of the stage of the proceedings in which they want to participate".

³⁰ ICC-02/05-03/09-215 with confidential annexes 1 and 2.

³¹ Request of Victims a/1646/10 and a/1647/10 for the Trial Chamber to review the Registry's "Notification of appointment of common legal representatives of victims" in accordance with Regulation 79(3), 30 September 2011, ICC-02/05-03/09-228 and annexes thereto.

³² See also, ICC-01/04-01/07-933-tENG, paragraphs 44-45.

30. The Chamber considers that with a view to ensuring an efficient and expeditious preparation of the trial, any duly completed applications to participate in the current proceedings should be submitted to the VPRS by 13 January 2012. The Chamber clarifies that this time limit does not apply to the submission of applications for reparations.

C. Redactions to be applied in victims' applications and role of the VPRS

31. Pursuant to Rule 89(1) of the Rules, the Registry must provide a copy of the applications for participation to the Office of the Prosecutor ("prosecution") and the defence who are entitled to reply within a time limit to be set by the Chamber. However, the transmission of applications to the parties is subject to Article 68(1) of the Statute, which mandates the Court to take appropriate measures to protect *inter alia* the safety, privacy, physical and psychological well-being, dignity and privacy of victims.

32. The Chamber notes that the Registry submitted that the redaction of identifying information constitutes the principal, if not the only, protective measure available to the Registry, even more so with respect to applicants located on the territory of the Sudan, where the Court has no access.³³ The Registry also stated that it has prepared redacted versions of all six applications and is ready to transmit them to the parties in accordance with Rule 89(1) of the Rules, should the Chamber so order. It submits that "consistent with its established guidelines" and in consultation with the VWU where necessary, it proposes to redact "any information which could be used to identify the applicant, his or her family or third persons such as intermediaries and community members referred to in the

³³ ICC-02/05-03/09-217-Conf-Exp, paragraph 16. See also, Report on eight applications to participate in the proceedings, 11 August 2010, ICC-02/05-03/09-60, paragraphs 14-38.

applications".³⁴ In this regard, the Registry noted the approach taken by Pre-Trial Chamber I, which ordered redacted versions of applications to be provided to the defence and non-redacted to the prosecution, and sought the Chamber's instructions as to the modalities of transmission of the applications to the parties³⁵.

33. The Chamber recalls and adopts the guidelines given by different Chambers as to the identifying information that may be redacted in the applications for participation:³⁶

- i) applicant's name(s);
- ii) name(s) of relatives;
- iii) place of birth;
- iv) date of birth;
- v) name of tribe or ethnic group, if this could be an identifying feature leading to the applicant, bearing in mind the overall circumstances;
- vi) occupation, if a specific occupation would enable the applicant to be identified;
- vii) relevant address;
- viii) telephone number and email address;
- ix) names and details of any person who helped the victim to fill out the application for participation;
- x) name(s) of victims of and/or witnesses to the acts described; and
- xi) characteristics enabling the applicant to be identified from the injury, loss or harm suffered.

³⁴ ICC-02/05-03/09-217-Conf-Exp, paragraph 17.

³⁵ ICC-02/05-03/09-217-Conf-Exp, paragraph 15.

³⁶ ICC-01/04-01/06-1308, paragraph 28; ICC-01/04-01/07-933-tENG, paragraphs 49 to 51; ICC-01/05-01/08-699, paragraph 33.

34. The VPRS, in consultation with the VWU, should propose to the Chamber any further redaction that it considers may be necessary, in the context of the case, explaining in these cases the reasons having led it to propose those redactions.
35. In this respect, the Chamber concurs with the reasoning of other Chambers, in that “the scope of [...] redactions cannot exceed what is strictly necessary in light of the applicant’s security situation and must allow for a meaningful exercise by the prosecution and the defence of their right to reply to the application for participation”.³⁷
36. Finally, the Chamber endorses the position of other Trial Chambers³⁸ and considers that the principle of equality of arms requires that the same versions be disclosed to the prosecution and to the defence.
37. Therefore, all applications for participation must be provided to the prosecution and defence in a confidential redacted form. Applicants will be referred to only by their reference number.

D. Classification of the Registry’s report

38. The Chamber notes that pursuant to Regulation 23 *bis* of the Regulations of the Court any document filed by the Registrar (or a participant) and marked “ex parte”, “under seal” or “confidential”, shall state the factual and legal basis for the chosen classification. The Report does not include such an explanation and it is

³⁷ See, among others, ICC-01/04-01/06-1308, paragraph 27; ICC-01/04-01/07-933-tENG, paragraphs 52; ICC-01/05-01/08-699, paragraph 26.

³⁸ See for example, ICC-01/04-01/06-1308, paragraph 30; ICC-01/04-01/07-933-tENG, paragraph 53.

not apparent to the Chamber why the Report and annex 1 cannot be made available to the parties.

FOR THESE REASONS, THE CHAMBER

DECIDES that the 89 victims authorised by Pre-Trial Chamber I to participate in the proceedings are authorised to participate in the trial, as set out in paragraph 17 above;

ORDERS the VPRS to verify whether applications for participation which were rejected by the Pre-Trial Chamber would merit reassessment in light of newly obtained information and, if so, to submit the applications to the Chamber by 30 November 2011, together with an explanatory report;

ORDERS the VPRS to register only complete applications as defined in paragraphs 21 to 25 of this Decision;

ORDERS that any new application for participation in the proceedings must be submitted to the VPRS by 13 January 2012;

ORDERS the Registrar to appoint the Office of Public Counsel for Victims as the legal representative of applicants who have no legal representative acting for them, pending a decision of the Chamber on their application;

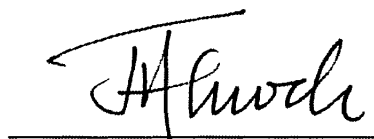
ORDERS the Registry to transmit to the prosecution and to the defence a redacted version of the applications provided by Applicants a/0543/09, a/0657/09, a/0658/09, a/2868/10, a/0601/11 and a/0602/11;

ORDERS the prosecution and the defence to file their observations on the six applications within 21 days of notification of the redacted applications;

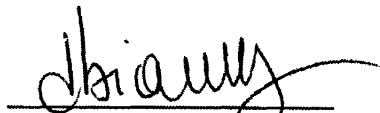
ORDERS the parties to refer to the six applicants by the numbers that have been assigned to them by the Registry; and

ORDERS the Registry to provide the reasons for the chosen level of confidentiality of the Report and annex 1 or indicate whether they may be reclassified public within 7 days of the filing of this decision.

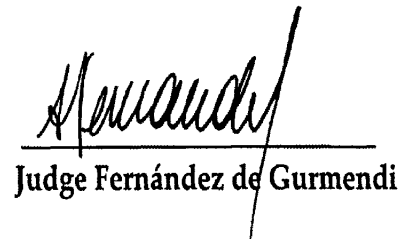
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fatoumata Dembete Diarra



Judge Fernández de Gurmendi

Dated this 17 October 2011

At The Hague, The Netherlands