

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 October 2013

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
AND SALEH MOHAMMED JERBO JAMUS**

Public

Public redacted Decision terminating the proceedings against Mr Jerbo

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Adebowale Omofade

Counsel for the Defence

Mr Karim A.A. Khan

Mr Nicholas Koumjian

Legal Representatives of Victims

Ms Hélène Cissé

Mr Jens Dieckmann

Legal Representatives of Applicants

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

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IV (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, after considering Articles 25(1) and 64(5) of the Rome Statute (“Statute”), and Regulation 31 of the Regulations of the Court (“Regulations”), renders the following Decision terminating the proceedings against Mr Jerbo.

I. PROCEDURAL HISTORY

1. On 23 April 2013, the defence for Mr Abdallah Banda Abakaer Nourain (“Mr Banda”) and Mr Saleh Mohammed Jerbo Jamus (“Mr Jerbo”) filed the Public Redacted Version of Defence Notification of the Death of Mr Saleh Mohammed Jerbo Jamus submitted on 21 April 2013 (“Defence Notification”),¹ in which it notified the Chamber that on 20 April 2013 it had received news that “Mr Jerbo died in North Darfur, Sudan on the afternoon of 19 April 2013, and was buried the same day.”² On 10 May 2013³ and 20 June 2013,⁴ the defence for Mr Banda and Mr Jerbo (“defence”) confidentially filed two updates to the Defence Notification (“Updates”).

2. Following the Chamber’s orders to file observations on the Defence Notification and the Updates,⁵ the Chamber received the respective submissions of the defence,⁶

¹ Public Redacted Version of “Defence Notification of the Death of Mr Saleh Mohammed Jerbo Jamus”, 21 April 2013, ICC-02/05-03/09-466-Red.

² ICC-02/05-03/09-466-Red, paragraph 1.

³ Update to Defence Notification of the Death of Mr Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09-466-Conf), ICC-02/05-03/09-475-Conf, with Annex A, ICC-02/05-03/09-475-Conf-Exp-AnxA .

⁴ Second Update to Defence Notification of the Death of Mr. Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09-466-Conf) and Additional Submissions pursuant to the Trial Chamber’s Order of 10 June 2013 (ICC-02/05-03/09-485-Conf), ICC-02/05-03/09-486-Conf.

⁵ Email from the Legal Officer of the Chamber to the parties and participants on 26 April 2013 at 15.19; Order requesting the parties’ observations on the Common Legal Representatives and the Registry’s proposal on the severance of the case, 16 May 2013, ICC-02/05-03/09-476; Order to the Defence and the Registry following the ‘Update to Defence Notification of the Death of Mr Saleh Mohammed Jerbo Jamus’, 10 June 2013, ICC-02/05-03/09-485-Conf.

⁶ Defence Observations on the Common Legal Representatives’ and the Registry’s proposals on the severance of the case, 28 May 2013, ICC-02/05-03/09-480.

the Office of the Prosecutor (“prosecution”),⁷ the Common Legal Representative⁸ (“CLR”) and the Registry⁹ on, *inter alia*, the appropriateness of the proposals to terminate the proceedings against Mr Jerbo or sever the case against Mr Jerbo from the case against Mr Banda.

3. On 18 July 2013, the Chamber held a status conference¹⁰ pursuant to the Order scheduling a status conference [REDACTED].
4. At the status conference, the Chamber invited the prosecution and the CLR to file additional submissions on the issues of severance and termination of the proceedings against Mr Jerbo by 2 August 2013¹¹ and invited the defence to file additional submissions by 9 August 2013.¹²
5. On 2 August 2013, the prosecution filed its “Observations regarding the severance of the case against Mr Jerbo from the case against Mr Banda and the potential termination of proceedings against Mr Jerbo” (“Prosecution Observations”).¹³ On the same day, the CLR filed the “Observations Supplémentaires des Représentants Légaux Communs” (“CLR’s Observations”).¹⁴

⁷ Prosecution’s Observations Regarding the Defence Notification of the Death of Mr Saleh Mohammed Jerbo Jamus, 6 May 2013, ICC-02/05-03/09-471; Public Redacted Version of ‘Prosecution’s Submissions Pursuant to Trial Chamber IV’s Order requesting the parties’ observations on the Common Legal Representatives and the Registry’s proposal on the severance of the case’ filed on 28 May 2013, 29 May 2013, ICC-02/05-03/09-479-Red.

