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

Date: 30 May 2012

TRIAL CHAMBER IV

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

SITUATION IN DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

***ABDALLAH BANDA ABAKAER NOURAIN
&
SALEH MOHAMMED JERBO JAMUSG***

Public Document

**Application for Leave to Appeal the “Decision on common legal representation”
pursuant to Article 82(1)(d)**

Source: Victims represented by Sir Geoffrey Nice QC and Rodney Dixon

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

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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Defence Support Section

Victims and Witnesses Unit

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**Victims Participation and Reparations
Section**

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Other

Introduction

1. The Legal Representatives for Victims a/1646/10 and a/1647/10 respectfully submit this application requesting leave to appeal against the Trial Chamber's "Decision on common legal representation" dated 25 May 2012.¹ Although the Decision only concerned Victims a/1646/10 and a/1647/10, the Legal Representatives also represent Victims a/6000/11, a/6001/11 and a/6002/11, who are similarly situated victims from Darfur whose applications for participation are pending. They would of course be affected by the import of the Decision in the same way as Victims a/1646/10 and a/1647/10.
2. The application for leave to appeal is made pursuant to Article 82(1)(d) of the Statute, Rule 155, and Regulations 33 and 65. The Legal Representatives for Victims a/1646/10 and a/1647/10 are required to demonstrate that the impugned decision concerns an issue that would significantly affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeal Chamber may materially advance the proceedings.
3. The Legal Representatives for Victims a/1646/10 and a/1647/10 submit that leave to appeal should be granted in order that four important issues, as set out below, are considered by the Appeals Chamber to ensure that the victims' interests are fairly safeguarded in the proceedings. Only the Appeals Chamber would now be able to resolve these issues to guarantee the proper and effective representation of the victims. In this way the proceedings could be materially advanced as Victims a/1646/10 and a/1647/10 (and the other three Darfuri victims if their applications are granted) would be represented in their best interests in the proceedings.

(i) Common Legal Representative's challenge to the credibility of the victims

4. The Trial Chamber did not take into account that the appointed Common Legal Representative directly challenged the credibility of Victims a/1646/10 and a/1647/10, the very persons who she is appointed to represent. In these circumstances any reasonable Trial Chamber would have found that it is impossible for the Common

¹ Decision on common legal representation, ICC-02/05-03/09-377, 25 May 2012 (hereinafter the "Decision").

Legal Representative to continue representing Victims a/1646/10 and a/1647/10. Leave to appeal should be granted on this ground alone.

5. As the Chamber will be aware, the Common Legal Representative alleged without any foundation that (i) the victims' statements about legal representation did not represent their actual views, (ii) the security concerns raised by the victims were not genuine, and (iii) Mr. Ansari is not to be trusted as an intermediary.²
6. These matters were addressed in the Reply of Victims a/1646/10 and a/1647/10. It was made clear that the victims were most concerned about being assigned a court appointed lawyer who did not trust them and questioned their integrity. This is an objection that any reasonable Trial Chamber should have taken into account when considering whether these victims could continue to be represented by the Common Legal Representative. There is no mention of this argument at all in the Chamber's Decision, and there is no indication that it was taken into consideration. Of course, a chamber is not required to deal with each and every argument raised by a litigant, but the Common Legal Representative's allegations were the main issue dealt with in the Reply.

(ii) The best interests of the victims must be overriding consideration

7. The Trial Chamber did not base its decision on the best interests of the victims concerned. It confined its review to whether the Registry took all reasonable steps to ensure that the "distinct interests" of the victims were represented and that no conflict of interest arose. The proper test on review is whether in the particular circumstances of these victims, it is in their best interests to be ordered to have separate legal representation. Of course, Rule 90 and Regulation 79 do not guarantee an absolute right to a legal representative of choosing, but neither do they restrict the rights of victims to a single common representative when no proper reason has been given for such an arrangement.

² Observations en réponse à la requête aux fins de réexamen de la proposition de désignation d'une représentation légale commune, ICC-02/05-03/09-230-Conf, 12 October 2011, paras. 34, 37.

8. This is a view supported by the ICC's jurisprudence. The guidelines of Rule 90 and Regulation 79 have been interpreted to "necessitate joint representation"³ only if groups of victims have common interests. A "flexible approach"⁴ has been found to be necessary when applying Rule 90 and it has been emphasised that "the greatest importance [must be attached] to the requirement that the participation of victims, through their legal representatives, must be as meaningful as possible as opposed to being purely symbolic."⁵ This priority has been placed above the duty to "ensure that the proceedings are conducted efficiently and with the appropriate celerity."⁶

9. However, in the present case the Registry gave no reasons for finding that Victims a/1646/10 and a/1647/10 would be best served by a single Common Legal Representative. Instead, the Registry stated that the "rule 90 process is intended to promote efficiency in the proceedings" and therefore "efficiency is most likely to be achieved by minimizing the number of groupings and teams."⁷ The Registry concluded that the victims "would benefit from the establishment" of a single legal team to represent the interest of all the participating victims⁸, but has never explained why the victims would benefit from single representation as opposed to representation by counsel they know and trust. On analysis, the Registry was determined to ensure, and simply decided, that the lawyers representing the victims had to be cut in number to one.

10. The Trial Chamber did not review the actual reasoning of the Registry. It relied on the "effectiveness of the proceedings"⁹ as being the rationale for appointing a single representative, without examining whether there was any reasoned and genuine basis for the Registry insisting on a single representative.

³ Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, para. 125.

⁴ Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, para. 124.

⁵ Order on the organisation of common legal representation of victims, ICC-01/04-01/07-1328, 22 July 2009, para. 10(a).

⁶ Order on the organisation of common legal representation of victims, ICC-01/04-01/07-1328, 22 July 2009, para. 10(b).

⁷ Report on the implementation of the Chamber's Order instructing the Registry to start consultations on the organisation of common legal representation, ICC-02/05-03/09-164-Red, 21 June 2011, para. 17.

⁸ Notification of appointment of common legal representative of victims, ICC-02/05-03/09-215, 14 September 2011; Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 25 August 2011, para. 9.

⁹ Decision, para. 38.

(iii) The agreement between the victims' lawyers

11. The Trial Chamber found that the agreement reached between the lawyers for the different victims was not binding on the Registry.¹⁰

12. There is no reason given for why the Registry was entitled to override this agreement when Rule 90(3) explicitly states that the Registrar may choose “one or more common legal representatives” only “if the victims are unable to choose a common legal representative or representatives”. The Rule does not require that lawyers must agree to cut the number of lawyers to one – the Rule clearly envisages that the victims can choose common legal representatives (plural).

(iv) Consultation with the victims

13. The Trial Chamber found that the views of the victims were sufficiently taken into account by the consultations conducted between the Registry and the Legal Representatives.¹¹ However, the Chamber overlooked that the Registry did not place any reliance on the submissions of the Legal Representatives, asserting that they “emanate not from the victims themselves but from the current legal representatives of the victims.”¹²

A. Conclusion

14. For these reasons, the Legal Representatives of Victims a/1646/10 and a/1647/10 submit that the requirements of Article 82(1)(d) have been satisfied, and respectfully request the Trial Chamber to grant leave to appeal.

¹⁰ Decision, para. 25

¹¹ Decision, para. 49.

¹² Report on the organization of common legal representation, ICC-02/05-03/09-187, 5 August 2011, para. 5.



Sir Geoffrey Nice QC
Rodney Dixon
Legal Representatives of the Victims

Dated 30th May 2012
London, United Kingdom