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Date: 30 September 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***  
***&***  
***SALEH MOHAMMED JERBO JAMUSG***

**Public Document**

**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)**

**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:

**The Office of the Prosecutor**

Luis Moreno-Ocampo, Prosecutor

**Counsel for the Defence**

Karim A. A. Khan QC

**Legal Representatives of Victims**

Helene Cisse  
Jens Dieckmann  
Brahima Kone  
Akin Akinbote  
Frank Adaka  
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  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Silvana Arbia, Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Fiona McKay

**Other**

## **A. Introduction**

1. The Legal Representatives for Victims a/1646/10 and a/1647/10 make this application in accordance with Regulation 79(3) on behalf of Victims a/1646/10 and a/1647/10 to request the Trial Chamber to review the appointment of the common legal representatives of victims made by the Registry on 14 September 2011.<sup>1</sup>
2. Following consultations with Victims a/1646/10 and a/1647/10, the Legal Representatives received from Victims a/1646/10 and a/1647/10 on 26 September 2011 their written instructions that they object to the Registry's decision appointing the common legal representatives and asking the Legal Representatives to communicate their views to the Trial Chamber in this application. The statements of Victims a/1646/10 and a/1647/10 dated 26 September 2011 are annexed hereto as Annex 1.
3. In addition, as the Trial Chamber is aware, the Legal Representatives represent three further victims from Haskanita whose applications are currently pending before the Trial Chamber (a/6000/11, a/6001/11, and a/6002/11). Following consultations with these victims, they have expressed the same concerns as Victims a/1646/10 and a/1647/10 and they support this application.
4. The Trial Chamber is, therefore, requested to review the decision of the Registry on three grounds:
  - a. In appointing the common legal representatives the Registry found that "the victims in this case would benefit from the establishment of a common legal representation team"<sup>2</sup> and that "there is no reason why all participating victims could not be represented by a single legal team."<sup>3</sup> The asserted benefit coming from representation by a single team has not been detailed or particularised in any way at any time. The victims are unable themselves to understand how it is said a benefit would flow to them from common representation. Victims

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<sup>1</sup> Notification of appointment of common legal representatives of victims, ICC-02/05-03/09-215, 14 September 2011 (hereinafter "Registry Decision of 14 September 2011").

<sup>2</sup> Notification of appointment of common legal representatives of victims, ICC-02/05-03/09-215, 14 September 2011, p. 3.

<sup>3</sup> Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 25 August 2011, para. 6-8.

a/1646/10 and a/1647/10 express the contrary view. They say that they would not benefit from being represented by new lawyers and that there are good reasons for retaining their Legal Representatives (as set out below). Victims a/1646/10 and a/1647/10 request that the Trial Chamber permit them to be represented in the trial proceedings by their Legal Representatives alongside the appointed common legal representatives.

Their request would not adversely affect the trial proceedings in any way; in particular it would not impact on the time allocated to victim representation in the trial as a whole as Victims a/1646/10 and a/1647/10 are content to share the time for their representation with the other victims, as are all other victims. There would also be no additional cost to the ICC as the Legal Representatives are privately funded and do not require legal aid. There would, however, be considerable benefits for Victims a/1646/10 and a/1647/10 to continue to be represented by their Legal Representatives. It would best serve their particular interests.

- b. The Registry has never consulted with Victims a/1646/10 and a/1647/10 about the appointment of the common legal representatives. As a minimum this step should have been taken by the Registry before it concluded that the exclusion of the Legal Representatives would benefit Victims a/1646/10 and a/1647/10.
- c. The Registry disregarded the victims' proposal on common legal representation for no good reason and has acted in violation of Rule 90.