⁸ Observations des Représentants Légaux Communs sur la Notification de la Défense (ICC-02/05-03/09-466-Red), 6 May 2013, ICC-02/05-03/09-472, with 8 public annexes.

⁹ Registry’s observations on the ‘Public Redacted Version of ‘Defence Notification of the Death of Mr Saleh Mohammed Jerbo Jamus’ submitted on 21 April 2013’ (ICC-02/05-03/09-466-Red) dated 23 April 2013, 27 May 2013, ICC-02/05-03/09-473-Red; Report of the Registry pursuant to Trial Chamber IV’s ‘Order to the defence and the Registry following the Update to Defence Notification of the Death of Mr Saleh Mohammed Jerbo Jamus’ dated 10 June 2013, 21 June 2013, ICC-02/05-03/09-487-Conf.

¹⁰ ICC-02/05-03/09-T-22-CONF-ENG scheduled pursuant to Order scheduling a status conference, 28 June 2013, ICC-02/05-03/09-488.

¹¹ ICC-02/05-03/09-T-22-CONF-ENG, page 73, lines 18 to 19.

¹² ICC-02/05-03/09-T-22-CONF-ENG, page 73, lines 13 to 16.

¹³ Prosecution’s observations regarding the severance of the case against Mr. Jerbo from the case [against] Mr. Banda and the potential termination of proceedings against Mr. Jerbo, ICC-02/05-03/09-494-Conf.

¹⁴ ICC-02/05-03/09-495-Conf.

6. On 9 August 2013, the defence filed the “Defence Response to Prosecution’s and Common Legal Representatives Observations regarding the Severance of the Case against Mr Jerbo from the case against Mr Banda and the potential termination of proceedings against Mr Jerbo” (“Defence Response”).¹⁵
7. On 26 August 2013, the CLR, without prior leave of the Chamber, filed the “Réponse des Représentants Légaux Communs à la Soumission du Procureur” (“CLR’s Response”).¹⁶
8. On 30 August 2013, the defence filed an application for leave to reply¹⁷ to the CLR’s Response.

II. SUBMISSIONS OF THE PARTIES AND PARTICIPANTS

9. In the Prosecution Observations, the prosecution submits that [REDACTED] it is now appropriate for the Chamber to sever the case against Mr Jerbo from the case against Mr Banda.¹⁸ As regards the issue of termination, the prosecution does not object to the termination of proceedings against Mr Jerbo on condition that such termination is without prejudice: “i.e. that the proceedings against him may be again pursued should information become available that he is alive.”¹⁹ The prosecution argues that the option to terminate the proceedings without prejudice is supported by the practice of the *ad hoc* tribunals, and the fact it is not currently possible to obtain official confirmation of Mr Jerbo’s death.²⁰ [REDACTED], it also states that only “conclusive evidence” of death can justify the termination of

¹⁵ ICC-02/05-03/09-496-Conf-Red2.

¹⁶ ICC-02/05-03/09-499-Conf.

¹⁷ Defence Application for Leave to Reply to the ‘Réponse des Représentants Légaux Communs à la Soumission du Procureur (ICC-02/05-03/09/494-Conf)’, ICC-02/05-03/09-502-Conf.

¹⁸ ICC-02/05-03/09-494-Conf, paragraph 7.

¹⁹ ICC-02/05-03/09-494-Conf, paragraph 18.

