

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 12 October 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***

Confidential

With confidential Annexes 1 and 2 and public Annexes 3, 4, 5 and 6

**Observations in response to the request for review of the proposed appointment of
common legal representation**

**Source: Ms Hélène Cissé, common legal representative of victims, Lead Counsel
Mr Jens Dieckmann, common legal representative of victims, Associate
Counsel**

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

The Office of the Prosecutor
Luis Moreno Ocampo

Counsel for the Defence
Karim A. A. Khan

Legal Representatives of Victims
Hélène Cissé
Jens Dieckmann

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Fiona McKay

Other
Sir Geoffrey Nice, QC & Rodney Dixon

1. As part of the process of preparing the case for trial, the Registry drafted a report dated 15 April 2011 recommending that common legal representation be arranged.¹
2. After collecting and considering all of the information, observations and applications concerning the modalities of common legal representation filed by the legal representatives of the victims acting at the trial stage of this case, the Registry submitted to the Chamber its "Proposal for the common legal representation of victims" on 25 August 2011² and an "Addendum to the Proposal for the common legal representation of victims" on 26 August 2011.³
3. By its *Order inviting the Registrar to appoint a common legal representative* of 6 September 2011, Trial Chamber IV invited the Registrar to appoint a common legal representative of the victims in the case.⁴
4. By submissions dated 14 September 2011, the Registry of the International Criminal Court informed Trial Chamber IV of the appointment of Ms Hélène Cissé as Lead Counsel and common legal representative of all of the victims and Mr Jens Dieckmann as Associate Counsel and common legal representative of all of the victims.⁵
5. By a filing notified on Friday, 30 September 2011, Sir Geoffrey Nice QC and Rodney Dixon requested the Chamber to review the Registry's appointment of common legal representation in respect of Sudanese victims a/1646/10 and a/1647/10 pursuant to regulation 79(3) of the Regulations of the Court.⁶

¹ ICC-02/05-03/09-134, 15 April 2011.

² ICC-02/05-03/09-203, 25 August 2011.

³ ICC-02/05-03/09-204-Conf-Exp, 26 August 2011.

⁴ ICC-02/05-03/09-209, 6 September 2011.

⁵ ICC-02/05-03/09-215, 14 September 2011.

⁶ ICC-02/05-03/09-228, 30 September 2011.

Legal basis for these observations

6. Counsel constituting the common legal representation wish to submit respectfully to the Chamber their observations on the points of law which they consider crucial for the victims, on the basis of regulation 24(2) and, subsequently, regulation 34(b) of the Regulations of the Court.
7. The aforementioned regulation 24(b) states that “[v]ictims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3, and rule 89, sub-rule 1, subject to any order of the Chamber”.
8. Regulation 22 of the Regulations of the Court provides that the term “document” “shall include any motion, application, request [...] and any other submission in a form capable of delivering a written record to the Court”.
9. Under regulation 34(b), “[a] response referred to in regulation 24 shall be filed within 21 days of notification in accordance with regulation 31 of the document to which the participant is responding”. The request in relation to which the common legal representation wishes to submit observations was notified to Counsel on 30 September 2011.
10. The victims represented by the common legal representatives satisfy the criteria of regulation 24(2).
11. They have been authorised to participate in the proceedings since the *Abu Garda* case and their standing has been maintained in the instant case concerning Abdallah Banda Jerbo and Saleh Mohammed Jerbo, both at the pre-trial stage and in the ongoing preparation for trial.

12. They have been invited by Trial Chamber IV on several occasions to make observations during status conferences and in the interim; furthermore, the Chamber requested the Registry to arrange the common legal representation of these victims.
13. The continued participation of victims throughout the proceedings is enshrined in regulation 86(8) of the Regulations of the Court, which states: "A decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber". The applicability of this rule has been confirmed by a previous ruling.⁷

Observations in response

A. Information on the implementation of the common legal representation at the current stage

14. The common legal representatives wish to provide the Chamber with information on the implementation of the common legal representation at the current stage.
15. The former counsel for the victims from Mali⁸ and Nigeria⁹ have supported the implementation of the common legal representation proposed by the Registry, and steps have been taken to enable contact and direct consultations between the common legal representatives and the victims from Mali and Nigeria. The files of those victims will be transferred to the common legal representatives without difficulty. However, the request of the common legal representatives to receive the file of the Sudanese victims has been denied until the request for review filed on 30 September 2011 and all matters pertaining thereto are settled.

