

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 25 May 2012

**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 Document**

**Decision on common legal representation**

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

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

**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 Applicants for  
Participation/Reparation**

**Unrepresented Victims**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

Mr Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Ms Fiona McKay

**Others**

Mr Akin Akinbote

Mr Frank Adaka

Sir Geoffrey Nice

Mr Rodney Dixon

Mr Brahim Koné

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 ("Banda and Jerbo case"), in accordance with Articles 64(2) and (7), 67(1), 68(1) and (3) of the Rome Statute ("Statute"), Rules 16(1)(b) and 90 of the Rules of Procedure and Evidence ("Rules"), Regulations 23<sup>bis</sup>3 and 79 of the Regulations of the Court ("Regulations"), Regulations 112 and 113 of the Regulations of the Registry and Articles 1, 12 and 16 of the Code of Professional Conduct for counsel ("Code of Conduct"), issues the following Decision on common legal representation.

## **I. Background and submissions**

1. On 21 April 2011, the Chamber issued its "Order instructing the Registry to start consultations on the organisation of common legal representation" ("Order of 21 April 2011"),<sup>1</sup> in which it, *inter alia*, ordered the Registry 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>2</sup>
2. On 21 June 2011, the Registry filed its "Report on the implementation of the Chamber's 'Order instructing the Registry to start consultations on the organisation of common legal representation'" ("First Report"),<sup>3</sup> in which it proposed, *inter alia*, steps to complete the implementation of the Chamber's Order of 21 April 2011.<sup>4</sup> The Registry explained that individual consultations as to their legal representation had already taken place with regard to some victims and recommended that, due to the

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<sup>1</sup> Order instructing the Registry to start consultations on the organisation of common legal representation, 21 April 2011, ICC-02/05-03/09-138.

<sup>2</sup> ICC-02/05-03/09-138, page 6.

<sup>3</sup> Report on the implementation of the Chamber's Order instructing the Registry to start consultations on the organisation of common legal representation, 21 June 2011, ICC-02/05-03/09-164-Red and annex.

<sup>4</sup> ICC-02/05-03/09-164-Red, paragraphs 26 to 29.

limited value of further direct consultations and the related time and resources constraints, it would be “preferable to rely on input received already as regards their wishes relating to legal representation (...)”.<sup>5</sup> It finally suggested that “in the interest of efficiency, it finalize recommendations on victim grouping based on information about the case, the victims and their views which are already known to the Registry; for example from proceedings to date, the victims’ applications, previous discussions with the victims and the input submitted by the current legal representatives”.<sup>6</sup> In addition, in a public annex to this First Report, the Registry proposed general criteria for selection of common legal representatives under Rule 90(3) of the Rules.<sup>7</sup> The Registry specified the general nature of these criteria as opposed to situation/case specific criteria.<sup>8</sup> On 4 July 2011, the Chamber approved the Registry’s approach concerning the implementation process to be followed and the criteria detailed in the annex.<sup>9</sup>

3. On 15 July 2011, the Victims Participation and Reparation Section sent a message to the then legal representatives in the case requesting them to express their interest to be appointed as common legal representative before 22 July 2011.<sup>10</sup> On 18 July 2011, four of the five legal representatives’ teams, including Mr Dixon and Mr Nice, filed the “Joint Observations of Victims’ Legal Representatives on Common Legal Representation” (“Joint Observations”).<sup>11</sup> They proposed to the Registry to organise the common legal representation with three legal teams, composed of two lawyers

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<sup>5</sup> ICC-02/05-03/09-164-Red, paragraphs 13 and 14.

<sup>6</sup> ICC-02/05-03/09-164-Red, paragraph 27.

<sup>7</sup> ICC-02/05-03/09-164-Anx.

<sup>8</sup> ICC-02/05-03/09-164-Anx, paragraph 1.

<sup>9</sup> Email from the Legal Officer to the Chamber to the Registry on 4 July 2011 at 17.43 and Report on the organization of the common legal representation, 5 August 2011, ICC-02/03-03/09-187, page 4.

<sup>10</sup> Joint Observations of Victims’ Legal Representatives on Common Legal Representation, 18 July 2011 (notified on 19 July 2011), ICC-02/05-03/09-182-Anx 1.

<sup>11</sup> ICC-02/05-03/09-182.

each, stating that it was the agreement of the victims and that “there [was] no need for the Registry to submit any proposal of its own to the trial Chamber (...)”.<sup>12</sup>

4. On 5 August 2011, the Registry filed its “Report on the organization of the common legal representation” (“Second Report”),<sup>13</sup> in which it reiterated the impossibility of conducting further individual consultations. The Registry specified that it had reviewed the Joint Observations but that the views and proposals by the legal representatives cannot be treated as an “agreement among the victims themselves” as required under Rule 90 of the Rules.<sup>14</sup> The Registry concluded that in the present case, the victims were unable to choose a common legal representative or representatives and accordingly, pursuant to Rule 90(3) of the Rules, the Registry announced that it will make a proposal for common legal representation.<sup>15</sup>
5. As a result, on 25 August 2011, upon instruction by the Chamber,<sup>16</sup> the Registry filed its “Proposal for the common legal representation of victims” (“Proposal”) together with annexes,<sup>17</sup> which was notified on 26 August 2011. On this latter date, the Registry further filed a confidential *ex parte* Registry only addendum to its Proposal, which was notified on 29 August 2011 (“Addendum”).<sup>18</sup>

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<sup>12</sup> ICC-02/05-03/09-182, paragraph 13.

