

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-03/09  
Date: 7 December 2010

**PRE-TRIAL CHAMBER I**

**Before:** Judge Cuno Tarfusser, Presiding Judge  
Judge Sanji Mmasenono Monageng  
Judge Sylvia Steiner

**SITUATION IN DARFUR, SUDAN**

*IN THE CASE OF PROSECUTOR*

*v.*

*ABDALLAH BANDA ABAKAER NOURAIN  
&  
SALEH MOHAMMED JERBO JAMUS*

**Public Document**

**Submission by Legal Representatives for Victims a/1646/10 and a/1647/10 in light  
of Urgent Prosecution Objection**

**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

Essa Faal

**Counsel for the Defence**

Karim A. A. Khan

**Legal Representatives of Victims**

Sir Geoffrey Nice QC

Rodney Dixon

**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**

Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## A. Introduction

1. The legal representatives for victims a/1646/10 and a/1647/10 file these submissions as ordered by the Pre-Trial Chamber in light of the Prosecution's Urgent 'Objection to the continued representation of these victims'.
2. Counsel for the victims, Sir Geoffrey Nice and Rodney Dixon, received notification of the order of Pre-Trial Chamber I to provide a response to the Prosecutor's Objection in the late morning of Monday 6<sup>th</sup> December 2010. Neither of them was in a position to turn to the document until the late evening of 6<sup>th</sup> December 2010 and the morning of 7<sup>th</sup> December and thus the response provided in accordance with the deadline of 1400 hours on 7<sup>th</sup> December is necessarily provisional and incomplete given the range of assertions made by the Prosecutor and the number of issues raised.
3. Counsel regret that the Chamber has been obliged to deal with this application by the Prosecutor at such a late stage. Despite what is said at paragraph 13 of the present Application about receiving the two victims' application without indication as to by whom they were represented, it was as long ago as 28<sup>th</sup> September 2010 in a footnote to his observations on the applications of these victims (which the Prosecutor did not oppose) that the Prosecutor indicated his belief that Counsel may be representing the victim applicants and that SIDG may be involved (see footnote 33). Had he asked, SIDG would have confirmed their involvement as the name of the SIDG member appearing on the applications made clear in any event. The Prosecutor was aware that SIDG had assisted with previous applications in respect of victims from Haskanita, as is also confirmed in the footnote. Further, the letter to the VPRS of 23 June 2010 accompanying the statements of the victim applicants seeking participation stated who the Legal Representatives were and that SIDG has assisted in the preparation of the applications. The Legal Representatives filed their observations on 12 November 2010, but the Prosecutor raised no objection at that point. All parties, and the court process, would have been better served by the present application having been filed well in advance of 8<sup>th</sup> December 2010, the date set for the Confirmation Hearing.
4. Counsel also received late on 7<sup>th</sup> December 2010 a 'courtesy copy' of a detailed Defence Application to restrain Legal Representatives for the victims a/1646/10 & a/1647/10 from acting in proceedings and for an order excluding the involvement of

specified intermediaries, formally provided by the court at 0940 on the morning of the 7<sup>th</sup> December. It appears that this document has been long in preparation and it is too detailed to be responded to in full in advance of the hearing on 8<sup>th</sup> December. Again, Counsel for the victims will provide as part of this provisional and incomplete response such observations as it can in the time allowed responsive to the Defence Application. Again, the court would have been better served by a more timely application of this sort raising the issues that it does.

5. A central problem created by the lateness of these two filings is that it is impossible for any issues on which the Chamber *might* require assistance to be dealt with by evidence. The Legal Representatives cannot give evidence themselves and are limited to setting out arguments from available evidence, for example as to whether any conflict exists – none does in their professional judgement and none is expected – coupled with other relevant observations and arguments on issues raised, again by reference only to existing evidence.
6. Thus, by setting out in summary *some* corrections to, appropriate comments on and criticisms of the Prosecutor's Objection and the Defence Application the Legal Representatives hope that insofar as any issues remain outstanding they may be dealt if possible at the oral hearing on 8<sup>th</sup> December, alternatively that there should be a timetable set for further detailed written submissions before any determination of the issues raised.