⁷ ICC-01/05-01/08-699, para. 22, 22 February 2010, in the case of *The Prosecutor v. Jean Pierre Bemba Gombo*.

⁸ Annex 1, confidential.

⁹ Annex 2, confidential.

B. *The victims' characteristics and interests are not fundamentally distinct or conflicting, within the meaning of the applicable provisions*

16. Rule 85 of the Rules of Procedure and Evidence defines individual victims in the following terms: “(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.

17. The only elements of crimes upheld against the Accused in the *Decision on the confirmation of charges* are those defined in article 8(2)(c)(i), 8(2)(e)(iii) and 8(2)(e)(v) of the Rome Statute.¹⁰

In the specific case of the two Sudanese victims authorised to participate in the proceedings on the basis of the elements of crimes set forth in article 8(2)(e)(iii), they were admitted on account of the emotional harm they suffered as a direct result of the attack on the Haskanita base of the African Union peacekeeping mission on 29 September 2007, where they were located as employees of that mission.

18. Indeed, in its decision, Pre-Trial Chamber I stated that, in respect of Applicants a/1646/10 and a/1647/10, only the psychological harm they suffered qualifies as harm resulting from the charges brought against the suspects, within the meaning of rule 85(a) of the Rules of Procedure and Evidence, since both applicants were traumatised as a direct result of the attack, during which their own lives were endangered and they witnessed African Union soldiers being killed and injured.¹¹

19. The Chamber made a point of dismissing the other elements of harm argued by these victims which were linked to events which allegedly took place in the village of Haskanita. Consequently, an attempt to broaden the category of victims of the attack on the Haskanita military base, *inter alia* by including a notion of “harm to the village community” and by broadening the factual elements of the crime within the

¹⁰ ICC-02/05-03/09-121-Corr-Red, 8 March 2011, *Decision on the Confirmation of Charges*.

¹¹ ICC-02/05-03/09-89, 29 October 2010, *Decision on Victims' Participation at the Hearing on the Confirmation of the Charges*, paras. 29 and 30, p. 13.

meaning of rule 85(a) to include events which may have occurred in the village of Haskanita runs counter to the aforementioned Court documents, which require a specific and direct causal link between the elements of the crimes with which the Accused are charged and the harm suffered.

20. All of the victims were granted victim status owing to the fact that the harm they all suffered – both the Sudanese victims and those from other countries – resulted exclusively from the specific elements of crime which were upheld against the Accused and which resulted from the attack of 29 September 2007 against the African Union Peacekeeping Mission in Sudan (AMIS) site in Haskanita, Darfur: that is, the elements of crime under article 8(2)(c)(i), 8(2)(e)(iii) and 8(2)(e)(v) of the Rome Statute, which are the only elements upheld by the *Decision on the Confirmation of Charges* rendered by Pre-Trial Chamber I on 7 March 2011, which committed the Accused for trial before Trial Chamber IV, and by the decisions granting the status of victim authorised to participate in this case.
21. The fact that the Sudanese victims are civilians who were at the Haskanita base and living in Sudan can in no way constitute a basis on which to argue conflicting interests. In particular, in light of the only elements of harm upheld by the Chamber and recalled *supra*, the participation of these two Sudanese victims is clearly governed by the provisions of article 8(2)(e)(iii), the elements of which are listed at page 38 of the Elements of Crimes, under the corresponding article.
22. Article 8(2)(e)(iii) of the Statute states that this war crime means “[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”.

23. The definition of the elements of the crime under article 8(2)(e)(iii) is clear and precise (page 38 of the Elements of Crimes, Core Legal Texts of the International Criminal Court):

Article 8(2)(e)(iii): War crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission:

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.

24. In light of these provisions and the factual circumstances clearly set out in the Document Containing the Charges¹² and upheld in the *Decision on the Confirmation of Charges* and in other decisions examining the admission criteria for participating victims, it does not appear relevant to argue the specificity and distinctness of the two Sudanese victims and a conflict of interests with the other victims because the Sudanese victims are civilians living in Sudan whereas the other victims are military personnel from the base or relatives of military personnel who were killed.