## **B. Procedural background**

5. On 15 April 2011, the Registry asked the Trial Chamber to “issue the necessary requests under sub-rules 90(2) and (3) for victims to arrange common legal representation with the assistance of the Registry, or in the alternative for the Registry to prepare a proposal on common representation.”<sup>4</sup> The Registry noted that “it will be important to consult with at least those victims already participating in the

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<sup>4</sup> Report recommending a decision concerning the common legal representation of victims participating in the case, ICC-02/05-03/09-134, 15 April 2011, para. 11(i).

proceedings, to seek their input on questions of their appropriate grouping(s) and future legal representation.”<sup>5</sup>

6. On 21 April 2011, the Trial Chamber ordered the Registry in accordance with Rule 90 and Regulation 79 “to consult with the 89 participating victims with a view to appointing a common legal representative or common legal representatives representing their interests for the remainder of the proceedings in this case, in the presence of their current legal representatives.”<sup>6</sup>
7. On 20 May 2011, the Registry held consultations with all of the Legal Representatives for the victims at the ICC. The minutes of this meeting are attached hereto as Annex 2. At this meeting the Legal Representatives for Victims a/1646/10 and a/1647/10 explained the reasons for separate representation of the Darfuri victims. The Registry also made inquiries about the means available to consult the victims. The Legal Representatives for Victims a/1646/10 and a/1647/10 confirmed that these victims could be consulted by video-link. The Registry asked the Legal Representatives to file written submissions by 30 May 2011.
8. On 30 May 2011 the Legal Representatives for Victims a/1646/10 and a/1647/10 filed written submissions setting out the reasons for separate representation of the Darfuri victims. These submissions are attached hereto as Annex 3.
9. On 21 June 2011, the Registry reported that it had “not yet conducted consultations directly with victims”<sup>7</sup> but noted the “Chamber’s Order requiring it to implement rule 90 by conducting consultations with the participating victims”<sup>8</sup> and that this approach “is based on a more fundamental principle, namely that to the extent possible victims’ preferences and interests should be the paramount consideration in organising common legal representation.”<sup>9</sup> The Registry nevertheless decided that “alternative approaches could be considered in order to uphold the principle of

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<sup>5</sup> Report recommending a decision concerning the common legal representation of victims participating in the case, ICC-02/05-03/09-134, 15 April 2011, para. 10.

<sup>6</sup> Order instructing the Registry to start consultations on the organization of common legal representation, ICC-02/05-03/09-138, 21 April 2011.

<sup>7</sup> 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. 6.

<sup>8</sup> 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. 7.

<sup>9</sup> 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.10.

prioritising victims' preferences and interests"<sup>10</sup> and "conducting further meetings with the victims at this stage will not in practice enable the victims themselves, as a group, to choose common legal representatives."<sup>11</sup> The Registry recognised that grouping the Darfuri victims under a separate team might be necessary but stated that "more information is required in order to determine whether there is indeed a sufficient justification for the separate representation of this group."<sup>12</sup>

10. On 8 July 2011, the Registry posted a public notice on the ICC website calling for interested candidates to apply for the position of common legal representative for all of the victims.

11. On 12 July 2011, the Legal Representatives for Victims a/1646/10 and a/1647/10 responded to the Registry Report of 21 June 2011 by sending Ms. Fiona McKay (Head of VPRS) a letter offering assistance with facilitating "video-link to Khartoum to consult with the victims"<sup>13</sup>. In addition, the Legal Representatives for Victims a/1646/10 and a/1647/10 responded to the potential conflict of interest expressed in the Registry Report of 21 June 2011 by asking for "a fair opportunity to respond to them before any decision is taken on legal representation"<sup>14</sup> while noting that the Pre-Trial Chamber was "of the view that no concrete evidence has been brought to [the Court's] attention that could substantiate the existence either of an abuse of the Court process or of a conflict of interest."<sup>15</sup> This letter is attached hereto as Annex 4.

12. On 18 July 2011, the Legal Representatives for the all of the victims in this case (including Ms. Helene Cisse) jointly filed "observations on the procedure being followed by the Registry in respect of the appointment of common legal representative/s" and also "the agreement reached by the victims as to the common legal representation they have chosen in accordance with Rule 90(1) and (2)".<sup>16</sup> The filing submitted a proposal from all of the victims for "three Legal Representatives

<sup>10</sup> 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.11.

<sup>11</sup> 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.14.

<sup>12</sup> 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.19.

<sup>13</sup> Letter to VPRS from Sir Geoffrey Nice QC and Rodney Dixon, 12 July 2011, para. 6, 7.

<sup>14</sup> Letter to VPRS from Sir Geoffrey Nice QC and Rodney Dixon, 12 July 2011, para. 5.

<sup>15</sup> Letter to VPRS from Sir Geoffrey Nice QC and Rodney Dixon, 12 July 2011, para. 9.; Confirmation of Charges Hearing, Transcript, 8 December 2010, pg. 4, ln. 12-15.