<sup>13</sup> Report on the organization of the common legal representation, 5 August 2011, ICC-02/03-03/09-187.

<sup>14</sup> ICC-02/03-03/09-187, paragraph 5.

<sup>15</sup> ICC-02/03-03/09-187, paragraphs 3 and 4.

<sup>16</sup> Email communication from the Chamber to the Registry through the Legal Adviser to the Trial Division on 11 August 2011, at 10.09.

<sup>17</sup> Proposal for the common legal representation of victims, 25 August 2011 (notified on 26 August 2011), ICC-02/05-03/09-203 and public annexes 1 and 3, confidential and public redacted annex 2, confidential *ex parte* only available to the Registry annexes 4, 5, 6 and 7.

<sup>18</sup> Addendum to Proposal for the common legal representation of victims, 26 August 2011 (notified on 29 August 2011), ICC-02/05-03/09-204-Conf-Exp.

6. On 14 September 2011, the Registrar appointed Ms H       Ciss   and Mr Jens Dieckmann ("Appointed Legal Representatives"), as principal counsel and associate counsel, respectively.<sup>19</sup>
7. On 30 September 2011, pursuant to Regulation 79(3) of the Regulations of the Court, Mr Dixon and Mr Nice, former legal representatives of victims a/1646/10 and a/1647/10 ("Applicants"), filed 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'" ("Request for Review"),<sup>20</sup> in which the Applicants oppose the appointment of the common legal representatives on three grounds. The Applicants explain that (i) "the asserted benefit coming from representation by a single team has not been detailed or particularised in any way at any time", (ii) the two victims they represent have not been individually consulted by the Registry and (iii) the Registry disregarded the proposal of three legal teams and "acted in violation of Rule 90 [of the Rules]".<sup>21</sup> They appended to their Request for Review six annexes, including two letters by victims a/1646/10 and a/1647/10, respectively, asking the Court to continue being represented by the Applicants,<sup>22</sup> the minutes of a meeting between all legal representatives and the Registry on 20 May 2011,<sup>23</sup> correspondence between the Registry and the Applicants<sup>24</sup> and a letter from the Director of REDRESS to the Registry on 17 August 2011.<sup>25</sup>
8. On 12 October 2011, the Applicants further submitted to the Chamber the "Filing of confidential statement in support of the 'Request of Victims a/1646/10 and a/1647/10

<sup>19</sup> Notification of appointment of common legal representatives of victims, 14 September 2011, ICC-02/05-03/09-215 with confidential annexes 1 and 2.

<sup>20</sup> 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, 30 September 2011, ICC-02/05-03/09-228.

<sup>21</sup> ICC-02/05-03/09-228, paragraph 4 a), b) and c).

<sup>22</sup> ICC-02/05-03/09-228-Anx1-Red.

<sup>23</sup> ICC-02/05-03/09-228-Anx2.

<sup>24</sup> ICC-02/05-03/09-228-Anx3 to Anx5.

<sup>25</sup> ICC-02/05-03/09-228-Anx6.

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",<sup>26</sup> in support of their Request for Review and by which the Applicants requested to the Chamber to receive a statement of Mr Ansari,<sup>27</sup> the "case manager and assistant" (sic) of the Applicants,<sup>28</sup> working directly with victims a/1646/09 and a/1647/10.

9. On 14 October 2011, the Appointed Legal Representatives filed confidentially their observations in response ("Observations") to the Request for Review.<sup>29</sup> They appended to their Observations six annexes, including two confidential electronic communications from Mr Brahima Kone and Mr Akin Akinbote, former legal representatives of victims, congratulating Ms Cisse and Mr Dieckmann for their appointment by the Registrar.<sup>30</sup> Four public documents concerning the activities of Mr Ansari and the Sudan International Defence Group ("SIDG"), of which he is Secretary General, were also annexed.<sup>31</sup>
10. On 7 November 2011, upon the Chamber's Order,<sup>32</sup> the Applicants filed the "Corrigendum 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" ("Reply"),<sup>33</sup> in which the Applicants take issue with four

<sup>26</sup> Filing of confidential statement in support of 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", 11 October 2011 (notified on 12 October 2011), ICC-02/05-03/09-229.

<sup>27</sup> ICC-02/05-03/09-229-Conf-Anx1.

<sup>28</sup> ICC-02/05-03/09-229, paragraph 2.