25. In fact, it is because these two Sudanese victims were members of the staff employed locally by the African Union Peacekeeping Mission attacked by the rebels on 29 September 2007 that they were considered, like all the staff at the base, as being protected by the international law of conflict, which considers all staff belonging to such missions as civilians not participating in hostilities and thus entitled to protection. Like all the other victims, they suffered harm as a direct result of the attack. In the instant case, these two victims were accepted solely on account of the psychological harm they suffered as a result of the attack.

¹² ICC-02/05-03/09-79-Red, Document Containing the Charges.

26. It follows that the interests of these two victims are neither separate nor conflicting, since their aim is to obtain reparations for the harm they suffered.
27. The local living conditions described in paragraph 28 of the request for review of common legal representation in respect of these two victims from Sudan may be different from those in Mali, Nigeria, Senegal, Gambia and Botswana, but these living conditions, in light of the elements above, do not make them victims with separate, conflicting interests, since the aim is to seek redress for harm caused by one and the same attack, and to demonstrate that the attack was illegal and a war crime.
28. The modalities of the harm suffered and of the attendant reparations may differ from one victim to another regardless of whether they are of the same nationality and whether they live in the same country. However, this does not establish incompatible, conflicting interests warranting separate legal representation.
29. The appointment of a common legal representative is appropriate in the instant case, since all of the victims suffered harm as a result of the same attack. Moreover, the statements of the two victims contain numerous similarities with regard to the types of crimes at issue.¹³
30. The joint observations of the legal representatives of 18 July 2011 underscored the wish to have taken into account the close cultural and social links which had been forged between those representatives and the victims over the course of two years, but did not highlight conflicts of interest between the various victims in their aim to obtain reparations and to see those responsible for the war crimes at the root of their suffering face international justice.

¹³ ICC-02/04-01/05-252, Pre-Trial Chamber II, (Single Judge), 10 August 2007, paras. 80 and 162; ICC-02/04-125 and ICC-02/04-01/05-282, Pre-Trial Chamber II (Single Judge), 14 March 2008, para. 192.

31. These observations were taken into account by the Registry, which, nevertheless, considered that there was neither incompatibility nor real conflict of interests warranting a rejection of common legal representation.
32. Finally, the reaction of the former legal representatives from Nigeria and Mali and the readiness of the victims from those countries, as well as of those from Senegal, Gambia and Botswana, to accept the common legal representatives – including the representative who had never before intervened in the case and is neither African nor a national of any of the victims' countries – shows that the provisions of rule 90(1) should not be considered in absolute terms and can be consistent with the criteria set out in rule 90(2) and (3), which seek to ensure greater effectiveness and consistency. Furthermore, it should be underscored that one of the fundamental principles of the International Criminal Court is international cooperation and the search for symbiosis between different cultural and legal traditions.

C. Primacy of the direct expression by the victims themselves, in total freedom and honesty, of their wishes and of the obligation to cooperate in implementing the decisions of the organs of the International Criminal Court

33. In view of the evidence revealed in the annexes which were circulated publicly on 30 September 2011 and of other evidence brought to the attention of the legal representatives after the announcement of the Registry's appointment of the common legal representatives, the latter wish to make some observations on the primacy of the direct expression by the victims themselves, in total freedom and honesty, of their wishes and of the obligation to cooperate in implementing the decisions of the organs of the International Criminal Court.
34. A close reading of the statements of Victims a/1646/10 and a/1647/10 causes puzzlement and casts doubt on their credibility and probative value in that it raises questions as to whether they are the genuine, direct and totally uninfluenced expression of the wishes of the victims themselves. Firstly, we read at the end of this

statement drafted in English and thought to have been written directly by the victims, that a certain Mr Anzari attests to having translated into Arabic the meaning of the sentences written in English, by a person of uncertain identity, but in any case not by the victims themselves, who neither understand nor write English but, it would seem, understand Arabic. Ultimately, it is unclear what actually occurred. The one thing that is certain is that it was not the victims themselves who wrote the statements, but that they may have signed them (it is not clear what really occurred and under what conditions they might have signed).

