



Original: **English**

No.: ICC-02/05-03/09
Date: 28 September 2010

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER
NOURAIN AND SALEH MOHAMMED JERBO JAMUS***

Public Redacted Version of

**“Prosecution’s Observations on 8 Victims’ Applications for
Participation in the Proceedings”, Filed on 10 September 2010**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Mr. Karim A.A. Khan

Legal Representatives of the Victims

Legal Representatives of the Applicants

Sir Geoffrey Nice

Mr. Rodney Dixon

Colonel Frank Adaka

Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

**The Prosecution of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Ms. Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to Rule 89(1) of the Rules of Procedure and Evidence (“Rules”) and the “Decision Setting a Time Limit for the Parties’ Replies to 8 Victims’ Applications for Participation”¹ (“Decision”) issued by Single Judge Cuno Tarfusser, the Prosecution submits the following observations on the applications for participation in the case of *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (“the *Banda & Jerbo* case”) of Applicants a/0536/09, a/0582/09, a/0584/09, a/0585/09, a/1646/10 a/1647/10 a/1648/10, and a/1649/10 (“The Applicants”).
2. For the reasons detailed below, the Prosecution requests the Single Judge to grant the Applicants a/536/09, a/1646/10, a/1647/10, a1648/10, and a/1649/10 authorization to participate as victims in the proceedings at the pre-trial stage in the *Banda & Jerbo* case pursuant to Article 68(3). The Prosecution further requests the Single Judge to deny Applicants a/582/09, a/584/09/, and a/585/09 authorization to participate.

Background

3. On 12 August 2010, the Victims Participation and Reparation Section filed the “Report on eight applications to participate in the proceedings”² (“the Report”). The Report was accompanied by 8 applications in which The Applicants requested to be authorised to participate in pre-trial proceedings in the *Banda and Jerbo* case concerning the crimes as a result of which they allegedly suffered harm. Among the applicants, a/0536/09³, a/0582/09⁴, a/584/09⁵ and a/0585/09⁶ had applied previously to participate in the proceedings in the *Abu Garda* case. In her “Decision on the 52 Applications for Participation at the Pre-Trial Stage of the case” of 9 October 2009,⁷

¹ ICC-02/05-03/09-65.

² [Footnote Redacted].

³ [Footnote Redacted].

⁴ [Footnote Redacted].

⁵ [Footnote Redacted].

⁶ [Footnote Redacted].

⁷ ICC-02/05-02/09-147-Red, paras 140-141.

the Single Judge had denied the request for participation of a/0582/09, a/584/09 and a/0585/09 and did not consider the application of a/0536/09, for reasons stated therein.

4. On 26 July 2010, Pre-Trial Chamber 1 (the "PTC") designated Judge Cuno Tarfusser as Single Judge responsible for carrying out the functions of the PTC, including all the issues related to victims' applications and subject to article 57 (2) (a) of the Statute, in relation to the situation in Darfur, Sudan and any case emanating therefrom.⁸
5. On 24 August 2010, the Single Judge issued a decision granting the Prosecutor and the Counsel for the Defence until 10 September 2010 to submit observations on the requests for participation. In the same decision, the Single Judge ordered the Registry to provide the Prosecution, no later than 27 August 2010, with non-redacted copies of all eight Applications and the Counsel for the Defence with copies from which names, addresses and other sensitive information which could lead to identification of the Applicants are redacted.⁹

Request for Confidentiality

6. The Prosecution requests that this filing be received as "Confidential" because it discusses and cites filings that are currently confidential. The Prosecution will file a public redacted version of this filing.

Legal criteria for victim participation in the proceedings

7. The Prosecution considers that victims' participation before the Court is an essential feature of the Rome Statute system and an important contribution to international justice. Under the Statute, victims are actors in the administration of international justice rather than its passive subjects. Their participation is a statutory right, not a privilege bestowed on a case-by-case basis.

⁸ ICC-02/05-233.

⁹ ICC-02/05-03/09-65, p. 5.

8. The Prosecution supports victims' participation when all statutory requirements are met. Consistent with its view of the unique and necessary perspective victims lend to the proceedings, the Prosecution supports a liberal perspective in permitting applicants to amend or clarify facially deficient applications.
9. Established jurisprudence requires that an applicant meet four requirements before the Court will authorize an applicant's participation as a victim under Article 68(3) of the Statute:
- (i) the applicant qualifies as a victim pursuant to Rule 85 of the Rules;
 - (ii) the applicant's personal interests are affected by legal or factual issues raised in the proceedings at hand;
 - (iii) the applicant's participation is appropriate in that particular stage of the proceedings; and
 - (iv) the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁰
10. Applicants are required to make a *prima facie* showing that these four requisites are met.¹¹
11. With respect to Article 68(3)'s first requirement - qualification as a victim under Rule 85 - the following four criteria must be satisfied for victim status to be warranted, regardless of the stage of the proceedings in which the applicants wish to participate:
- (a) the applicant must be a natural person as set forth in Rule 85(a) or an organization or institution as set forth in Rule 85(b);
 - (b) the applicant must have suffered personal harm;
 - (c) the crime from which the harm resulted must fall within the jurisdiction of the Court; and
 - (d) there must be a causal link between the crime and the harm the

¹⁰ See, e.g., ICC-01/04-01/06-1335, para. 50; ICC-02/05-02/09-147-Red, para. 2 ("A person shall be granted the right to participate in proceedings if (i) he/she has submitted a complete application to participate, (ii) he/she falls under the definition of victim within the meaning of rule 85 of the Rules, and (iii) his/her personal interests are affected by the proceedings at hand as prescribed in article 68(3).").