²⁰ ICC-02/05-03/09-494-Conf, paragraph 16.

proceedings completely.²¹ The prosecution claims that the Court has jurisdiction to terminate proceedings pursuant to Article 25(1) of the Statute, but that the practice of the Court has been to terminate proceedings only upon the provision of “compelling evidence of death, such as a death certificate issued by governmental authorities, and forensic identity verification of the remains of the deceased”.²²

10. The prosecution [REDACTED] that it may be possible to obtain a separate death certificate from the Popular Committee. The prosecution submits that “it remains unclear whether these [...] documents could really serve as official confirmation of Mr Jerbo’s death”²³ because they do not emanate from any governmental authority in the Sudan. The prosecution, however, submits that the Court should take reasonable steps to obtain these documents.²⁴
11. In her Observations, the CLR submits that the proceedings against Mr Banda must be severed from the proceedings against Mr Jerbo because both are accused as direct co-perpetrators within the meaning of Article 25(3)(a) of the Statute—a mode of criminal responsibility that recognises each individual criminally responsible as a principal.²⁵
12. The CLR objects to the termination of proceedings against Mr Jerbo for several reasons. Firstly, [REDACTED] it is possible to obtain a death certificate or an equally authoritative document.²⁶ Secondly, the jurisprudence demonstrates that in accordance with the norms of international criminal law, the production of an accused’s death certificate is essential to the termination of international penal

²¹ ICC-02/05-03/09-494-Conf, paragraph 16.

²² ICC-02/05-03/09-494-Conf, paragraphs 8 and 16.

²³ ICC-02/05-03/09-494-Conf, paragraph 14.

²⁴ ICC-02/05-03/09-494-Conf, paragraph 14.

²⁵ ICC-02/05-03/09-495-Conf, paragraphs 58 and 59.

²⁶ ICC-02/05-03/09-495-Conf, paragraphs 19 to 30.

proceedings.²⁷ Thirdly, [REDACTED].²⁸ The CLR concludes that the termination of proceedings would deny the victims justice because it forecloses all possibility of ever obtaining a decision on the culpability of Mr Jerbo and obtaining reparations.²⁹

13. In the Defence Response, the defence submits that it “takes no position on the prosecution’s and the legal representative’s respective submissions on the possible severance of the case...”.³⁰

14. With regard to the termination of proceedings against Mr Jerbo, the defence submits that “it take[s] no position save that it may be necessary to preserve the *status quo* resource-wise”.³¹ The defence states that it is prepared to assist the Court in obtaining the death certificates [REDACTED], provided that the process of obtaining these documents does not expose the individuals involved to any unreasonable risks and that the Registry will reimburse any associated costs to obtain and then transmit the certificates to the seat of the Court.³² The defence [REDACTED] reiterates its position that it has no reason to doubt the information that Mr Jerbo is deceased.³³

15. In response to the remarks concerning the jurisprudential practice requiring proof of official death certificates, the defence argues that the prosecution and the CLR fail to identify a critical distinction relating to the fact that none of the cases cited dealt with “national authorities not only unwilling to assist but actively hostile to the [C]ourt such as the situation facing the parties in this case.”³⁴

²⁷ ICC-02/05-03/09-495-Conf, paragraphs 31 to 43.

²⁸ ICC-02/05-03/09-495-Conf, paragraphs 44 to 56.

²⁹ ICC-02/05-03/09-495-Conf, paragraph 5.

³⁰ ICC-02/05-03/09-496-Conf-Red2, paragraph 1.

³¹ ICC-02/05-03/09-496-Conf-Red2, paragraph 18.

³² ICC-02/05-03/09-496-Conf-Red2, paragraph 19.

³³ ICC-02/05-03/09-496-Conf-Red2, paragraphs 17 and 18.

³⁴ ICC-02/05-03/09-496-Conf-Red2, paragraph 15.

III. ANALYSIS AND CONCLUSION

Preliminary Issue

16. The Chamber notes that the CLR's Response was filed outside of the schedule set out by the Chamber at the status conference. When giving directions for submissions, the Chamber authorised the defence to respond to the submissions of the prosecution and the CLR,³⁵ but no such authorisation was given to the CLR. Furthermore, the setting of a time limit of one week was a clear indication that the time limits of Regulation 31 of the Regulations were not applicable in that instance. Therefore, the legal representative should have first sought leave to respond to the Prosecution's Observations. No application for leave was filed with the Chamber. The Chamber will thus not consider the CLR's Response. Accordingly, the defence's application for leave to reply to this response becomes moot.³⁶

Whether the proceeding shall be severed and/or terminated

17. The Chamber recalls that, according to Article 19(1) of the Statute, the Chamber "shall satisfy itself that it has jurisdiction in any case brought before it". Pursuant to Article 25(1) of the Statute, the Court has jurisdiction only over "natural" persons. The Chamber recalls that the purpose of criminal proceedings is to determine individual criminal responsibility, and notes that other chambers of this Court have terminated proceedings against deceased persons for lack of jurisdiction.³⁷

18. The Chamber further notes that in cases involving the termination of proceedings against a deceased accused person or suspect before this Court and before other international courts, a termination decision was supported by the provision of a

³⁵ ICC-02/05-03/09-T-22-CONF-ENG, page 73, lines 18 and 19.