<sup>29</sup> Observations en réponse à la requête aux fins de réexamen de la proposition de désignation d'une représentation légale commune, 12 October 2011 (notified on 14 October 2011), ICC-02/05-03/09-230-Conf; confidential annexes 1 and 2 and public annexes 3 to 6; Observations in response to the request for review of the proposed appointment of common legal representation, 25 October 2011, ICC-02/05-03/09-230-Conf-tENG.

<sup>30</sup> ICC-02/05-03/09-230-Conf-Anx1 and 2.

<sup>31</sup> ICC-02/05-03/09-230-Anx3 to 6.

<sup>32</sup> Order on the application on behalf of victims a/1646/10 and a/1647/10 for leave to reply, 31 October 2011, ICC-02/05-03/09-242.

<sup>33</sup> Corrigendum 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, 4 November 2011 (notified on 7 November 2011), ICC-02/05-03/09-246-Corr.

points raised by Maître Cissé in her Observations.<sup>34</sup> They further argue that her unfounded allegations concerning Mr Ansari raise concerns about her ability to represent the Darfuri, or any other victims before the Court.<sup>35</sup>

11. On the same day, the Appointed Legal Representatives proposed to re-classify as public their Observations and annexes 1 and 2 thereto, as, *inter alia*, the initial Request for Review and the related Reply were filed publicly.<sup>36</sup>

## II. Analysis and conclusion

### *Application of Rule 90 of the Rules and standard of review*

12. The Chamber clarifies that Rule 90 of the Rules does not guarantee to victims an absolute right to be represented by a legal representative of their choosing. Indeed, a literal and contextual interpretation of Rule 90 makes clear that it has been drafted in a sequential manner. While the first paragraph states the general principle that victims shall be free to choose a legal representative (Rule 90(1)), this principle is qualified by Rule 90(2), which applies “where there are a number of victims” and “for the purpose of ensuring effectiveness of the proceedings”. In this situation, victims themselves may have to choose one or more common legal representatives (Rule 90(2)), this necessarily implies limitation on their right to legal representation. Further, in the event that the victims are unable, within a certain time indicated by the Chamber, to choose their common counsel, the Chamber may request the Registrar to choose one on their behalf (Rule 90(3)).

13. The victims’ freedom to choose a legal representative is even more reduced in the framework of this last option. Indeed, the common legal representative will not be

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<sup>34</sup> ICC-02/05-03/09-246-Corr, paragraph 5.

<sup>35</sup> *Ibid.*

<sup>36</sup> Common Legal Representative's proposal to reclassify the ‘Observations en réponse à la requête aux fins de réexamen de la proposition de désignation d’une représentation légale commune’ with Annexes 1 and 2, 7 November 2011, ICC-02/05-03/09-248.



chosen by the victims, who were unable to do so within the established deadlines, but by the Registrar. According to the applicable Rules and Regulations, in selecting the common legal representative the Chamber and the Registry shall take reasonable steps to ensure that the victims' interests are appropriately represented and conflicts of interest are avoided.

14. Once the Registrar acts under Rule 90(3), the common legal representative is not chosen by the victims but by the Registrar. The Registry and the Chamber should apply the "guidelines" provided under Rule 90(4) and Regulation 79 of the Regulations. In particular, consideration should be given to the specificity of each group of victims; their distinct or conflicting interests, if any; their views; their local traditions and any other factors that may be appropriate. From the wording of Rule 90(4) of the Rules ("shall take all reasonable steps"), it is understood that these factors are to be interpreted as "guidelines" considered on a case by case basis.
15. Here, in the context of the Request for Review under Regulation 79(3) of the Regulations, the issue before the Chamber is whether the Appointed Legal Representatives have been selected by the Registrar in accordance with Rule 90(4) of the Rules referring to Article 68(1) of the Statute, and with Regulation 79(2) of the Regulations. In other words, the Chamber will review whether the Registry has taken "all reasonable steps to ensure that the distinct interests of the victims are represented and any conflict of interest is avoided", bearing in mind the effectiveness of the proceedings and of the legal representation of all victims in this case. The Chamber further notes that, pursuant to Rule 90(4), the criteria warranting the implementation of a common legal representation system, namely the distinct interests of victims being represented and the absence of conflict of interest, are cumulative.

*Whether the victims have distinct interests warranting a separate representation*

## **1 . Applicants' arguments**

16. The Applicants' argument that the two Darfuri victims have interests distinct from the peacekeepers victims is twofold:

### ***a) Practical difficulties***

17. The Applicants submit that the two Darfuri victims they represent constitute a "very 'specific' group" of victims because they only speak Arabic, reside in the Republic of Sudan ("Sudan"), which is not cooperating with the Court and are in a sensitive position with regard to their security and safety.<sup>37</sup> The Applicants further elaborated that, due to security concerns, Darfuri victims had to be removed from Darfur.<sup>38</sup> In this context, they have to benefit from the assistance of Mr Ansari, a Sudanese intermediary from SIDG, who has direct and easier access to the victims, has developed a trusted relationship between the victims and the Applicants and was able to liaise with the VPRS as well on the situation of Darfuri victims.<sup>39</sup> Mr Ansari also reported that victims a/1646/10 and a/1647/10 "would feel most comfortable by retaining their lawyers".<sup>40</sup>

18. The Applicants further argue that it is unclear how the Appointed Legal Representatives will be able to effectively represent the Darfuri victims. Given that the Registry did not consider maintaining "any of the two [Applicants] or Mr Ansari as part of the team of common legal representatives", it is the Applicants'

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<sup>37</sup> ICC-02/05-03/09-228, paragraph 28 and ICC-02/05-03/09-246-Corr, paragraph 19.