¹¹ See, e.g., ICC-02/05-01/07-58, para. 7; ICC-01/04-01/07-579, para. 67, ICC-02/05-02/09-121, para. 14.

applicant personally suffered,¹² as well as between the crime and the applicant's personal interests.¹³

12. The jurisprudence has established that for the purposes of participation in the pre-trial or trial proceedings in a particular case, the harm alleged by a victim must be linked with the charges: i.e. the charges confirmed against the accused or, at earlier stages in the proceedings, the offences alleged in the warrant of arrest or summons to appear or the document containing the charges.¹⁴ The charges against Abdallah Banda Abakaer and Saleh Mohammed Jerbo Jamus are set-out in the Prosecutor's Application under Article 58 filed on 20 November.¹⁵
13. The Appeals Chamber also confirmed that in the case of natural persons, both direct and indirect victims may suffer harm, provided the harm suffered is personal to the individual.¹⁶ Cognizable harms under Rule 85(a) include material, physical and psychological injuries.¹⁷ It may be inflicted on an individual or collective basis "in a variety of different ways such as physical or mental injury, emotional suffering or substantial impairment of his or her fundamental rights."¹⁸
14. [Redacted]¹⁹ [Redacted].²⁰ [Redacted].²¹

Institutional applicants

15. For institutional applicants - applicants who are not natural persons - the criteria to be fulfilled for the purposes of rule 85 (b) are:

¹² See e.g., ICC-01/04-01/06-601-tEN, p. 9; ICC-01/04-01/06-228-tEN, p. 7; ICC-02/05-02/09-121, paras. 11-13.

¹³ See ICC-01/04-01/06-1432, para. 2.

¹⁴ ICC-01/04-01/06-1432, para. 2; ICC-01/04-01/07-579, paras. 66-67; ICC-02/05-02/09-121, paras. 12-13;

¹⁵ ICC-02/05-03/09-20-Red.

¹⁶ ICC-01/04-01/06-1432, para. 32..

¹⁷ ICC-01/04-01/06-1432, para. 32. See also ICC-02/04-164, para. 8 ("treating 'psychological trauma' and 'emotional harm' as falling within the concept of 'mental harm'").

¹⁸ ICC-01/04-01/06-1432, para. 34.

¹⁹ [Footnote Redacted].

²⁰ [Footnote Redacted].

²¹ [Footnote Redacted].

- the victim must be an organisation or institution whose property is dedicated to religion, education, art or science or charitable purposes, a historical monument, hospital or other place or object for humanitarian purposes;
- the organisation or institution must have sustained harm;
- the crime from which the harm arises must fall within the jurisdiction of the Court; and
- there must be a direct causal link between the crime and the harm.²²

16. When acting on behalf of an organisation or institution within the meaning of Rule 85(b) of the Rules, the person must demonstrate that he or she has *locus standi* to do so.²³ The Prosecution supports participation by legal persons meeting the criteria and having sufficient authority to represent the organization or institution concerned. For example, Trial Chamber I in the *Lubanga* case ruled that the principal of a school from which children were allegedly recruited by Lubanga's militia, and who himself qualified as a victim under rule 85(a), also had sufficient authority to act on behalf of the school under rule 85(b). Accordingly, it held that he could participate both on his own behalf and on behalf of his school.²⁴ The Appeals Chamber has noted that rule 85 (b) limits the definition of organizational or institutional victims to those that have sustained "direct harm to any of their property."²⁵

Factual analysis of the applications

17. For the purposes of these observations, the applicants are categorized as:

- (i) Applicants previously denied participation in the *Abu Garda* case; and
- (ii) New applicants.

²² ICC-01/04-423-Corr-tENG, para. 140.

²³ ICC-02/05-02/09-147-Red, para. 9.

²⁴ ICC-01/04-01/06-1556-Corr-Anx1, paras. 110-111.

²⁵ ICC-01/04-01/06-1432, para. 30.