**B. Conflict of interest**

7. No conflict of interest of any kind has been identified by the Legal Representatives. Had it been they would not have been able to act. None is forecast.
8. All filings made by the Legal Representatives for whichever party have acknowledged the evidence of crimes having been committed on all sides in Sudan and the desirability of questions of culpability being resolved at trials. On the other issues – such as where such trials should be held – there is unity of view by those represented by the Legal Representatives. Holding these views does not in any way or for any reason disqualify these victims from being represented before the ICC given the Pre-Trial Chamber's decision that they meet the criterion established for participation.

Holding such views does not mean that the victims will not respect the court from start to finish in their role as victims, abiding as they would have to by rules about the proper limits of victim participation.

**C. Access to confidential information**

9. The legal representatives are subject to the rules of the court as well to its code of practice and the code of practice of the Bar of England and Wales. All requirements for confidentiality that are identified by the rules and by the Chamber will, of course, be complied with in full. No reason is given as to why this should not be.

**D. Background and present realities**

10. The Legal Representatives come from a legal environment where the client chooses the lawyer and the lawyer does not choose whom s/he is willing to represent.
11. Throughout their representation of SWTUF, SIDG and victims seeking participation, the Legal Representatives and the clients they represent have been completely open - at all times and in all ways - about what they seek, whom they represent, and what the overall attitude of clients is to the ICC.
12. Paragraphs 7 and 8 of the Observations on behalf of Victims a/1646/10 and a/1647/10 dated 12 November 2010 made their position crystal clear:

7. From the first meeting with the victims, both of them sought to apply to be recognised as victims in the case, *inter alia*, because of the harm and suffering that they endured in the attack on the AMIS base in Haskanita on 29 September 2007. On the basis of the initial instructions taken from them about what issues they might wish to raise before the ICC, they stated that nothing had been done to investigate and acknowledge what had happened to them and other ordinary villagers at the hands of rebel forces in Haskanita on that day. They raised questions about the legitimacy and true motivations of the proceedings when those who reside in Haskanita had seemingly been completely overlooked. **Put in straightforward terms, they wanted the ICC Judges to be informed of their concerns, for the truth to be known, and**

**for appropriate action to be taken.** They had hoped that the authorities in Darfur would provide a remedy in the courts or through traditional methods of offering compensation, and questioned whether it was appropriate for an international court to be involved, particularly for a case of this kind. [emphasis added]

8. These issues are stated here as relayed in general terms by the victims. As their legal representatives, Counsel acknowledge that there are limitations in the Statute, Rules and developing jurisprudence of the ICC on the scope of the participation of victims in ICC proceedings. These are matters which the two victims have been, and will be further, advised about, but the main thrust of their concerns and interests are outlined here so that the Chamber and parties are fully informed of the background of these victim participants.

13. The fact that the victims had hoped that ‘the authorities in Darfur would provide a remedy... and that they questioned whether it was appropriate for an international court to be involved...’ is background laid before the court for complete openness at this early stage. Whether it emerges in any way in the course of the trial will be for the Chamber to decide given that the jurisprudence on this area of law is still in development. The thrust of the victims’ application and interest is that the best and most accurate account of what happened to them in the course of the attack may be known to the court.

14. The Legal Representatives have had the ability to visit Darfur and should be able to do so again. Victims a/1646/10 and 1/1647/10 are, so far as is known, the only two victim participants in these proceedings presently living in Darfur. They are in a position to give direct evidence of events that form the subject of the charges as they witnessed the attack on the AU base. They are both willing to travel to The Hague should that be required of them by the court.

