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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 JAMUS***

Public Document

**Application on behalf of Victims a/1646/10 and a/1647/10 for Leave to Reply to the
“Observations en réponse à la requête aux fins de réexamen de la proposition de
désignation d’une représentation légale commune” filed on 12 October 2011”**

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

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 to request leave to reply to the “Observations en réponse à la requête aux fins de réexamen de la proposition de désignation d’une représentation légale commune”¹ filed on 12 October 2011 by the Common Legal Representatives appointed by the Registry.
2. These Observations were filed in response to the “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)”, filed on 30 September 2011.²

B. Legal basis for Application for Leave to Reply

3. The Legal Representatives for Victims a/1646/10 and a/1647/10 file this Application pursuant to Regulation 24(5) of the Regulations of the Court which states that “Participants may only reply to a response with the leave of the Chamber.”³
4. The Legal Representatives for Victims a/1646/10 and a/1647/10 submit that there are good reasons to grant leave to reply to the Observations of 12 October 2011.
5. *First*, Ms. Cisse expressly challenges the authenticity and credibility of victims’ own statements that they wish to be represented separately by their lawyers.⁴ In addition, she questions the validity of the victims’ concerns about safety and security in Sudan. There is a surprising hostility displayed towards the very victims who the Common Legal Representatives have been appointed by the Registry to represent. Instead of showing any respect for and understanding of the victims’ concerns and interests, Ms.

¹ 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 (hereinafter “Observations of 12 October 2011”).

² 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), ICC-02/05-03/09-228, 30 September 2011 (hereinafter “Victims’ Request of 30 September 2011”).

³ Regulations of the Court, Reg. 24(5).

⁴ The Observations of 12 October 2011 were filed on behalf the Registry appointed Common Legal Representatives. The Observations of 12 October 2011 were only signed by Ms. Cisse. It is for this reason that the Observations of 12 October 2011 are referred to in her name in this application.

Cisse has chosen to challenge their good faith without any evidence to support her allegations. It is a most unfortunate (and unexpected) filing. It serves only to re-enforce the concerns and fears that Victims a/1646/10 and a/1647/10 have expressed about being represented by lawyers who are imposed by the Registry without consultation, whom they have never met and who they have no reason to believe will represent their best interests.

6. Ms. Cisse's attack on the Darfuri victims is also surprising in view of the position that she took before she was appointed by the Registry. She had strongly supported the common proposal of all victims to have three separate teams to take account of the different needs and interests of the different groups of victims, who would share the time granted by the Trial Chamber for victim representation in the trial (and taking into account that Victims a/1646/10 and a/1647/10 did not require legal aid funding). She claimed to have done so on the basis of the views of the victims whom she represented at the time, as expressed to her.⁵

7. Victims a/1646/10 and a/1647/10, therefore, request a fair opportunity to reply to Ms. Cisse's observations. They wish to confirm that any suspicions that Ms. Cisse seeks to cast over the credibility of their statements, the validity of their security concerns and the sincerity of the request they make for representation are completely unfounded. It is entirely permissible under the Rules and Regulations for the victims to be requesting a review of the Registry's decision. Ms. Cisse implies (as a minimum) that they have done something wrong - disingenuous - by asking that her appointment be reviewed. The victims ask the Trial Chamber to allow them to answer the allegations made against them, unsupported, as they are, by any evidence. The issue of their representation is plainly a very important one for the Victims a/1646/10 and a/1647/10, given their vulnerable and sensitive position. They should be afforded the opportunity to be heard in reply to Ms. Cisse's adverse observations; indeed given the rift Ms. Cisse *herself* creates between them and the lawyers appointed to represent their best interests by the Registry. It may be thought unavoidable that the victims should be heard before she takes further work on their behalf.⁶

⁵ Joint Observations of Victims' Legal Representatives on Common Legal Representation, ICC-02/05-03/09-182, 18 July 2011, para. 14.

⁶ Consideration of the position of a defendant represented by a court appointed lawyer may be of assistance. In any case – and in any country with a developed legal system – revelation of lack of confidence by the lawyer in the client defendant or by the client defendant in his lawyer would *have* to be investigated by the court before allowing the trial to proceed. Without proper investigation it could have no confidence in the lawyer properly