<sup>38</sup> ICC-02/05-03/09-228, paragraph 31 and ICC-02/05-03/09-246-Corr, paragraphs 14 and 15.

<sup>39</sup> ICC-02/05-03/09-228, paragraphs 31 to 34.

<sup>40</sup> ICC-02/05-03/09-228, paragraph 34.

submission that the Appointed Legal Representatives “will not be able to contact or communicate with the victims”.<sup>41</sup>

***b) Interests of Darfuri victims to have the factual base of the case broadened***

19. The Applicants explain in several of their submissions that the interests of Darfuri victims are different from those of the peacekeepers because of their position as citizen victims from Sudan and their related interest in having the Chamber examine a broader context of the attack on the camp, namely the attack of Haskanita village. At the Registry’s meeting, the Applicants explained that Darfuri victims are of the view that the “local civilian community ha[s] been neglected. And they may wish to try to broaden the factual base of the case (though not necessarily the charges)”. Such a submission was reiterated in the Applicants’ Reply, regretting 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, contrary to their own experience, that local Sudanese may have collaborated with the rebel attackers)”.<sup>42</sup> While acknowledging that a wider group of victims from Haskanita village have not been accepted as victims in the case, the Applicants consider that the Darfuri victims’ interests are thus different from the ones of the peacekeeper victims in this regard.<sup>43</sup>

**2 . Appointed Legal Representatives’ arguments**

20. It is the Registry’s<sup>44</sup> and the Appointed Common Legal Representatives’ assessment that one single legal team is appropriate in order to have all the victims’ distinct interests properly represented in this case. In their Observations, the Appointed

<sup>41</sup> ICC-02/05-03/09-228, paragraphs 42 to 47.

<sup>42</sup> ICC-02/05-03/09-246-Corr, paragraph 20. Footnote omitted.

<sup>43</sup> ICC-02/05-03/09-228-Anx2, page 3.

<sup>44</sup> ICC-02/05-03/09-203, 25 August 2011, paragraphs 7 and 8.

Common Legal Representatives submit that the victims' interests in this case are not fundamentally distinct and inform the Chamber that the former legal representatives of victims from Mali and Nigeria "have supported" and implemented the Registrar's choice for one legal team composed of Ms Cissé and Mr Dieckmann.<sup>45</sup>

21. More specifically, with regard to the two Darfuri victims, the Appointed Legal Representatives explain that they were granted victim status in the case because they were members of the staff employed locally by the African Union Peacekeeping Mission attacked on 29 September 2007 and, as a result, they were considered as civilians entitled to protection under the international law of conflict "like all the staff of the base".<sup>46</sup> In addition, they suffered the same harm as a direct result of the attack. It is also stated that the argument according to which the Darfuri victims would have distinct and specific interests "because the Sudanese victims are civilians living in Sudan whereas the other victims are military personnel from the base or relatives of military personnel who were killed" is not "relevant".<sup>47</sup> The "living conditions" of the victims do not make them victims with separate interests "since the aim is to seek redress for harm caused by one and the same attack, and to demonstrate that the attack was illegal and a war crime."<sup>48</sup>

22. On the argument that the Darfuri victims have distinct interests in the sense that they wish to have the interests of the local community of Haskanita represented and because they could bring evidence on the contested issue of the lawfulness of the attack of Haskanita AMIS base, the Appointed Legal Representatives submit that the issue of broadening the factual elements of the crime and consequently the

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<sup>45</sup> ICC-02/05-03/09-230-Conf-tENG, parts A and B.

<sup>46</sup> ICC-02/05-03/09-230-Conf-tENG, paragraph 25.

<sup>47</sup> ICC-02/05-03/09-230-Conf-tENG, paragraph 24.

<sup>48</sup> ICC-02/05-03/09-230-Conf-tENG, paragraph 27.

category of victims of the case to include the attack of Haskanita village has already been adjudicated and rejected at the pre-trial stage.<sup>49</sup>