<sup>16</sup> Joint Observations of Victims' Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011, para. 1.

[to] be appointed” who would “cooperate and work closely together” and “shar[e] the time allocated to victim participation in the trial.”<sup>17</sup> In addition, the Legal Representatives expressed concern that the Registry disregarded “the Chamber’s Order which required consultation with the victims first”<sup>18</sup> and noted that “it would be contrary to the Trial Chamber’s Order and Rule 90 for the Registry to select a new legal representative/s pursuant to its notice of 8 July and impose such a person/s on the victims without consulting them or giving effect to their agreement as to legal representation.”<sup>19</sup>

13. On 5 August 2011, the Registry stated in its further Report that it “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.”<sup>20</sup> The Registry stated that its “ability ... to assist victims to make their own choice ... is highly dependent on resources and time, both of which were regrettably limited in the present instance”<sup>21</sup> and “[f]or these reasons the Registry considers that the victims in the present case have been unable to choose a common legal representative.”<sup>22</sup> Further, the Registry considered that the victims’ “proposal emanates not from the victims themselves but from the current legal representatives of the victims” and therefore does not constitute an agreement by victims as to their common legal representation.”<sup>23</sup>

14. On 8 August 2011, the Legal Representatives of Victims a/1646/10 and a/1647/10 responded to the Registry’s further questions regarding common representation. This letter is annexed hereto as Annex 5.

15. On 22 August 2011, the Legal Representatives for all the victims jointly (including Ms Helene Cisse) responded to the Registry’s Report of 5 August 2011 by stating that the victims’ proposal filed on 18 July 2011 “is based on the express views and instructions

<sup>17</sup> Joint Observations of Victims’ Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011, paras. 14, 15.

<sup>18</sup> Joint Observations of Victims’ Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011, para 10.

<sup>19</sup> Joint Observations of Victims’ Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011, para 12.

<sup>20</sup> Report on the organisation of common legal representation, ICC-02/05-03/09-187, 5 August 2011, para. 2.

<sup>21</sup> Report on the organisation of common legal representation, ICC-02/05-03/09-187, 5 August 2011, para. 3.

<sup>22</sup> Report on the organisation of common legal representation, ICC-02/05-03/09-187, 5 August 2011, para. 4.

<sup>23</sup> Report on the organisation of common legal representation, ICC-02/05-03/09-187, 5 August 2011, para. 5.

of the victims themselves.”<sup>24</sup> The Legal Representatives noted that 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 chounsel (Rule 90(2)).”<sup>25</sup> Additionally, the Legal Representatives stated that “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.”<sup>26</sup>

16. On 25 August 2011, the Registry filed its proposal for common legal representation in which the Registry concluded that “it has not been made aware of any conflicting, significantly distinct interest or other factor that would require victims to be grouped separately for representation in the present case”<sup>27</sup> and therefore saw “no reason why all participating victims could not be represented by a single legal team.”<sup>28</sup> The Registry recommended the appointment of one principal counsel and one associate counsel who were identified in a confidential annex attached to the filing.<sup>29</sup>
17. On 6 September 2011, the Trial Chamber noted the Registry’s Proposal of 25 August 2011 and instructed the Registry to appoint a common legal representative in accordance with Rule 90(3).<sup>30</sup>
18. On 14 September 2011, in accordance with the Trial Chamber’s instruction and Rule 90(3), the Registry appointed Ms Helene Cisse as principal counsel and Mr. Jens Dieckmann as associate counsel for all victims participating in the proceedings.<sup>31</sup>

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<sup>24</sup> 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, ICC-02/05-03/09-200, para 2.

<sup>25</sup> 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, ICC-02/05-03/09-200, para.5.

<sup>26</sup> 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, ICC-02/05-03/09-200, para. 9.

<sup>27</sup> Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 25 August 2011, para. 7.

<sup>28</sup> Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 25 August 2011, para. 8.

<sup>29</sup> Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 25 August 2011, para. 32.

<sup>30</sup> Order inviting the Registrar to appoint a common legal representative, ICC-02/05-03/09-209, 6 September 2011, para. 4.

<sup>31</sup> Notification of appointment of common legal representatives of victims, ICC-02/05-03/09-215, 14 September 2011.