³⁶ ICC-02/05-03/09-502-Conf, paragraph 29.

³⁷ *The Prosecutor v. Muammar Mohammed Abu Minya Gaddafi*, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, 22 November 2011, ICC-01/11-01/11-28; *The Prosecutor v. Joseph Kony et al.*, Decision to Terminate the Proceedings Against Raska Lukwiya, 11 July 2007, ICC-02/04-01/05-248.

death certificate issued by an official governing body.³⁸ In the present case no such certificate has been obtained. The Chamber is, however, not persuaded that the production of a death certificate is an essential pre-requisite to the termination of criminal proceedings, as suggested by the CLR. Instead, it is one of the avenues available to the Chamber to prove the relevant fact, namely that the person is deceased. In seeking to establish this fact, nothing prevents the Chamber from considering evidence other than an official death certificate. And it was with this understanding that the Chamber embarked on the attempt to [REDACTED], a course that would have been wholly redundant had the Chamber considered an official death certificate to be the only appropriate means of proof.

19. The Chamber takes note of the submissions of the defence and the Registry that no official death certificate has been issued in relation to Mr Jerbo or that it is highly unlikely that such an official death certificate will be issued in relation to Mr Jerbo in the near future.³⁹ The evidence [REDACTED] lends support to this assertion.⁴⁰ The Chamber finds the submissions and the evidence on this matter to be persuasive. It is satisfied that it is not possible to obtain an official death certificate with respect to Mr Jerbo in the near future.

20. In addition, [REDACTED] the possibility of obtaining a death certificate from a popular committee.⁴¹ However [REDACTED].⁴² The Chamber is not satisfied that the possibility of obtaining a certificate from the popular committee [REDACTED]

³⁸ See *The Prosecutor v. Muammar Mohammed Abu Minya Gaddafi*, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, 22 November 2011, ICC-01/11-01/11-28, page 3; *The Prosecutor v. Joseph Kony et al.*, Decision to Terminate the Proceedings Against Raska Lukwiya, ICC-01/04-01/05-248, page 3; International Criminal Tribunal for the former Yugoslavia: *Prosecutor v. Janko Bobetko*, Order Terminating Proceedings Against Janko Bobetko, 24 June 2003, IT-02-62-I; *Prosecutor v. Momir Talić*, Order Terminating Proceedings Against Momir Talić, 12 June 2003, IT-99-36/1-T; *Prosecutor v. Stipo Alilović*, Decision on Motion by the Prosecutor for Withdrawal of Indictment Against Stipo Alilović, 23 December 1997, IT-95-16.

³⁹ ICC-02/05-03/09-475-Conf, para 6; ICC-02/05-03/09-473-Conf, para 4.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

would be of any assistance. Such a certificate would not emanate from State authority and it is unclear to the Chamber how it could guarantee a thorough and reliable confirmation that Mr Jerbo died. Similarly, the Chamber is not persuaded that a certificate [REDACTED] could replace an official death certificate, notwithstanding [REDACTED].⁴³

21. The Chamber finds that [REDACTED] to obtain any of the two unofficial certificates as the reliability of these alleged documents is likely to be lower [REDACTED]. Hence, the Chamber is of the view that the defence's offer to "assist [...] the Registry to try to obtain the [unofficial] death certificates [...]"⁴⁴ would serve no useful purpose. In addition, the Chamber takes into account the submission of the defence that it may be dangerous to undertake efforts to obtain those unofficial certificates.⁴⁵

22. As the Chamber has observed that it is not possible to obtain an official document confirming Mr Jerbo's death, the Chamber will now proceed to examine the evidence on record. [REDACTED] Mr Jerbo died on 19 April 2013⁴⁶ [REDACTED].⁴⁷ [REDACTED].⁴⁸ [REDACTED].⁴⁹ [REDACTED].⁵⁰

23. [REDACTED].⁵¹ [REDACTED].⁵² [REDACTED].⁵³

24. [REDACTED].⁵⁴ [REDACTED]. [REDACTED]⁵⁵ [REDACTED]. [REDACTED].⁵⁶ [REDACTED]. Despite the absence of an official death certificate, the Chamber is

⁴³ [REDACTED].

