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

Date: 22 August 2011

TRAIL 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 PROSECUTOR

v.

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

Public

Joint Victims' Observations on the Registry "Report on the organisation of common legal representation" and Request for the Joint Agreement on Common Legal Representation to be adopted pursuant to the Trial Chamber's Order

Source: Victims' Legal Representatives Brahim Kone, Helene Cisse, Akin Akinbote, Sir Geoffrey Nice QC & Rodney Dixon

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

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Legal Representatives of Victims

Brahima Kone
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Akin Akinbote
Sir Geoffrey Nice QC &
Rodney Dixon

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
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Joint Observations and Request by the Victims

1. This filing is jointly submitted by the Legal Representatives of the victims in light of the Registry's "Report on the organisation of common legal representation"¹ filed on 5 August 2011. The Legal Representatives wish to correct the Registry's conclusion that the "Joint Observations of Victims' Legal Representatives on Common Legal Representation"² filed on 18 July 2011 "emanates not from the victims themselves but from the current legal representatives of the victims"³ and "does not detail the views expressed by the victims themselves."⁴
2. The joint agreement on common legal representation filed on 18 July 2011, as stated in that filing, is based on the express views and instructions of the the victims themselves. Written confirmation from the victims can of course be obtained. The Legal Representatives are surprised that the Registry took the view that the joint agreement on common representation is not reflective of the views of the victims. There is no basis at all to make this assumption, especially when the Registry has not taken any steps to consult with the victims themselves.
3. The Trial Chamber's order on common legal representative/s is clear: the first step is that the victims must be given an opportunity to select common legal representatives/s, and as a second step, only if the victims are unable to do so, should the Registry make a recommendation about common representation to the Trial Chamber.⁵ This approach mirrors the procedure set in Rule 90(2) and (3).⁶
4. In its Report, the Registry seeks to justify its initiatives to find common legal representative/s on the basis that the victims have been "unable to choose a common legal representative or representatives"⁷. This conclusion is patently wrong. The victims have chosen their common legal representatives. They have advised the Registry of their choice through their Legal Representatives in their filing of 18 July

¹ Report on the organization of common legal representation, ICC-02/05-03/09-187, 5 August 2011 (hereinafter "Registry Report of 5 August 2011").

² Joint Observations of Victims' Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011 (hereinafter "Joint Observations of 18 July 2011").

³ Registry Report of 5 August 2011, para. 5.

⁴ Registry Report of 5 August 2011, para. 5.

⁵ Order instructing the Registry to start consultations on the organisation of common legal representation, 02/05-03/09-138, 21 April 2011, paras. 5, 6 (hereinafter "Order of 21 April 2011").

⁶ Rule 90(2) and (3). See also Order of 21 April 2011.

⁷ Registry Report of 5 August 2011, para. 4.

2011. This agreement should be transmitted to the Trial Chamber by the Registry in accordance with the Trial Chamber's Order. The Legal Representatives request that the Registry act in accordance with the Trial Chamber Order and advise the Trial Chamber of the victims' own choice of legal representatives so that the matter of common legal representation can now be settled.

5. If the Registry disagrees with the victims' joint agreement of common representation, it should state its objections, although there is no provision in the Rules which permits the Registry to oppose the election of the victims. The Registry is entitled to provide "assistance" to the victims "if necessary", but not to oppose the victim's choice of counsel and impose different counsel (Rule 90(2)). It is only if the victims cannot agree that the Registry may upon the Chamber's request, choose one or more common legal representatives (Rule 90(3)).

6. A reason given by the Registry for not endorsing the joint agreement of the victims on legal representation is that the "Registry has been unable to meet directly with the victims participating in the present case in order to assist them to choose a common legal representative."⁸ The Registry has sought to justify its failure to consult with the victims on account of a lack of "resources and time ... in the present instance."⁹ While the Legal Representatives appreciate the heavy workload of the VPRS, this cannot be a justification for refusing to accept the joint agreement of the victims.