### 3 . Chamber's analysis

23. At the outset, the Chamber notes this issue is fundamentally centred on a legal dispute on the application of Rule 90 of the Rules and Regulation 79 of the Regulations.<sup>50</sup> The Chamber will address below the Applicants' argument that the Registry, by disregarding the proposal made in the Joint Observations for three legal teams, allegedly violated Rule 90 of the Rules.
24. Four out of the five legal teams proposed in their Joint Observations that common legal representation be organised within three legal teams. This proposal was not retained by the Registry. The Registry alternatively proposed general criteria for selecting common legal representatives, including whether they had a relationship of trust with the victims, they demonstrated commitment to working with vulnerable persons, they had familiarity with and a connection to the situation country, relevant litigation expertise/experience, and finally whether they had sufficient availability and information technology skills.<sup>51</sup> These criteria have never been contested by any of the former legal representatives and have been fully endorsed by the Chamber.<sup>52</sup> Furthermore, the Registry explained at length the full selection process of the common legal representatives,<sup>53</sup> and how all the former legal representatives participated in this process. This is not under dispute.<sup>54</sup>
25. The proposal for three legal teams was the initiative of some of the legal representatives after they held a meeting with the Registry on 20 May 2011, as part

<sup>49</sup> ICC-02/05-03/09-230-Conf-tENG, paragraphs 17 to 19.

<sup>50</sup> ICC-02/05-03/09-228, paragraphs 52 to 55.

<sup>51</sup> ICC-02/05-03/09-164, paragraphs 26 to 29 and ICC-02/05-03/09-164-Anx, paragraphs 2 to 12.

<sup>52</sup> ICC-02/05-03/09-203, page 4 and footnote 11.

<sup>53</sup> ICC-02/05-03/09-203, paragraphs 16 to 21.

<sup>54</sup> ICC-02/05-03/09-203, paragraph 20.

of the consultation process ordered by the Chamber. However, as a mere proposal, it could not bind the Registrar as regards her final choice. The Chamber considers that sufficient attention was given to the relevant factors described above and consequently the Chamber does not find that the Registry violated Rule 90 of the Rules when it did not endorse the proposal of three legal teams as formulated in the Joint Observations.

26. At the same time, the Chamber notes that the above selection criteria are general and, for the purpose of its complete review under Regulation 79(3) of the Regulations, the Chamber will consider the specific arguments put forward by the Applicants to contest the Registrar's choice. Considering the particularities of this case and the need for effectiveness of legal representation, the Chamber will analyse whether the interests of the Darfuri victims are significantly distinct from the ones of the peacekeeper victims to the extent that this would warrant a separate legal representation.

*a) Interest in broadening the factual circumstances of the case*

27. At the outset, the Chamber notes that during the pre-trial proceedings, it was ruled that victims a/1646/10 and a/1647/10 suffered psychological harm in that their lives were at risk during the attack of the MGS Haskanita base and they witnessed the killing of and injury to peacekeepers.<sup>55</sup>

28. The scope of the charges at trial, particularly the facts and circumstances described therein, is defined by the decision on the confirmation of the charges at the pre-trial stage.<sup>56</sup> In the present case, the confirmed charges against the accused persons are

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<sup>55</sup>Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, 29 October 2010, ICC-02/05-03/09-89, paragraphs 29 and 30.

<sup>56</sup>*Lubanga* case, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation

war crimes provided under Articles 8(2)(c)(i), 8(2)(e) (iii) and 8(2)(e)(v) of the Statute, which were allegedly committed during the MGS Haskanita attack on 29 September 2007.<sup>57</sup>

29. The Chamber shall permit victims to provide their views and concerns, where their personal interests are affected, at all stages of the proceedings considered to be appropriate. The “proceedings” are self-evidently those specific to the case at hand in which the charges, according to the jurisprudence of the Chamber, are defined by the decision on the confirmation of charges.<sup>58</sup>

30. In addition, the Chamber recalls the pre-trial “Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges” (Victims’ Decision),<sup>59</sup> in which applications of residents in Haskanita *village* were not granted victim status in this case for the reasons explained below:<sup>60</sup>

15. (...) even if it could be established that the attack on the MGS Haskanita somehow contributed to the harm allegedly suffered by the applicants, such harm would be too remote from the alleged crimes to meet the requirement of having occurred “as a result” of those crimes, within the meaning of rule 85(a) of the Rules.

22.(...) the Chamber is of the view that the applicants cannot be considered to be victims of the Case since the events as a result of which they allegedly suffered harm are not the incidents which form the basis of the crimes with which the suspects are charged. Accordingly their applications are rejected.

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of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, paragraphs 93 to 97.

<sup>57</sup> Corrigendum of the “Decision on the Confirmation of Charges”, ICC-02/05-03/09-121-Corr-Red.

<sup>58</sup> Decision on the Joint Submission regarding the contested issues and the agreed facts, 28 September 2011, ICC-02/05-03/09-227 paragraph 31.

<sup>59</sup> Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges, 29 October 2010, ICC-02/05-03/09-89.

<sup>60</sup> ICC-02/05-03/09-89, paragraphs 15 and 21 to 24.

31. Furthermore, on 17 October 2011, the Trial Chamber issued the “Decision on the Registry Report on six applications to participate in the proceedings”, in which it ordered:

(...) the VPRS to verify whether applications for participation which were rejected by the Pre-Trial Chamber would merit reassessment in light of newly obtained information and, if so, to submit the applications to the Chamber by 30 November 2011, together with an explanatory report; (...)