### **C. Legal basis for the present application**

19. The victims bring this application pursuant to Regulation 79(3) of the Regulations of the Court which provides that “Victims may request the relevant Chamber to review the Registrar’s choice of a common legal representative under rule 90, sub-rule 3, within 30 days of notification of the Registrar’s decision.”<sup>32</sup> Rule 90(3) provides that “If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.”<sup>33</sup>
20. In the present case it is clear that the Registry has acted pursuant to Rule 90(3) in choosing and appointing the common legal representatives upon the Trial Chamber’s request.<sup>34</sup> The Trial Chamber ordered the Registry to act under Regulation 79 and Rule 90 when consulting “the 89 participating victims with a view to appointing a common legal representative”<sup>35</sup> and specifically invited the Registry to “proceed in accordance with Rule 90(3)” to appoint the common legal representatives that the Registry had selected.<sup>36</sup>
21. The provisions of Regulation 79(3) are thus plainly applicable in affording the victims the right to request that the Registrar’s choice of a common legal representative be reviewed by the Trial Chamber.
22. Pre-Trial Chamber II has recently held “that victims may request the Chamber to review the Registrar’s choice concerning common legal representation only when the candidate is decided upon by the Registrar.”<sup>37</sup> In that case the Single Judge appointed

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<sup>32</sup> Regulation of the Court, Reg. 79(3).

<sup>33</sup> Rule 90(3).

<sup>34</sup> Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 25 August 2011, pg. 5; Report on the organisation of common legal representation, ICC-02/05-03/09-187, 5 August 2011, para. 4; See also, Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 25 August 2011, para. 16 in which the Registry publicly announces that “the rule 90 process [is] under way, and invit[es] persons wishing to represent victims in the present case to express their interest.”

<sup>35</sup> Order instructing the Registry to start consultations on the organisation of common legal representation, ICC-02/05-03/09-138, 21 April 2011, p. 3, 6.

<sup>36</sup> Order inviting the Registrar to appoint a common legal representative, ICC-02/05-03/09-209, 6 September 2011, para. 4.

<sup>37</sup> Decision on the "Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims, ICC-01/09-01/11-330, 9 September 2011, para. 13.

the common legal representative “pursuant to regulation 80(1) of the Regulations”.<sup>38</sup> This Regulation provides that “A Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require”. The Pre-Trial Chamber found that as no decision had been taken by the Registrar on the selection and appointment of the legal representative under Rule 90 and Regulation 79, the review provisions of Regulation 79(3) were not available to the victims in that case.<sup>39</sup>

23. There has been no appointment under Regulation 80(1) in the present case. The Registry has chosen and appointed the legal representatives under Rule 90(3). The provisions of Regulation 79(3) would be rendered meaningless if they did not apply in the present case in which the Registry’s has selected common legal representatives under Rule 90(3).

24. The Registry’s Hand Book on victim participation informs victims of their right to seek review of the Registry’s decision on common representation. It states that if “for any reason the victims are unable to organise themselves ... the judge may ask the Registrar of the ICC to do so” in accordance with Rule 90(3) and Regulation 79 and “if the victims are not happy with the Registrar’s choice, they may ask the judges to review it.”<sup>40</sup> The Hand Book also states that the victims may challenge the Registry’s decision on the grouping of victims: “Victims who prefer not to be joined with other victims in the same groups, for instance because they believe that their interests need to be represented separately due to a conflict of interest, can also ask the judges to review this decision.”<sup>41</sup>

25. It would be contrary to the Registry’s own advice to victims if the Registry took the view that its choice of legal representatives was not subject to review by the Trial Chamber.

<sup>38</sup> Decision on the "Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims, ICC-01/09-01/11-330, 9 September 2011, para. 14.

<sup>39</sup> Decision on the "Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims, ICC-01/09-01/11-330, 9 September 2011, para. 15.

<sup>40</sup> Booklet: Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, p. 18, ICC website: <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>.

<sup>41</sup> Booklet: Victims before the International Criminal Court, A Guide for the Participation of Victims in the Proceedings of the Court, p. 18, ICC website: <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf>.