8. Second, Ms. Cisse has made several erroneous and misleading allegations about (i) the interests and needs of the victims, (ii) the intermediary, Mr. Ansari, and (iii) the practical difficulties in representing the victims. In particular, she has attacked Mr. Ansari for no justifiable reason when he is the very person who is closest to the victims and with whom she would need to co-operate. Her questioning of his commitment to representing the victims before the ICC is most disconcerting. Without his tireless work in Darfur, the victims would not be participating before the ICC today. She appears to have adopted the misconceived position of the Prosecution and Defence that Mr. Ansari is somehow trying to undermine the ICC. There is simply no evidence of such conduct. On the contrary he has sought to involve ordinary Sudanese citizens in the work of the ICC at every turn through, *inter alia*, victim representation, coordinating training sessions for Sudanese investigations at the ICC⁷, and most recently, organising workshops at the ICC for persons involved in victim protection in Sudan.⁸ The victims thus request leave to reply to these allegations so that the Trial Chamber will have their views before it when considering Ms. Cisse's observations before any final decision is rendered.
9. The reasons why leave should be granted are explained in further detail below. Subject to the provisions of Regulations 34(c) and 35, Victims a/1646/10 and a/1647/10 request that they are granted leave to file a reply in respect of these matters by Monday 31 October 2011, or such date as ordered by the Trial Chamber. The Legal Representatives of Victims a/1646/10 and a/1647/10 submit that immediately following notification on 14 October 2011 of the Observations of 12 October 2011, they requested an expedited translation of the Observations into English, which is the working language of counsel. Having received a draft translation of the Observations from the Court on 18 October 2011, the Legal Representatives have filed their application for leave to reply as soon as possible thereafter. In the submission of the

respeering the defendant in the interest of the trial process. The Trial Chamber may recall how in the *Milosevic* case before the ICTY the court appointed Amicus Curiae, Michail Wladimiroff, expressed public doubts about the strength of the accused's case and was forthwith removed by the court from further involvement in the case. The principle applied in the case of a court *amicus*, whose duty to a defendant is indirect and to an extent impersonal, must apply, *a fortiori*, where expressions of mistrust and disbelief are voiced by a lawyer about the very person she is supposed to represent *directly and personally*. See 'Decision Concerning an Amicus Curiae', IT-02-54, Trial Chamber, 10 October 2002.

⁷ Letter from Geoffrey Nice QC and Rodney Dixon to VPRS, 8 August 2011.

⁸ Meeting with WVU and Mr. Ansari on 13 October 2011 to discuss and plan a 'good practices' and witness protection training. Subsequent emails with WVU on 17, 20 and 21 October 2011 have initiated concrete plans and details for the trainings.

Legal Representatives there are good grounds for permitting the Legal Representatives this period of time to file a reply by 31 October 2011. The matters that need to be dealt with in the reply are substantial and very important to the victims to ensure that their interests and security concerns are addressed in full; their resolution may also be thought to affect the integrity of the Court. The victims' submit that it would be unfair for them to be denied an opportunity to answer Ms. Cisse's allegations. Their views in reply should be taken into account by the Trial Chamber in its determination, especially since Ms. Cisse has challenged the victims' - potentially to become her own clients' - credibility.

C. Reasons to grant Leave to Reply

10. There are four main allegations made by Ms. Cisse, all of which are without any foundation, that require a reply from the victims. Each is adverse to the victims' submissions and real interests and thus should be answered so that the Trial Chamber can fairly evaluate the victims' request to review the Registry's appointment. These allegations are: (i) the victims's statements do not represent their actual views, (ii) the security concerns raised by the victims are not genuine, (iii) the interests of the Darfuri victims are the same as those of the other victims, and (iv) Mr. Ansari is not to be trusted as an intermediary.

(i) There is no basis at all to question the statements of the victims

11. It is regrettable that Ms. Cisse has in effect accused Victims a/1646/10 and a/1647/10 and the Legal Representatives of filing false statements about their choice of representation.⁹ There is nothing to support this very serious accusation. It is quite improper for Ms. Cisse to challenge the honesty of the victims and their Legal Representatives without any evidence. The victims ask for an opportunity to reply to Ms. Cisse's accusations.

12. The hostility that she has shown them (for no discernable reason) should not go unanswered. Ms. Cisse appears to adopt a similar view to that of the Registry (now that she has been appointed as the Common Representative) that the victims'

⁹ Observations of 12 October 2011, para. 34.

statements are not to be trusted.¹⁰ It is a most unfair accusation, especially when the victims have never been consulted by the Registry. The Trial Chamber is urged to allow the victims to reply to this attack on their credibility.

13. The victims will submit that far from allaying their concerns about new lawyers, these unjustified accusations confirm the victims' views that they should not be represented by Ms. Cisse. In all of her allegations she has not answered a primary submission of the victims that there is *no* good reason to prevent them from being represented separately when it will not in any way adversely affect the proceedings – no additional time will be required in the trial for their separate representation as the time can be shared amongst the victims and there will be no additional cost to the Court as the Darfuri victims are privately funded.