32. Following this instruction, none of the previously rejected applications or any explanatory report was submitted to the Chamber. In the present circumstances, the Chamber does not see any compelling reasons for not upholding the assessment made at pre-trial stage in the Victims’ Decision. Such assessment is still valid and should therefore continue during the trial stage. Accordingly, residents living in the Haskanita village are not to be considered as victims in this case, in view of the particular charges as framed. Therefore, the argument that the Darfuri civilian victims have an interest in having the views of local community of Haskanita taken into account is irrelevant to the charges. In light of the above, the interest of the Darfuri victims to broaden the factual circumstances of the case cannot justify distinct legal representation.

33. Having said this, the Chamber is of the view that should the two victims wish to present evidence related to the community of Haskanita or wish to express the views of the local community of Haskanita, they may request this through the Appointed Legal Representatives. The Chamber may then rule on such a request in due course, taking into consideration its relevance to the charges confirmed against the accused and its appropriateness at trial. This prospect, which at present is hypothetical, has no bearing on the Registrar’s choice of common legal representatives. It will be the duty of the Appointed Legal Representatives to represent the interests of these two victims and any other victim recognised in this



case. The Applicants have not demonstrated that as a result of the appointment of common representation, the ability of these two victims to present their views and concerns will be affected negatively and that they will suffer prejudice in being represented by the Appointed Legal Representatives.

***b) Practical difficulties and effectiveness of the proceedings***

34. The Chamber acknowledges that the Darfuri victims have particularities that distinguish them from other victims, namely they speak Arabic and are civilians residing in the Sudan. However, being a civilian or a military victim of the same events, speaking a different language or residing in a different country than the other victims in this case, does not *per se* imply that the two victims have distinct interests that would warrant separate representation. Such an approach would be incompatible with the system of common legal representation provided for in Rule 90(2) of the Rules and the necessary grouping of victims according to their common interest.

35. The Chamber notes the security concerns expressed by victims a/1646/10 and a/1647/10 and the fact that it was publicly stated that they had been relocated outside Darfur.<sup>61</sup> Moreover, the Chamber is mindful of the difficulties encountered by any person cooperating with the Court in accessing the Darfur territory and entering the Sudan.

36. The Chamber recalls “the particular circumstances of the case, such as the different geographical, cultural, ethnic, and linguistic backgrounds of the participating victims (...)”.<sup>62</sup> Moreover, in line with the approach taken in decisions on common legal representation issued by other Chambers of this Court, this Chamber places as well particular emphasis on “the need to respect local traditions” as set out under

<sup>61</sup> ICC-02/05-03/09-228, paragraph 28.

<sup>62</sup> ICC-02/05-03/09-138, paragraph 7.

Regulation 79(2) of the Regulations, and considers it “desirable” that the common legal representatives (or one member of their legal team) speak the victims’ language, share their culture and know their realities in order for the victims’ representation to be more meaningful.<sup>63</sup>

37. In the present case, the former legal representatives of victims a/1646/10 and a/1647/10, Mr Dixon and Mr Nice, do not speak Arabic. However, they were in contact with the two victims through an intermediary, Mr Ansari, who resides in the Sudan and who is able to communicate more easily with the victims. It would be convenient, although it is not determinative, that Mr Ansari could similarly transmit to the Appointed Legal Representatives any concerns, including security issues, that these two victims may have. Therefore, the Chamber instructs the Registry to explore further the possibility of including Mr Ansari or any other suitable intermediary as part of the legal team for the purpose of facilitating contact between the Appointed Legal Representatives and these two victims.

38. Furthermore, the Chamber underlines that the *rationale* behind a common legal representation system is the effectiveness of the proceedings. In the present case, the Registrar chose a single team of legal representatives composed of a principal counsel and an associate counsel able to work in both languages of the Court as, apart from victims a/1646/10 and a/1647/10, the majority of victims to be represented speak and understand mainly French or English. The Chamber is of the view that this will allow an adequate level of communication between the victims and their representatives. The Chamber is also satisfied that, in selecting a gender-

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<sup>63</sup> See for a similar approach: Trial Chamber III, Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005, paragraph 11; Trial Chamber II, Order on the organisation of common legal representation of victims, ICC-01/04-01/07-1328, paragraph 15; Pre-Trial Chamber II, Decision on Victims’ Participation in the Situation in Proceedings related to the Situation of the Republic of Kenya, 3 November 2010, ICC-01/09-24, paragraph 22.

balanced legal team, sufficient consideration was given to ensure that the distinct interests of all victims in this case are represented.

39. The Chamber further agrees with the Registrar's decision not to encourage an unbalanced grouping of victims with, on the one hand, one group of two victims represented by two counsel and on the other hand, one group of many more victims represented only by one principal counsel and an associate counsel.

40. For the foregoing reasons, the Chamber is persuaded that the distinct interests of individuals who have been granted the victim status in this case are represented and, as a result, the Applicants need not be maintained as common legal representative the two Darfuri victims.