#### **D. Grounds for Review**

26. Victims a/1646/10 and a/1647/10 request the Trial Chamber to review the choice of common legal representatives on the following three grounds:

**(i) Victims a/1646/10 and a/1647/10 will not benefit from being represented by the common legal representatives and there are good reasons to retain their existing lawyers**

27. Regulation 79(2) provides that “When choosing a common legal representative for victims in accordance with rule 90, sub-rule 3, *consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims*” (emphasis added).

#### **Special and sensitive circumstances**

28. Victims a/1646/10 and a/1647/10 (together with the three further victims from Darfur whose applications are pending before the Trial Chamber) are a very “specific” group of victims. They reside in Sudan, which is not a State Party to the ICC. The Government of Sudan does not recognise the ICC and has no relations with the Court. The victims, who only speak Arabic, cannot readily travel from Sudan. They have had to be moved from Darfur to elsewhere in Sudan for their safety and security. They are in a sensitive position.

29. For all of these reasons they are not in the same position as the other victims in the case who are non-Sudanese and all connected with the foreign peacekeepers who had been present in Sudan.

30. This fact has been recognised by the Legal Representatives for the other victims, including Ms. Helene Cisse, who has subsequently been appointed as the common legal representative.<sup>42</sup>

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<sup>42</sup> As reflected in the joint filings of all victims and the minutes of the meeting on 20 May 2011.

31. Victims a/1646/10 and a/1647/10 are the very first victims from Darfur who can participate in trial proceedings before the ICC. They have from the outset required special attention in order to facilitate their involvement in proceedings before the ICC. It was for this reason that Mr. Mohamed Ansari from SIDG was appointed as the case manager for the Legal Representatives. His appointment was confirmed by the Registry. He has served and continues to serve as the main point contact with the victims. He speaks Arabic and can travel to Darfur to consult with them. He has been able to arrange for them to be moved from Darfur for their security.
32. The Legal Representatives were introduced to the victims through Mr. Ansari in 2009 and consulted with the victims in various meetings in Sudan in 2010 and 2011. The details of these consultations have been provided to the Registry.<sup>43</sup> As a result, a close and trusted relationship between the Legal Representatives, Mr. Ansari and the victims was established over time. An effective and well-functioning team has developed to represent the victims, a team that accommodates their special and sensitive position.
33. As the Registry knows, the Legal Representatives and Mr. Ansari have established constructive and open relations with VPRS, meeting on a regular basis to update the VPRS on all developments given the unique circumstances of these Darfuri victims.<sup>44</sup>
34. It is thus vital that the Trial Chamber takes all reasonable steps to safeguard their position and interests. They would feel most comfortable by retaining their present lawyers. This request should only be denied if there are good reasons for so doing. In the submission of the victims no such reason has been identified by the Registry and no reason exists for refusing their request.

No reason to refuse victims the legal representatives of their choice

35. There is no good reason to terminate the victims' representation of choice at this late stage before the trial is due to commence. The Registry has not provided any specific basis for refusing to allow these victims to continue to be represented by their legal team. Indeed, the Registry has recognised that multiple legal teams for victims are

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<sup>43</sup> See Letter from Sir Geoffrey Nice QC and Rodney Dixon to VPRS, 8 August 2011, Annex 5.

<sup>44</sup> The Legal Representatives along with Mr. Ansari have facilitated training for Sudanese persons working with victims at the ICC in April 2011. See Letter from Sir Geoffrey Nice QC and Rodney Dixon to VPRS, 8 August 2011, Annex 5.

appropriate where there are “identified conflicting or distinct interests or where this is otherwise necessary for the fair and effective conduct of the proceedings.”<sup>45</sup> The Registry also accepted that it might be beneficial for the Darfuri victims to be grouped separately but that “more information is required in order to determine whether there is indeed a sufficient justification for the separate representation of this group.”<sup>46</sup>

36. The Registry nevertheless concluded on 14 September 2011 that the victims “would benefit from the establishment” of a single victims’ group<sup>47</sup> and that “there is no reason why all participating victims could not be represented by a single legal team.”<sup>48</sup>

37. However, the Registry never explained why Victims a/1646/10 and a/1647/10 would benefit from the exclusion of their established legal team particularly in light of their specific circumstances.

38. The victims themselves state that they do not believe that they will benefit from common representation. The Registry has simply given no weight to the views of the victims and does not begin to explain how it can be right that their views are overridden without giving, or attempting to give, any reason for so doing. There would have to be very good reasons to justify denying the victims their choice of representation. The Registry has offered none.