35. It is unclear under what conditions or by whom these sentences in English were drafted, whether they are a summary of a conversation between the victims and the intermediary Mr Anzari, and under what conditions. The circumstances of signing are no clearer. It is uncertain whether the phrases represent the free and direct expression of the wishes of the victims themselves, or whether any pressure or influence was brought to bear by the intermediary organisations, especially given that Mr Anzari is not a sworn interpreter but the Secretary-General of the Sudan International Defense Group (SIDG), as attested by his business card which was sent to the common legal representatives following their appointment.¹⁴

36. What makes the statements contained in Annex 1 even more suspect is that Mr Anzari gives the impression that he is acting as an interpreter without mentioning his position as Secretary-General of the SIDG.

37. As for the confidential annex signed in London and notified on 13 October 2011, this was produced solely by Mr Anzari and merely contains allegations totally unsupported by concrete facts. Moreover, it appears somewhat paradoxical that, in his capacity as Secretary-General of the SIDG, Mr Anzari states that he fears the reactions of the Sudanese Government, which does not recognise the International

¹⁴ Public Annex 3: business card of Mr Anzari, Secretary-General of the SIDG.

Criminal Court, whereas he has constantly defended the Sudanese Government's stance denying that the International Criminal Court has any jurisdiction. It is not at all clear what new and urgent factor could jeopardize the safety of the two Sudanese victims.

38. Moreover, excerpts of unequivocal statements from the SIDG clearly state that the SIDG was established in order to oppose the ICC's involvement in the war crimes committed in Darfur and to support the political campaign to boycott the ICC's initiatives by means of propaganda and large-scale media manipulation, such as gathering nearly ten million signatures from people in Sudan.¹⁵

39. Furthermore, the common legal representatives are surprised to learn that Mr Anzari is the case manager, since from the start of the SIDG's intervention, the only case manager known and presented as such is Mr Haydee Djiskal, not Mr Anzari.

40. The opposition to the ICC's involvement, *inter alia* via the organ responsible for prosecutions, the ICC Prosecutor, in the investigation of war crimes is incompatible with the proper fulfilment of the mandate to genuinely and impartially defend victims, which necessitates sharing the fundamental convictions governing the mission entrusted to the International Criminal Court by the international community to combat impunity for crimes which it considers to be of most serious concern, and appears contrary to the interests of the victims who are bringing their cases before the Court precisely in order to obtain justice.

41. On account of the marked political stance of Mr Anzari, Secretary-General of the SIDG, who is very active in that capacity not only in defending positions which deny the International Criminal Court's jurisdiction over the various cases in Darfur, (including in the present case at the start of the confirmation hearing where the first argument to be advanced was that the Court lacked jurisdiction over the case, which

¹⁵ Public annexes 4, 5 and 6: documents on the SIDG's campaigning activities.

cannot be in the interest of the two victims in question), but also in leading mobilisation campaigns in this regard in Sudan and Europe, as shown in Annexes 4, 5 and 6, the common legal representatives wish most respectfully to draw the Court's attention to the importance of ensuring that the two Sudanese victims represented by the SIDG and the SWTUF express their wishes in an honest, direct and totally free manner.

42. Concerning the practical difficulties which the common legal representatives might encounter in communicating with the victims, the representatives would like to emphasise the following points:

- Contact and communication between the Sudanese victims and the legal representatives seeking to continue to represent them do not appear to take place directly in Arabic, since those representatives have never claimed or proven either that they communicated in that language, or that they could speak or write Arabic;
- All the participants and parties are obliged to cooperate with the organs of the Court in order to facilitate the implementation of the Court's decisions, including compliance with the provisions of article 15 of the Code of Professional Conduct;
- The observations on practical difficulties, *inter alia* concerning the continued support of Mr Anzari and of the organisations supporting and funding the participation of the Sudanese victims, are merely vague speculation, whereas the primary duty of any intermediary claiming to act in accordance with the fundamental rules of the International Criminal Court is to cooperate with the organs of the Court in implementing their decisions.

43. The common legal representatives wish to emphasise that none of these observations should in any way prejudice the sovereign power of the Chamber, and that their observations only address legal issues which they deem to be of crucial interest to the victims.

[signed]

**Ms Hélène Cissé, Lead Counsel
Common Legal Representation for Victims**

Dated this **12 October 2011**,
At **Dakar, Senegal**