*Whether there is potential conflict of interest warranting a separate representation*

41. A requirement to consider in choosing one or more common legal representative(s) is whether a conflict of interest exists between the victims. It has been submitted by Mr Dixon and Mr Nice that the interest of the two Darfuri victims may conflict with the interests of the peacekeepers.

42. With regard to the issue of conflict of interest, although no definition of a conflict of interest is provided under the Code of Conduct applicable to the legal representatives of victims,<sup>64</sup> the approach so far adopted before this Court is that "in case the common legal representative receives conflicting instructions from one or more groups of victims, he or she shall endeavour to represent both positions fairly and equally before the Chamber. In case the conflicting instructions are irreconcilable with representation by one common legal representative, and thus amount to a conflict of interest, the common legal representative shall inform the

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<sup>64</sup> Articles 1, 12 and 16 of the Code of Conduct.

Chamber immediately, who will take appropriate measures [...].”<sup>65</sup> Similarly, this Chamber is of the view that a conflict of interest may arise when the situation or the specificity of the victims is so different that their interests are irreconcilable.

43. In the *Katanga and Ngudjolo* case, a different grouping of victims and the appointment of two legal teams were necessary to address the issue of representation of child soldiers on the one hand, and the remaining victims on the other.<sup>66</sup> This was necessary because the alleged former child soldiers could have been at the same time perpetrators of crimes against the other group of victims. Therefore, the group of child soldier victims was identified by the legal representatives as giving rise to a potential conflict of interest with the other victims who did not participate in the attack but only suffered harm from it.<sup>67</sup> In this case the interests of the victims were manifestly opposed to the extent that the appointment of different legal teams was not only appropriate but necessary.

44. In the present case, the Chamber notes that during the pre-trial proceedings, it was ruled that victims a/1646/10 and a/1647/10 suffered psychological harm in that their lives were at risk during the attack and they witnessed the killing of and injury to peacekeepers,<sup>68</sup> and the international victims mainly suffered harm either on account of the death of a relative or on account of their traumatising experience of the attack.<sup>69</sup> Therefore, the two Darfuri victims and the international victims

<sup>65</sup> See for example, *Katanga and Ngudjolo Chui* case, Order on the organization of common legal representation of victims, 22 July 2009, ICC-01/04-01/07-1328, paragraph 16.

<sup>66</sup> *Katanga and Ngudjolo Chui* case, Order on the organization of common legal representation of victims, 22 July 2009, ICC-01/04-01/07-1328.

<sup>67</sup> ICC-01/04-01/07-1328, paragraphs 5 and 6.

<sup>68</sup> Decision on Victims' Participation at the Hearing on the Confirmation of the Charges, 29 October 2010, ICC-02/05-03/09-89, paragraphs 29 and 30.

<sup>69</sup> ICC-02/05-03/09-89, paragraphs 6 to 10 referring to decisions in the case *The Prosecutor v. Bahar Idriss Abu Garda* such as, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 25 September 2009, ICC-02/05-02/09-121; Public Redacted Version of Decision on the 52 Applications the Pre-Trial Stage of the Case" for Participation at the Pre-Trial Stage of the Case, 9 October 2009, ICC-02/05-02/09-147-Red and Decision on Applications a/0655/09, a/0656/09, a/0736/09 to a/0747/09, and a/0750/09 to a/0755/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case, 19 March 2010, ICC-02/05-02/09-255.

suffered similar harm as a result of crimes allegedly committed during the MGS Haskanita attack.

45. In addition, on the issue of conflicting interests, the Chamber notes the Registry's analysis contained in the confidential Annex 2 to its Proposal that was notified to all legal representatives.<sup>70</sup> In particular, the Registry envisaged two situations where victims of this case may have conflicting interests.<sup>71</sup> However, the Registry concluded that, at this stage, it did not have sufficient information to conclude that there was a conflict of interest. The Chamber is convinced that the Registry took into consideration the legal representatives' views and all relevant elements in its possession in reaching this reasonable conclusion and that appropriate steps have been taken to ensure that a conflict of interest is avoided.

46. For the foregoing reasons, the Chamber is not persuaded that conflict of interest exists which would justify a different grouping than the one proposed by the Registry. As a result, the Appointed Legal Representatives should be maintained as common legal representatives of the two Darfuri victims.

*Whether the two Darfuri victims should have been directly consulted*

47. The Applicants finally contend that the victims they represented have not been consulted and that their views were not taken into consideration. This argument amounts to an allegation of a violation of Regulation 79(2) of the Regulations, which provides that the Registry should give consideration to the victims' views when choosing a common legal representative. The Chamber notes the two Darfuri victims' preference for having continued representation of their interests by the Applicants. To this end, the Chamber will review the consultation process carried

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<sup>70</sup> ICC-02/05-03/09-203-Conf-Anx2, paragraph 3

<sup>71</sup> ICC-02/05-03/09-203-Conf-Anx2, paragraph 4.

out by the Registry and whether this process prejudiced victims a/1646/10 and a/1647/10.