39. The provisions of Regulation 79(2) require the Registry to give consideration to the views of the victims and to assist specific groups of victims. Absent good reasons for refusing the request of Victims a/1646/10 and a/1647/10 to be represented by their lawyers, they should not be denied this fundamental right, especially given the specific circumstances applicable to these victims.

40. The trial proceedings will not be affected in any way by permitting Victims a/1646/10 and a/1647/10 to retain their current lawyers:

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<sup>45</sup> Proposal for the common legal representatives of victims, ICC-02/05-03/09-203, 25 August 2011, para. 6.

<sup>46</sup> 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. 19.

<sup>47</sup> Notification of appointment of common legal representatives of victims, ICC-02/05-03/09-215, 14 September 2011, p. 3.

<sup>48</sup> Proposal for the common legal representation of victims, ICC-02/05-03/09-203, 25 August 2011, para. 6-8.

- The time allocated by the Trial Chamber to victim participation in the trial can be shared with the appointed common legal representatives. All of the victims in the present case have agreed to “shar[e] the time allocated to victim participation in the trial”<sup>49</sup>. The separate representation of Victims a/1646/10 and a/1647/10 will take no extra time in the proceedings.<sup>50</sup> No additional time will be requested from the Trial Chamber.
- No additional resources and funding will be requested from the Trial Chamber or Registry. The Legal Representatives are privately funded and do not require legal aid funding.<sup>51</sup> The Registry’s decision is bound to add very substantially to the costs of representation by requiring Ms Helene Cisse to start creating professional relationships afresh with the victims in Sudan who speak a language she does not speak. She will have to overcome the difficulties that the Registry itself apparently encountered in communicating directly with any of the victims (whether logistic / financial or otherwise, something that has never been explained to the victims or their representatives). As against the very substantial but unknown costs that would be incurred by Registry’s decision there is the certain freedom from cost to the ICC of representation by privately funded representatives.
- The rights of the parties, in particular the Accused, will not be adversely affected by Victims a/1646/10 and a/1647/10 having their lawyers to represent them.

41. There is no reason to refuse the request of Victims a/1646/10 and a/1647/10 to be represented by their lawyers. Victims a/1646/10 and a/1647/10 submit that the Registry has in reality not identified any reasons that require the Legal Representatives to be excluded from the proceedings. A blanket assertion by the Registry that the

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<sup>49</sup> Joint Observations of Victims’ Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011, paras. 14, 15.

<sup>50</sup> Throughout the proceeding both Victims a/1646/10 and a/1647/10 and their Legal Representatives have abided by the Statute, Rules, Regulations and Code of Conduct of the Court. The Mission Statement of SIDG states that: “At the ICC SIDG will, through its lawyers and generally, fully respect the court while ensuring that the views and interests of the victims it represents are put before the court.” See <http://sidgsudan.org/mission-statement/>

<sup>51</sup> See Letter from Sir Geoffrey Nice QC and Rodney Dixon to VPRS, 8 August 2011, Annex 5.

victims will benefit from common representation, without any supporting reasoning, is not sufficient to deny the victims' request.

#### Practical difficulties

42. The Trial Chamber should also take account of the real practical difficulties of refusing the victims' request. It is unclear how the Registry expects the appointed common legal representatives to be in a position effectively to represent Victims a/1646/10 and a/1647/10, and any other victims who are recognised from Haskanita.
43. Mr. Ansari could act as an intermediary, but no arrangements have been put in place to retain him in any official capacity. The Registry decided not to appoint any of the two Legal Representatives or Mr. Ansari as part of the team of the common representatives. Instead, the Registry decided to appoint an associate counsel who has never been part of these proceedings and has no connection at all with the Darfuri victims.
44. The victims are at a loss as to why the Registry would regard it as being to their benefit to be represented by someone who has never had any association with them, let alone the conflict in Sudan and the facts of the present case. The Registry has not identified any particular reason for the victims to justify its decision. The victims are concerned that the Registry has excluded their lawyers on account of false allegations that they represent the Government of Sudan. They ask that if this is the reason behind the Registry's decision, it should be made public so that the victims and the Legal Representatives have a fair opportunity to respond and to show it to be untrue.
45. The reality is that the appointed common legal representatives will not be able to contact and communicate with the victims other than through Mr. Ansari on the ground in Sudan. Mr. Ansari simply cannot guarantee that the common representatives will have access to Sudan to visit the victims or that the victims will be able to leave Sudan at any stage. Mr. Ansari is not a government official and cannot guarantee that any of the necessary travel and entry visas will be authorised.
46. As was explained to the Registry, the visas for entry into Sudan were provided to the current Legal Representatives on the application of SWTUF and SIDG whom the