(ii) The victims' genuine security concerns should be taken into account

14. Ms. Cisse also questions the security concerns raised by the Darfuri victims.¹¹ This is an astonishing submission. There is no reason at all to challenge the victims who are in a vulnerable position in Sudan on the issue of their fears for their safety and security. Ms. Cisse need only follow the reports from Darfur of continuing armed attacks to realise the seriousness of the situation.¹²

15. Their sensitive security situation is one of the reasons why the victims have asked to be represented by their lawyers. These same concerns do not arise in respect of the other victims who Ms. Cisse represents. The Darfuri victims ask that they are allowed to reply to Ms. Cisse's observations to ensure that the Trial Chamber is apprised of the victims' security concerns and why separate representation would be most appropriate for their specific circumstances.

¹⁰ This is not the view Ms. Cisse took before she was appointed by the Registry when she challenged the Registry's argument that the proposal on common representation put forward by all the victims was not based on their views (see 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, 22 August 2011, paras. 2, 10.).

¹¹ Observations of 12 October 2011, para. 37.

¹² For example see *12 Oct 11-UPDATE: On attack in North Darfur*, UNAMID website, 12 October 2011; *Sudan: Peacekeepers Killed in North Darfur Attack*, The Nigerian Daily, 11 October 2011; *Sudan: Darfur Camps Targeted by Random Attacks*, allAfrica, 10 October 2011; and, *Darfur peacekeepers killed in Sudan attack*, BBC, 11 October 2011.

(iii) The Darfuri victims have distinct and unique concerns and circumstances

16. Ms. Cisse argues that there is no difference between the Darfuri victims and the other victims in this case to justify separate representation. She overlooks the clear provisions of Regulation 79(2) which state that when choosing a common legal representative “*consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims*”.¹³ The Darfuri victims are a *specific* group with distinct concerns and circumstances. Ms. Cisse offers no good reason why they should not be represented separately. If anything, her adverse observations re-enforce the need for separate representation.
17. As will be explained in a reply on behalf of the victims, if leave to file a reply is granted, it is correct that all of the victims in the camp suffered harm as a result of the same attack. But this is to miss the point. The Darfuri victims have requested separate representation *not* because the harm they suffered was *different*, but because of their unique and sensitive position as citizen victims of and from Sudan, a group the Prosecutor failed, for no accountable reason, to include in the victims he identified. Their interests as victims from Sudan are clearly different from the interests of peacekeepers who do not need to live in Sudan, who do not have the desire to return to Darfur once it is safe for them to do so and who do not have the economic and associated losses of victims attacked in their own country. The Darfuri victims submit that no compelling reason has been identified for refusing them the right to be represented by counsel of their choice.
18. Furthermore, it is immediately a matter of some concern for Ms. Cisse to be readily accepting that the harm suffered by the Darfuri victims should not extend to any of the events that occurred in the town of Haskanita.¹⁴ As the Legal Representatives for the Darfuri victims have previously submitted, the broader context of the attack on the camp may become significant in determining whether the attack itself was unlawful. It must be troubling that Ms. Cisse has failed to understand the forensic significance for the trial, and thus for *any* victim she represents, of this broader context.¹⁵

¹³ Regulations of the Court, Reg. 79(2).

¹⁴ Observations of 12 October 2011, paras. 19, 20, 25.

¹⁵ Observations by the Legal Representatives for Victims a/1646/10 and a/1647/10 on the ‘Joint Submission by the Office of the Prosecutor and the Defence Regarding the Contested Issues at the Trial of the Accused Persons’ and the ‘Agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence between the

Moreover, the Darfuri victims have always maintained that it was most surprising that the Prosecutor did not include them, the local residents of Haskanita, as victims in the charges on account of what happened to them in the camp and in light of the destruction of their village (suggesting instead only that local Sudanese may have collaborated with the rebel attackers ¹⁶). 'International' victims have been the sole focus of suffering in this case as it has been formulated by the Prosecutor. Ms. Cisse appears not to have understood a main concern of the Darfuri victims although it might be thought - in the most general way - that interests of citizens of a conflict-torn country might attract as much or even more attention of this Court than the interests of the peacekeepers who involve themselves in the fray with their eyes open as to the risks they will face. Her observations require a reply that will now, in light of her expressed approach show that she has no capability of genuinely representing the best interests of the Darfuri victims.

19. Ms. Cisse also seeks to make a legal argument that "the provisions of rule 90(1) are not to be regarded in absolute terms".¹⁷ This requires a reply as the Darfuri victims have put forward very specific reasons for why separate representation is justified in their case.