48. In the present case, the consultation process between the Registry and the former legal representatives of victims /1646/10 and a/1647/10 lasted around five months.<sup>72</sup> When requested to start consultations between the Registry and the victims, within the meaning of Rule 90(2) of the Rules, the Registry was specifically instructed to conduct such consultations “in the presence of the legal representatives currently representing the victims in the case”.<sup>73</sup> The legal representatives were also instructed to fully cooperate with the Registry in its consultations with the victims.<sup>74</sup>

49. The Chamber notes the Applicants’ complaints that victims have not been consulted *directly* and that, with regard to the two victims, a video-link session was envisaged but could not take place in the end for reasons not specifically explained to the Chamber.<sup>75</sup> However, as expressed above, mindful of the specific circumstances of the case, especially the difficulty for the Registry to consult directly with the Darfuri victims, the Chamber is satisfied that the consultation process<sup>76</sup> made through their victims’ legal representatives was appropriate. In the implementation process of the Order of 21 April 2011, despite their different views on common legal representation, nothing suggests a lack of cooperation between the legal representatives and the Registry. Indeed, the Registry held a meeting on 20 May 2011 with all former legal representatives of victims and subsequently had an extensive exchange of correspondences with Mr Dixon and Mr Nice about the appropriate representation of victims a/1646/10 and a/1647/10. The Chamber notes

<sup>72</sup> From the Chamber’s Order on 21 April 2011 to start consultation and the appointment of the common legal representatives on 14 September 2011.

<sup>73</sup> ICC-02/05-03/09-138, paragraph 7.

<sup>74</sup> ICC-02/05-03/09-138, paragraph 8.

<sup>75</sup> ICC-02/05-03/09-228-Anx2, page 6 and ICC-02/05-03/09-228-Anx4, paragraphs 6 and 7. It appears that such video-link was proposed at the Registry’s meeting on 20 May 2011 but was costly to implement. The cost estimate was supposed to be provided to the Registry by the Applicants and eventually did not take place.

<sup>76</sup> See paragraphs 2 to 4 above.

that a consultation process does not mean that the victims' wishes will be automatically satisfied. It is the Chamber's view that during the five month consultation process, the legal representatives were sufficiently consulted on behalf of the Darfuri victims and thus they were able to express any views and concerns of their then clients to the Registry.

50. In the present circumstances and considering that the appointment of the common legal representatives respects the admissible interests of victims, including victims a/1646/10 and a/1647/10, and that no evident conflict of interest exists between the victims that would warrant a different grouping than the one proposed so far by the Registry, the Chamber is of the view that the absence of "direct" consultation with the victims was not prejudicial to the two victims as their views were largely conveyed through their legal representatives. The Chamber is persuaded that these views will continue to be appropriately expressed through the Appointed Legal Representatives, who will act in accordance with the Code of Conduct to best serve the interests of their clients.

#### **4. Classification of documents**

51. The Chamber notes the request by the Appointed Legal Representatives to reclassify documents ICC-02/05-03/09-230-Conf and its related Annexes thereto,<sup>77</sup> as well as the confidential *ex parte* classification of documents ICC-02/05-03/09-187-Conf-Exp-Anx and ICC-02/05-03/09-204-Conf-Exp.

52. In application of the principle of publicity of the proceedings, as enshrined in Articles 64(7) and 67(1) of the Statute, the Chamber finds, pursuant to Regulation 23bis(3) of the Regulations, that documents ICC-02/05-03/09-187-Conf-Exp-Anx, ICC-02/05-03/09-204-Conf-Exp and ICC-02/05-03/09-230-Conf may be re-classified

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<sup>77</sup> ICC-02/05-03/09-248.

as public as the basis for the classification no longer exists and no confidential information is contained therein.


53. The Chamber notes that Annexes 1 and 2 to the document ICC-02/05-03/09-230-Conf consist of electronic correspondence from counsel Kone and Akinbote expressing their agreement with the Registrar's choice to appoint Ms Cissé as common legal representative of the victims of the case. This correspondence also mentions the private contact details of several individuals. While the Chamber concedes that the content of this correspondence is not confidential, identifying information of individuals who have no link with the present proceedings and whose prior consent for disclosing their identities has not been sought, should remain confidential. Therefore, the Chamber does not consider it necessary at this stage to reclassify the two annexes abovementioned.

54. For these reasons, the Chamber hereby:

- a) **CONFIRMS** the Registrar's choice to appoint Ms Cisse and Mr Dieckmann as common legal representatives of victims in the present case;
- b) **ORDERS** the Registrar to appoint any assistant to the team of common legal representatives as necessary;
- c) **ORDERS** the classification as public of the following documents:
  - ICC-02/05-03/09-187-Conf-Exp-Anx;
  - ICC-02/05-03/09-204-Conf-Exp; and
  - ICC-02/05-03/09-230-Conf.



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

  
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**Judge Joyce Aluoch**  
**Presiding Judge**  
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**Judge Silvia Fernandez de Gurmendi**  
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**Judge Chile Ebbe-Osuji**

Dated this 25 May 2012  
At The Hague, The Netherlands