Legal Representatives have been advising in respect of ICC matters since the Sudan Situation arose before the ICC, well before their representation of the victims from Haskanita. It should be recognised that this legal work has resulted in ordinary citizens from Darfur participating before the ICC, a development that should be encouraged. There is no reason, of course, why these citizens should be ‘punished’ by limitations on their freedom of choice in representation simply because their government does not recognise or cooperate with the ICC. They have their own rights and it will be in the long term interest of the ICC if the ordinary citizen is seen as able to assert rights before the court whatever the approach of his /her government.<sup>52</sup>

47. All of these complications can be avoided by retaining the existing legal team. It would save resources for the ICC. The Registry’s determination to exclude the legal team at this stage cannot be justified on any practical grounds, nor on any other grounds.

**(ii) The Registry has never consulted with Victims a/1646/10 and a/1647/10 about common legal representation**

48. The Victims a/1646/10 and a/1647/10 ask the Trial Chamber to review the Registry’s decision because it is not based on any consultations with them.

49. Victims a/1646/10 and a/1647/10 did express their views through their Legal Representatives, but the Registry did not accept that these were the views of Victims a/1646/10 and a/1647/10.<sup>53</sup> This finding is irrational when the Registry did not itself take any steps to verify with the victims whether these were their views or not.

50. The Registry was ordered by the Trial Chamber on 21 April 2011 to initiate its procedures for the organisation of common representatives. In the nearly 5 months that followed until the Registry appointed the common representatives, the Registry

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<sup>52</sup> All representations by the Legal Representatives in all proceedings in the Sudan Situation to date have focused on adding evidence and other relevant material to that presented by the Prosecution. There is no suggestion – nor could there be – that the material presented has been other than material likely to assist with establishment of a better narrative of events. There are obvious risks – *for the narrative derived from any trial* – in a party not cooperating or participating. In the Sudan Situation generally – and in the representation of the victims of Haskanita in particular – may be found cooperative actions by Sudanese citizens that can substantially improve the trial narratives to be left by ICC court proceedings and that may significantly reduce the risk of the distortion of the narrative that may result from non cooperation by the Government.

<sup>53</sup> Report on the organisation of common legal representation, ICC-02/05-03/09-187, 5 August 2011, para. 5.



took no steps to consult with the Victims a/1646/10 and a/1647/10. The Legal Representatives made it clear to the Registry that the victims could easily have been contacted by the Registry by video-link<sup>54</sup> so as to accommodate the Registry's limited "resources and time."<sup>55</sup>

51. Victims a/1646/10 and a/1647/10 draw to the attention of the Trial Chamber a letter from the Victims' Rights Working Group submitted to the Registry on 17 August 2011. In its letter, the Victims' Rights Working Group expressed "serious concerns ... regarding the failure of the Registry to ensure that victims ... were provided with the opportunity to choose their legal representatives as required by Rule 90(1) and (2)". The letter noted that in the present case, the Registry "did not carry out the required consultations with victims" and this failure "has directly impeded their ability to exercise their right to choose a common legal representative."<sup>56</sup> The letter is annexed hereto as Annex 6.

**(iii) The Registry has failed to comply with Rule 90 in its selection of the common legal representatives**

52. The fundamental principle underlying Rule 90 on victim representation is that the victims should choose their legal representatives. Rule 90(1) states that the victims "shall be free to choose a legal representative."<sup>57</sup> Rule 90(2) gives victims the right to "choose a common legal representative or representatives" with the assistance of the Registry if necessary.<sup>58</sup> When the Trial Chamber ordered the Registry to commence "consultations between the Registry and the victims, within the meaning of Rule 90(2) of the Rules" it intended that the victims should be given the opportunity to choose their common legal representatives in accordance with Rule 90.<sup>59</sup>

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<sup>54</sup> Letter to VPRS from Sir Geoffrey Nice QC and Rodney Dixon, 12 July 2011, paras. 6, 7. The Legal Representatives had also offered to arrange for face-to-face meetings to take place in Sudan or elsewhere.

