



Original: English

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

Date: 27 March 2012

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernandez de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

Public Document with Public Annex

**Defence Request for an Order Prohibiting the Recruitment of the Registry
Zaghawa Language Assistants by the Prosecution**

Sources: Defence Team of Abdallah Banda Abakaer Nourain
Defence Team of Saleh Mohammed Jerbo Jamus

Document 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
Mr Adebawale Omofade

Counsel for the Defence

Mr Karim A. A. Khan QC
Mr Nicholas Koumjian

Legal Representatives of the Victims

Ms. Hélène Cissé
Mr Jens Dieckmann

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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence respectfully request the Trial Chamber to issue an order prohibiting the recruitment of the Registry Zaghawa language assistants¹ by the Prosecution as both Zaghawa language assistants acted as interpreters during legally privileged telephone calls with the Accused in this case and are also privy to sensitive confidential Defence information.

II. Applicable Law

2. As part of the rights and minimum guarantees afforded to an accused under the Rome Statute ("Statute"), Article 67(1)(b) provides for the right to:

[...] communicate freely with counsel of the accused's choosing in confidence.

3. The Statute also provides the Trial Chamber with powers to safeguard and protect the fairness and integrity of the proceedings before it.²

4. Pursuant to Article 64(2) of the Statute, the Trial Chamber

shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

5. Moreover, according to Article 64(3)(a) of the Statute, the Trial Chamber seized with the case shall

[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, pursuant to Article 64(6)(c),

[p]rovide for the protection of confidential information.

¹ The Defence note that the filings by the Prosecution and Registry refer variously to Zaghawa trainees and Zaghawa language assistants. The Defence assume that these descriptions refer to the same two individuals.

² See also ICC-02/05-03/09-252 OA, para. 30.

7. In relation to the Registry's role in the provision of language services the following provisions are of relevance.

8. First, Article 43(1) of the Statute states that:

The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

9. Article 44(2) of the Statute in relevant part provides that:

In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity.

10. Regulation 57 of the Regulations of the Registry state in relevant part that:

The Registry shall provide interpretation, translation, editing and revision services in accordance with the provisions of the Statute, Rules, Regulations of the Court, and these Regulations.

III. Background

11. On 8 September 2011, the Chamber ordered the Registry and the Prosecution to, *inter alia*: (i) immediately start consultations on the best manner to join their efforts with regard to Zaghawa translation and interpretation in order to facilitate the expeditious preparation of the trial, including the common usage of the current resources available to the Court; and (ii) file a joint report with the Chamber on the common plan of action envisaged no later than 16.00 on 20 September 2011.³

12. On 16 September 2011, the Prosecution contacted the Defence by email seeking the Defence's views on certain aspects of the common plan of action the Prosecution and Registry were devising pursuant to the Trial Chamber's order.⁴ In the email, the Prosecution advised that the proposal as it currently

³ ICC-02/05-03/09-211.

⁴ See the public annex attached hereto. The annex has been redacted to remove references to Defence team members' and OTP staff members' email addresses.

stood was to create a pool of common Zaghawa language assistants to translate the Prosecution's witness statements and to provide courtroom interpretation. At the stage when courtroom interpretation was to be provided, it was proposed that all language assistants would become contractually Registry employees. The Prosecution also advised that the proposal included provision that one Registry language assistant from the pool would be compartmentalised should the Defence require language assistance from the Registry. Similarly, there would be a dedicated Prosecution language assistant. Subject to any resource issue, it was proposed that this dedicated Prosecution language assistant be retained as a Prosecution employee and not transfer to the Registry to provide courtroom interpretation.

13. The Defence's views on the proposal were submitted to the Prosecution by email on 16 September 2011.⁵ In short, the Defence agreed to the proposal save that two dedicated language assistants were requested for Defence purposes. The Defence considered the request prudent and fair in view of the scarcity of Zaghawa language resources and to build contingency into the plan to deal with sickness, holiday and other unexpected situations. The Defence agreed that their views be shared with the Registry.⁶

14. On 20 September 2011, the Prosecution advised that the joint filing to be made with the Registry that day would not reflect the views expressed by the Defence.⁷ No response was ever received either from the Prosecution or the Registry regarding the substance of the Defence views expressed in the email of 16 September 2011.

⁵ See the public annex attached hereto.

⁶ *Ibid.*

⁷ *Ibid.*

15. On 20 September 2011, the Prosecution and Registry filed the “Prosecution’s and Registry’s Joint Report on a Common Plan of Action with regards to Zaghawa Translation and Interpretation”.⁸ This filing did not make reference to dedicated language assistants. However, as proceedings had not yet reached trial stage when OTP language assistants would move to become Registry employees in order to provide courtroom interpretation, it was considered by the Defence that, rather than raise a theoretical discussion about resources, the issue could be reviewed at a date closer to trial and any necessary provisions made then.
16. On 21 October 2011, the Defence via the Registry’s Counsel Support Section (“CSS”) requested the assistance of Sudanese Arabic interpreters. On 21 October 2011, CSS advised that the interpreters assigned to assist the Defence team were the two Registry Zaghawa language assistants and that they would be available for Defence use on 26 and 27 October 2011.
17. On 26 and 27 October 2011, the two Registry Zaghawa language assistants, who speak Sudanese Arabic and Zaghawa, provided language assistance to the Defence team.⁹
18. On 20 February 2012, the Prosecution and the Registry filed the Fifth Joint Prosecution and Registry’s Monthly Report on Translation and Interpretation Issues (the “Fifth Joint Report”).¹⁰ In the Fifth Joint Report, it was advised that:

“since there has been no development regarding the trial date and in view of the severely reduced budget for 2012, the current two trainees will not have their contracts extended beyond their current end of contract which is the

⁸ ICC-02/05-03/09-220.