⁴⁴ ICC-02/05-03/09-496-Conf-Red2, paragraph 19.

⁴⁵ ICC-02/05-03/09-496-Conf-Red2, paragraphs 15 and 19.

⁴⁶ [REDACTED].

⁴⁷ [REDACTED].

⁴⁸ [REDACTED].

⁴⁹ [REDACTED].

⁵⁰ [REDACTED].

⁵¹ [REDACTED].

⁵² [REDACTED].

⁵³ [REDACTED].

⁵⁴ [REDACTED].

satisfied that the evidence it received points towards the death of Mr Jerbo on 19 April 2013.

25. Following the Chamber's request,⁵⁷ the defence, the prosecution, the CLR and the Registry referred to and discussed in their written and oral submissions the "termination" of the proceedings. In particular, the prosecution requests that the proceedings be terminated "without prejudice".⁵⁸ The circumstances of the case at hand are unusual in that it is not possible to obtain an official death certificate or otherwise safely explore other measures to prove, with certainty, Mr Jerbo's death (e.g. exhumation followed by a DNA analysis). In the circumstances, the Chamber is of the view that it is appropriate to terminate⁵⁹ the case against Mr Jerbo without prejudice to resume such proceedings should information become available that he is alive, instead of proceeding under Article 64(5) of the Statute by severing the case of Mr Jerbo from that of Mr Banda. Should there be a need to reopen the case against Mr Jerbo, the case shall proceed from the stage of the proceedings at which it currently stands.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

- (a) **decides not to consider** the CLR's Response;
- (b) **declares** the defence's application for leave to reply to the abovementioned response moot;

⁵⁵ [REDACTED].

⁵⁶ [REDACTED].

⁵⁷ Email from the Legal Officer of the Chamber to the parties and participants on 26 April 2013 at 15.19, whereby the Chamber requested observations on whether there is any objection to "terminating trial proceedings".

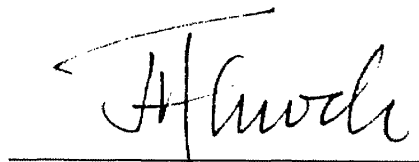
⁵⁸ ICC-02/05-03/09-494-Conf, paragraph 18.

⁵⁹ As set out in his separate opinion, Judge Eboe-Osuji would use the word 'discontinue' rather than 'terminate'.

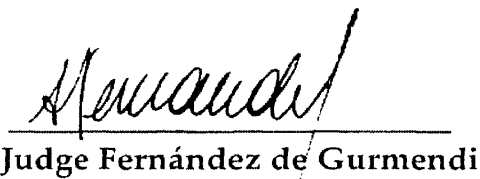
- (c) **terminates**⁶⁰ the proceedings against Mr Jerbo without prejudice to resume such proceedings should information become available that he is alive; and
- (d) **orders** the Registry to remove the name of Mr Jerbo from the present case.

Judge Eboe-Osuji appends a separate opinion.

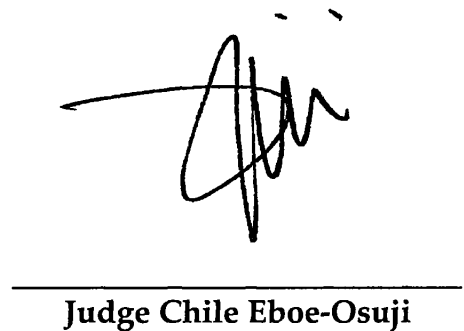
Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Fernández de Gurmendi



Judge Chile Eboe-Osuji

Dated this 4 October 2013

At The Hague, The Netherlands

⁶⁰ As indicated earlier, Judge Eboe-Osuji would prefer the word 'discontinues'.