<sup>55</sup> Report on the organisation of common legal representation, ICC-02/05-03/09-187, 4 August 2011, para. 3.

<sup>56</sup> Victims' Rights Working Group letter to the Registry, 'The Registry's approach to Common Legal Representation for victims participating in cases before the Court,' 17 August 2011.

<sup>57</sup> Rule 90(1).

<sup>58</sup> Rule 90(2).

<sup>59</sup> Order instructing the Registry to start consultations on the organisation of common legal representation, ICC-02/05-03/09-138, 21 April 2011, para. 7.

53. In accordance with Rules 90(1) and (2) all of the victims in the present case jointly submitted their choice for common representation to the Registry on 18 July 2011.<sup>60</sup> The victims asked that their proposal be implemented with the undertaking that they were willing to “shar[e] the time allocated to victim participation in the trial.”<sup>61</sup>

54. The Registry decided not to accept this proposal. The victims say that this decision was unfounded. First, the Registry is not authorised under the Rules or Regulations to refuse to accept the victims’ proposal. It may only assist the victims if necessary in their choice of common legal representatives. It may only appoint common representatives if the victims are unable to agree on common representative/s. The Trial Chamber’s order made this plain.<sup>62</sup> Second, in any event, the reason given by the Registry for its refusal to abide by the wishes of the victims is wrong. As noted above, the Registry has no basis to conclude that the “proposal emanates not from the victims themselves but from the current legal representatives of the victims” and “therefore does not constitute an agreement by victims as to their common legal representation.”<sup>63</sup> The Registry did not consult with the victims themselves to check whether it was their common proposal or not.

55. The Legal Representatives confirmed in their filing of 18 July 2011 that the common proposal was based on the views of the victims.<sup>64</sup> The Registry simply ignored these submissions. It appears that the Registry was determined to exclude the lawyers of Victims a/1646/10 and a/1647/10’s irrespective of the views of their clients. As has again been confirmed in the statements filed by the victims, the common proposal was based on their views.<sup>65</sup>

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<sup>60</sup> Joint Observations of Victims’ Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011.

<sup>61</sup> Joint Observations of Victims’ Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011, paras. 14, 15.

<sup>62</sup> Order instructing the Registry to start consultations on the organisation of common legal representation, ICC-02/05-03/09-138, 21 April 2011, para. 4-6.

<sup>63</sup> Report on the organisation of common legal representation, ICC-02/05-03/09-187, 5 August 2011, para. 5.

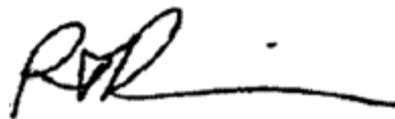
<sup>64</sup> Joint Observations of Victims’ Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011, paras. 1, 14. There is an absurd and arguably disingenuously misleading circularity in Registry’s argument, however disguised to the following effect: Registry has not contacted victims for various unstated reasons; contact therefore has to be via their legal representatives; but these representations are not the proposals of the victims themselves as the lawyers are not to be trusted (for some unstated reason); thus the victims have made no representations.

<sup>65</sup> Annex 1.

**E. Conclusion**

56. Victims a/1646/10 and a/1647/10 wish to participate as victims in the trial proceedings in order to assist the Court in finding the truth about the attack on the AMIS camp. As noted by the Trial Chamber in its Decision of 28 September 2011, Victims a/1646/10 and a/1647/10 could be called as witnesses if necessary.<sup>66</sup>

57. For the reasons set out in this application Victims a/1646/10 and a/1647/10 ask the Trial Chamber to review the Registry's decision to remove their Legal Representatives. The victims respectfully request the Trial Chamber to permit their lawyers of choice to represent them at trial.



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Sir Geoffrey Nice QC  
Rodney Dixon  
Legal Representatives of the Victims

Dated 30<sup>th</sup> September 2011  
London, United Kingdom

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<sup>66</sup> Decision on the Joint Submission regarding facts the contested issues and the agreed, ICC-02/05-03/09-227, 28 September 2011, para. 41.