15. SWTUF and SIDG have maintained close contact with the relevant organs of the ICC to ensure proper conduct of affairs on behalf of these victims. A representative (Mohamed Ansari) of SIDG acting for both SIDG and SWTUF together with the Legal Representatives met representatives of the Registry (including Marc Dubiusson, Head of Court Management; Fiona McKay, Head of ICC Victim’s Unit; and Megan

Hirst, Legal Officer, ICC Victim's Unit) on 22 September 2010 *inter alia* to arrange for SIDG staff to be trained by ICC staff in the best practice of taking victim statements in future. At that meeting Mr Ansari offered to give what assistance he could for members of ICC staff to gain access to Sudan. For the avoidance of any doubt, and as instructed, the Legal Representatives understand that Mr Ansari is not a member of the ruling party of which Ibrahim Ghandour of the SWTUF is a leading member but of a party opposed to the President.

16. Any procedural step taken before or on Wednesday 8<sup>th</sup> December that excludes Counsel presently acting for the victims will leave those victims unrepresented. They have met the Legal Representatives and expressed a desire to be represented by them with full understanding of the part that was played by SWTUF and SIDG in making the introduction to the Legal Representatives and meeting the costs of representation by them.

**E. Observations on particular paragraphs of the Prosecutor's Application**

17. The following observations can be made:

- Paragraph 8: There is no evidence of SWTUF being a 'government funded umbrella organization'.
- Paragraph 9: Professor Ibrahim Ghandour's views on resisting pressure to arrest the Sudanese President are views he is entitled to hold and are irrelevant to the matter at hand.
- Paragraph 10: gathering signatures in support of President Al Bashir on the issue of the ICC was a position SIDG and SWTUF were entitled to take and in no way makes them surrogates of the President.
- Paragraph 11: there is nothing objectionable in using a court's own systems to challenge the way it operates and that is what SWTUF and SIDG have done.
- Paragraph 12: The victims who desired to be represented are not shown in any way to have been acting other than for the reasons given in paragraphs 7 and 8 of the 'Observations', see above.
- Paragraph 13: dealt with at paragraph 3 above.

18. Paragraphs 14-26 require no comment on history where factual; characterizations such as 'boast', 'proxy' etc. are not accepted and repetition of terms do not in any way provide evidence of the assertion where none is shown to exist.
19. As to paragraphs 27 to 33 the Legal representatives observe only that repetition of terms such as 'surrogates' or 'proxies' does nothing to advance the argument in the absence of evidence and, more significantly, that any implication contained in pleading overall that the Legal Representatives are personally committed to the position of their clients is completely without foundation. It reflects a failure by the Prosecutor properly to understand the role of counsel appearing other than as prosecutors at the ICC.
20. The Legal Representatives have been doing what their clients have desired within the rules of the ICC, no more and no less. They have no view about the conflict in Sudan let alone any loyalty to one side or another within it. Accordingly, the observations:
- Paragraph 3: 'The Prosecution suggests that counsel may be intending to use these proceedings...'
  - Paragraph 13: 'Counsel have also expressed their intention to express the victims views and concerns at the confirmation hearing'
  - Paragraph 27: 'The entities and counsel also have previously tried several times to inject themselves into this Court's proceedings to make their political statements against its jurisdiction speaking ultimately on behalf of President Al Bashir'
  - Paragraph 28: 'The circumstances of the relationship between counsel and the two victims further substantiate their joint alliance with President Al Bashir'
  - Paragraph 29: 'Moreover, the submissions made so far by counsel confirm (a) that through them President Al Bashir and his supporters have been attempting different ways to access the Court's process in a covert manner; and (b) the attempted interventions are designed to inject arguments in favour of President Al Bashir's position',

are inappropriate insofar as they suggest any personal commitment by the Legal Representatives to any side of the Sudan conflict.



21. Turning to the Defence Application it is worth remembering that the Defence may well want to eliminate the contribution of victims from within Darfur able to give evidence of the kind these two victims can give. That, of course, is no reason for excluding representations of the victims, the reverse.

22. As to the Defence introductory remarks the Legal Representatives observe that assertions without evidence in support such as

- ‘the use of victims as a front for the Government of Sudan and President Al Bashir in order to advance an agenda which is wholly inconsistent with the purpose of victim participation’
- ‘a conflict of interest in the case of the legal representatives for victims a/1646/10 & a/1647/10 and the intermediaries being used by them’
- an intention ‘to determine whether or not this case should proceed to trial or to take
- ‘an opportunity for ulterior motives and political objectives to be pursued’
- of those ‘that defy the jurisdiction of the Court, to raise irrelevant matters or generally attempt to undermine the purpose of the Court including its aim to guarantee lasting respect for and the enforcement of international justice’,

are all assertions only, unsupported by evidence.