7. The Legal Representatives wish to stress that they are not seeking to be at all confrontational in this filing. They wish this matter to be resolved constructively, but they sense some hostility from the Registry to their continued representation which, if correct, is unjustified and impractical. Your Legal Representatives have consulted and worked with the victims in this case from very different countries and backgrounds for a considerable period of time. They have acted diligently and in the best interests of their clients at all times. No complaints or concerns have ever been raised by the Registry. Your Legal Representatives are also very familiar with the case, the facts, and all of the pleadings. It would not make any economic sense to replace all of them at this late stage, given all of their experience, and most importantly, the trust built up with their respective victim clients, with an entirely new team/s.

⁸ Registry Report of 5 August 2011, para. 2.

⁹ Registry Report of 5 August 2011, para. 3.

8. To the extent that there may be concerns over multiple representatives and any negative affect this may have on potentially elongating the proceedings, the teams have undertaken to work together and to share the time allotted to victims as a whole. For example, if the Trial Chamber decided to allocate one hour for opening statements to the victims, this time could be divided by agreement amongst the Legal Represetatives to ensure that the particular interests of each group were raised in the time as ordered by the Trial Chamber without in any way extending the proceedings as whole. The same arrangement could be made with written pleadings – for the sake of economy the pleadings for the victims could be kept to a single filing for all victims on any particular issue with each group of victims able to contribute their submissions to the single document in accordance with their particular interests and through their well-known and trusted current Legal Representatives.

9. There appears to be no good reason to bring in a completely new team/s especially when there is no justification for removing any of the existing team/s, when it would be contrary to the wishes of the victims, and when it would in reality waste more time and resources for the ICC (in particular for a new team/s to have to travel to several countries including Nigeria, Botswana, The Gambia, Senegal, Mali and Sudan only to make initial contact with their new victim clients). Although there was some contact between the Registry and victims represented by Mr. Akinbote in the past, the Registry has not had any *formal* contact with the victims, *as recognised victims*, since the victims' applications to participate in the proceedings were granted by Pre-Trial Chamber 1 in Abu Garda's case and in the present Banda and Jerbo's case. The contact and relationship that has been built with the victims in many different countries over many years by the current Legal Representatives (and which has been funded by the Registry for most of the teams) would be set aside and lost if the Registry were to replace the existing teams – the Registry would have to start from scratch.

10. The Trial Chamber has noted “the relationship of trust thus far established between the victims and their current legal representatives”¹⁰ and thus, ordered the Legal Representatives to participate in “[c]onsultations with victims regarding their future

¹⁰ Order of 21 April 2011, para. 7.

representation” and to “fully cooperate with the Registry.”¹¹ The Legal Representatives have duly consulted with the victims and have put forward their joint agreement on common representation. The Legal Representatives have suggested various ways for the VPRS to consult with the victims, including through videolink where possible. It is unfair for the Registry not to consult with the victims while at the same time alleging that the Legal Representatives have not based the joint agreement on the views, instructions and best interests of the victims. Indeed, victims who have *in fact* been met by the Registry on any earlier occasion - in Senegal, Mali and Nigeria – to be asked to choose freely their legal representatives or for any other purpose will not understand why they have not been consulted about any change in representation. They may, indeed, see this as showing total lack of respect by the Court to them so to do.

11. In the Registry’s Report of 5 August 2011, the Registry requests the Trial Chamber to extend the deadline for the Registry to submit its proposal for common representation until 25 August 2011.¹² There is no need to grant this request, in the submission of the Legal Representatives. The victims have in accordance with the Trial Chamber’s Order submitted their choice on common representation in the Joint Observations of 19 July 2011. The victims respectfully request that their joint agreement on common representation should be adopted in accordance with the provisions of Rule 90.

12. This filing represents the views of the below signatories. Due to computer difficulties that have made communication with Mr Kone impossible for some 10 days, final approval of these observations has not been formally obtained from Mr. Kone (although in conversations before the technical difficulties Mr. Kone agreed to the drafting of these observations). There is no reason to believe that Mr. Kone does not also agree with the above observations that are copied to him when filed with the court for him to express support, alternatively any reservation, he may have in due course.



¹¹ Order of 21 April 2011, para. 8.

¹² Registry Report of 5 August 2011, paras. 9-12.

Helen Cisse



Akin Akinbote



Sir Geoffrey Nice QC and Rodney Dixon

Dated 22nd August 2011

The Hague