⁹ Further details of the assistance provided is given in paragraph 20 below.

¹⁰ ICC-02/05-03/09-299.

end of April 2012. [...] The two trainees will therefore be let go unless the Registry is instructed by the Chamber to do otherwise.”¹¹

19. On 20 March 2012, the Prosecution and the Registry filed the Sixth Joint Prosecution and Registry’s Monthly Report on Translation and Interpretation Issues (the “Sixth Joint Report”).¹² In the Sixth Joint Report, it was advised that:

“the Prosecution is consulting with the Registry as to the possibility of recruiting, on a temporary basis, the Zaghawa language assistants currently employed by the Registry, in the event that their contracts are not renewed as indicated in the Fifth Joint Report. These consultations are continuing.”¹³

IV. Submissions

20. The proposal that the Prosecution recruit, even on a temporary basis, the two Registry Zaghawa language assistants has the potential to seriously erode the fairness of these proceedings. These individuals, provided to the Defence team by the Registry, have had access to confidential Defence work product as a result of the assistance they provided on 26 and 27 October 2011. Specifically, as the language assistants speak Zaghawa, the Defence team asked the language assistants to interpret calls with both clients during which extremely sensitive case strategy and information was discussed. Additionally, both language assistants were present for and interpreted telephone calls in Sudanese Arabic and Zaghawa with potential Defence witnesses during which case specific and other sensitive witness information was discussed. Finally, the language assistants were present when the Defence team tried unsuccessfully to contact by telephone several named potential Defence witnesses.

¹¹ *Ibid.*, para. 1.

¹² ICC-02/05-03/09-311.

¹³ *Ibid.*, para. 9.

21. The Defence do not doubt the integrity and professionalism of the two language assistants at issue and understand and appreciate that both have received extensive training in ethics and confidentiality matters. The Defence assume that both have also made the solemn undertaking required by Rule 6.2 of the Rules of Procedure and Evidence. However, the fact remains that the Registry Zaghawa language assistants are both privy to confidential Defence information. As set out above, the confidential information is detailed and covers privileged calls with the clients, the identities of potential Defence witnesses and discussions on tactics and strategy. In addition, the Defence team agreed to use the Registry Zaghawa language assistants on the basis that they had been provided by a neutral organ of the Court. Had the Defence team known there was a risk that such language assistants would move to become employees of the Prosecution, the Defence team would never have agreed to their assistance. This is particularly so given that the proposed recruitment by the Prosecution of these language assistants potentially jeopardises legal professional privilege between client and counsel.¹⁴ Should the language assistants now move to become Prosecution employees assigned to work for the Prosecution on this very case, such a move would have a serious impact on the integrity of these proceedings.

22. An analogy may be drawn with conflict of interest situations which arise when counsel move from one organ or party of the Court to another.¹⁵ Counsel are equally subject to the highest obligations of confidentiality and must comply with strict codes of ethics. Nevertheless, counsel may not move from one organ or party to another in the very same case in which they have prior involvement. Further, counsel may not represent a client in a case in which they were privy to confidential information as a staff member of the

¹⁴ See Statute, Article 67(1)(b).

¹⁵ See Code of Professional Conduct for counsel, Articles 12 and 16.

Court relating to the case in which counsel seeks to appear.¹⁶ Clearly, the same concerns – that proceedings be beyond reproach and their integrity and fairness preserved – which underlie these prohibitions apply in this case regarding the recruitment of Registry language assistants by the Prosecution.

23. The issue raised by this filing is not new to either the Prosecution or the Registry. Both organs have been aware of the Defence's views regarding the need for dedicated Defence Zaghawa language assistants since 16 September 2011. However, neither organ has liaised with the Defence further to discuss language resources or to formulate a plan cognisant of and sympathetic to all parties' needs. The Prosecution and the Registry should have anticipated that the proposal that the Registry Zaghawa language assistants be recruited by the Prosecution would cause the Defence serious and very obvious prejudice, especially in view of the use already made by the Defence of the assistants. However, the Defence have not been contacted by either organ. In any event, the reality is that no approach could allay the Defence's concerns or remove the prejudice since the Registry language assistants have already taken part in legally privileged communications and are privy to detailed confidential Defence information.

24. The proposal that the Prosecution recruit the Registry Zaghawa language assistants is causing the Defence difficulties in the conduct of its already severely constrained investigations.¹⁷ The Defence requested Sudanese Arabic language assistance from the Registry's CSS for 30 March 2012. In response to this request, the Chief of CSS proposed that the Defence team use the Registry Zaghawa language assistants as the Court's resources for interpretation and translation in Zaghawa and other Darfurian languages, as

¹⁶ Code of Professional Conduct for counsel, Article 12.1.

¹⁷ See ICC-02/05-03/09-274. Despite these constraints, the Defence continue in good faith to try to advance investigations.

well as Sudanese Arabic, are finite and very restricted. Normally, the Defence would have no hesitation in agreeing to such a proposal as is evidenced by the team's past use of the Registry language assistants. However, the possible recruitment of these individuals by the Prosecution bars the Defence from using such language assistance in order to mitigate the potential for prejudice.

V. Conclusion and Request for Relief

25. In order to safeguard the fairness and integrity of these proceedings, the Defence respectfully request the Trial Chamber to issue an order prohibiting the recruitment of the Registry Zaghawa language assistants by the Prosecution.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel



Mr. Nicholas Koumjian
Co-Lead Counsel

for Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus

Dated this 27th Day of March 2012
At The Hague, The Netherlands

Dated this 27th Day of March 2012
At The Hague, The Netherlands