23. The Legal Representatives accept that victim representation should be ‘presented and considered...in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’

24. Paragraphs 8-20 of the Defence Application quote selectively from the Observations on behalf of the victims of 12 November 2010 and, in particular fail to quote the heart of their interest as highlighted at paragraph 12 above. The remainder of these paragraphs are characterised by failure to appreciate that there is nothing wrong with holding views adverse to the ICC or this particular prosecution and that many people in Sudan may feel themselves united by such views but that that in no way disqualifies victims who qualify from participating in the proceedings - just as these two victims have done. It would have been arguably improper, and certainly unhelpful to the

court, *not* to identify the victims' ancillary concerns and attitudes not least to ensure that the scope of legitimate involvement in proceedings can be settled at the start.

25. It would, of course, have been possible to have said nothing beyond the bare facts that led to the victims being accorded the right to participate. The Legal Representatives have, as throughout their involvement in the Sudan Situation cases, ensured that those they represent have provided complete visibility (or transparency as it is sometimes said) of what they do and seek to achieve. These victims seek to ensure that the best and fullest version of events in which they were involved should emerge from the trial process, no more, no less.
26. The use of terms such as 'proxy' 'front' etc. do nothing to further the argument absent proper evidence (none is identified) and the filing assumes a simple but unrealistic division between those who are for and those who are against the ICC. The reality, as to which the Legal Representatives hold no personal views, may on the evidence be much more complicated and there may well be those who are in principle against the trial of individuals by the ICC where those trials could have or could take place within Sudan quite without regard to their views for or against the sitting President. Further there is nothing remotely odd or inherently wrong in victims being identified by organisations that hold particular views that coincide with the views of those who seek to become victims. Negative views about the ICC or about the prosecution of this case are quite without significance to the issue of whether someone qualifies as and can and should be represented at the trial as a victim. It is easy enough to contemplate a possible conflict where an NGO wholly favourable to the prosecution identifies those who share its views as potential witnesses or victims for participation in the trial. That process of identification in no way disqualifies the people concerned from being involved subject, of course, to the NGO not being shown to have exerted any improper pressure on the individuals. Here there is no suggestion of any impropriety and the process of identification of victims is without basis for complaint.
27. Further, given the fact that the GOS has taken the stand it has it is inevitable that maintaining contact with and taking instructions from (and arranging access by the Legal Representatives to) the victims will need the services of organisations in the country that can achieve all of these things. SWTUF and SIDG can and do that

without any suggestion of their depriving either the victims or the Legal Representatives of the independence that their severally require to maintain.

28. Suggestions that the Legal Representatives are in any way compromised are without foundation. They have explained at all times whom they represent and have given advice and taken instructions to ensure the interests of those they represent are properly respected and understood.
29. The victims have at all times been aware of the way the Legal Representatives been funded and signed documents to that effect should be available by the time of the hearing. The need for a signed authority was overlooked and did not emerge from wide ranging discussions with court officials over representation although, of course, the Legal Representatives accept responsibility for not having these authorities signed earlier.
30. Involvement of victims still resident in Darfur represented by Legal Representatives who will comply with all duties owed to the court will bring benefit to the trial process, will not prejudice the Defendants in any way and will serve the legitimate interests of the victims as they are found to have been by the Chamber. No conflict of interest is shown and none is anticipated.
31. The Chamber is urged to reject both the Prosecution Objection and the Defence Application and to leave to the normal trial process the orderly arrangement of the proper limits of victim participation in this case.



---

For Sir Geoffrey Nice QC  
Rodney Dixon  
Counsel and Legal Representatives of the Victims

Dated this 7<sup>th</sup> day of December 2010  
London, United Kingdom