(iv) There is no basis at all to question Mr. Ansari's involvement

20. Ms. Cisse does not confine her attacks to the victims. She also accuses Mr. Ansari of not being capable of representing the interests of the victims.¹⁸ This is another completely misguided and offensive allegation. The victims would not have the opportunity to participate before the ICC if it had not been for Mr. Ansari and all of his efforts to ensure that they could be represented before the ICC. The reality may be that it will be quite impossible for the victims to continue to participate without Mr. Ansari's involvement, something the Court may have to decide as a specific issue and for which it might have to articulate a specific, practical, realistic protocol in the event that it leaves Ms. Cisse as the appointed representative. Mr. Ansari has acted professionally, openly and with dedication in all of his dealings with the ICC. It is hoped that the Registry, and in particular the VPRS, will confirm that this is the case.

Defence of Messrs Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus and the Office of the Prosecutor, ICC-02/05-03/09-194, 8 August 2011, paras. 5-9.

¹⁶ *Id.*, at para. 4.

¹⁷ Observations of 12 October 2011, para. 32.

¹⁸ Observations of 12 October 2011, para. 41, See also, paras. 34-41.

There has not been a single complaint made about his work or that of the Legal Representatives.¹⁹

21. The victims do need to reply to Ms. Cisse's submissions about Mr. Ansari. She has misrepresented the work of his organisation, SIDG.²⁰ She has adopted the views expressed by the Prosecution and Defence in questioning Mr. Ansari and the Legal Representatives' ability to represent the victims. None of these submissions has been accepted by the Court.²¹ It is most unfortunate that Ms. Cisse has merely chosen to 'parrot' the Prosecution and Defence in this case. Her comments raise very serious concerns about her ability independently to represent the Darfuri victims generally. They require a response as they show that Ms. Cisse does not have the best interests of the Darfuri victims in mind.

22. It has to be stated plainly that for an advocate to change from the position Ms. Cisse took when she may have felt herself at risk of losing the work of representing *some* victims to the position she now takes is to reveal an advocate unsuited to the task of appearing for victims at all and possibly an advocate who simply does not understand the duties of absolute good faith owed to the court that take precedence over any personal interests. If she can so easily change her own expression of view for seemingly personal reasons before she has ever met the very people she is appointed to represent how can she be entrusted with representation of any victims' interests? And it is not known whether in interview for the position she now holds she revealed her earlier stance, revealed above. The Legal Representatives for these two victims made their historic, current and prospective positions entirely clear in interview and

¹⁹ If any reservations have been expressed about either Mr Ansari or about the Legal Representatives that have *not* been passed on they should be conveyed now, identifying by whom and to whom made. One of the problems of the complex and seemingly 'private' structures of the ICC is that, to outsiders such as the victims generally in this case, there may be the appearance of the different organs of the Court communicating unseen to the detriment of open justice. There is no reason to believe that this has happened here but *any* concerns expressed within the ICC about the overall representation of interests in the Sudan case by the Legal Representatives and / or by Mr Ansari should be made public. The fact that the Sudanese government and President do not recognise the ICC for the purposes of the case against the President makes the willingness of SWTUF and SIDG – by whom the victims are funded – and the victims themselves to work *within* the ICC structures and rules of very great significance and of great potential value to the development of the ICC and of international law generally. Where SWTUF, SIDG and Mr Ansari lead others may follow and any hint of insincerity on any of their parts by any organ of the ICC should be revealed as openly as have the general and particular interests and concerns of SWTUF and SIDG, as well as of the victims, been illuminated for all to see.

²⁰ Observations of 12 October 2011, para. 38.

²¹ Confirmation of Charges Hearing, ICC-02/05-03/09-T-9-Red-ENG CT WT, 8 December 2010, pg. 4, ln. 12-15.

would have cleaved unswervingly to the positions they took and the offers of assistance they made.²²

D. Conclusion

23. For all of these reasons Victims a/1646/10 and a/1647/10 respectfully request leave to reply to the Observations of 12 October 2011 by Monday 31 October 2011, or such date as ordered by the Trial Chamber. It is very important for the victims that they have an opportunity to answer the unsubstantiated and unnecessarily hostile challenges made to the credibility of their request for separate representation.



Sir Geoffrey Nice QC
Rodney Dixon
Legal Representatives of the Victims

Dated 24th October 2011
London, United Kingdom

²² They made clear the difficulties that joint representation could involve, their adherence to the joint plan advanced by all victims' representatives then in place, their willingness to perform any overall supervision function that might be assigned and their willingness to cooperate with any others appointed to represent all victims, all to the best of their abilities.