Applicants previously denied participation in the *Abu Garda* case

Applicants a/0582/09, a/0584/09, and a/0585/09

18. Applicants a/0582/09, a/0584/09, and a/0585/09 previously applied to participate in the *Abu Garda* case. In the *Abu Garda* case, these applicants were all found to have provided sufficient proof of their identities as natural persons.²⁶ However, their applications were denied on the basis that “the alleged harm [could not] be said to be resulting from the alleged incident with which the suspect is charged.”²⁷ The Single Judge found that these applicants failed to allege

“crimes that would have . . . been committed at the MGS Haskanita as charged by the prosecution . . . [and they did not] claim to have suffered harm as a result of the crimes which were allegedly committed during the attack on the MGS Haskanita on 29 September 2007 or in intervening to assist direct victims, or to prevent their victimisation as a result of the alleged commission of the said crimes.”²⁸

19. Since the *Abu Garda* case and the *Banda and Jerbo* case originate from the same summonses and share the same counts, the analysis above applies equally to the *Banda and Jerbo* case. The additional information²⁹ submitted by Applicants a/0582/09, a/0584/09, and a/0585/09 does not remedy the deficiency identified by the Single Judge in the *Abu Garda* case that the applicants have failed to establish a causal connection between the alleged harm and the crimes as charged in the summons to appear. Accordingly, the Prosecution submits that these applicants be should be denied authorization to participate in the instant case.

Applicant a/0536/09

20. Application a/0536/09 was submitted by an individual on behalf of an institution pursuant to Rule 85 (b). Applicant a/0536/09 applied to participate in the *Abu Garda* case, but the application was not considered because the Single Judge held that the

²⁶ ICC-02/05-02/09-147-Red, para. 130.

²⁷ ICC-02/05-02/09-147-Red, para. 141.

²⁸ ICC-02/05-02/09-147-Red, para. 140.

²⁹ [Footnote Redacted].

institution had not provided proof of *locus standi*, and the application was therefore incomplete. Subsequently, supplementary information on *locus standi* was eventually provided, but the Single Judge did not consider it because it was submitted after the expiration of the relevant deadline.³⁰ The same supplementary information on *locus standi* forms part of Application a/0536/09 as filed in the current case and, in the Prosecution's view, sufficiently shows that the relevant person has the authority of the institution to make the application on their behalf.

21. [Redacted]³¹ [Redacted].³²

22. Accordingly, the Prosecution submits that applicant a/536/09 should be granted permission to participate in the proceedings.

New Applicants³³

23. Applicants a/1646/10, a/1647/10, a/1648/10, and a/1649/10 have provided sufficient proof to establish their identity as natural persons. The Prosecution notes at the outset, however, that the loss of property in Haskanita village and the inability to return to Haskanita cannot be considered harm for the purposes of Rule 85. In accordance with the jurisprudence in the *Abu Garda* case discussed above, the alleged harm cannot be said to be resulting from the incident with which the suspects are charged.³⁴ Accordingly, the Prosecution will only analyse harm claimed to be resulting from the crimes which were allegedly committed during the attack on the MGS Haskanita on 29 September 2007, or in intervening to assist direct victims, or to

³⁰ ICC-02/05-02/09-147-Red, para 10-11.

³¹ [Footnote Redacted].

³² Roy S. Lee "The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence," Transnational Pub (October 2001), p.433.

³³ The Prosecution has not been provided with any information as to the Legal Representatives of these new applicants, or whether they are in fact represented at the present time. However, the Prosecution notes that their applications appear to have been [Redacted]. This appears to be [Redacted]the Applications of Applicants a/0582/09, a/0584/09, and a/0585/09, represented by Messrs Geoffrey Nice & Rodney Dixon, and whose applications to participate have already been denied by this Chamber. In those Applications, [Redacted].

³⁴ ICC-02/05-02/09-147-Red, paras 140-141.

prevent their victimisation as a result of the alleged commission of the said crimes.
[Redacted].

24. [Redacted].³⁵ [Redacted]³⁶ [Redacted] the Prosecution reserves the right to file further observations before the Chamber and to challenge their participation in any subsequent pre-trial proceedings, since [Redacted].³⁷

Application a/1646/10³⁸

25. Applicant a/1646/10 claims that he [Redacted]. The Applicant provides a copy of [Redacted] in support of his application. He claims to have [Redacted] as a result of the attack. [Redacted]. Accordingly, the Prosecution submits that Applicant a/1646/10 has provided sufficient evidence establishing *prima facie* that he suffered, *inter alia*, emotional harm and [Redacted] as a result of the crimes allegedly committed in the attack on the MGS Haskanita on 29 September 2007.

Application a/1647/10³⁹

26. Applicant a/1647/10 claims that he [Redacted] when it was attacked on 29 September 2007. He provides no further information or documentation in support of his claim to have [Redacted]. He claims to [Redacted], and to have [Redacted] as a result of the attack. [Redacted]. Accordingly, the Prosecution submits that Applicant a/1647/10 has provided sufficient evidence establishing *prima facie* that he suffered, *inter alia*, emotional harm [Redacted] as a result of the crimes allegedly committed in the attack on the MGS Haskanita on 29 September 2007.

³⁵ [Footnote Redacted].

³⁶ [Footnote Redacted].

³⁷ [Footnote Redacted].

³⁸ [Footnote Redacted].

³⁹ The Prosecution notes that the Applicant provides a copy of [Redacted]. [Redacted].

Application a/1648/10⁴⁰

27. Applicant a/1648/10 claims to have [Redacted] and provides [Redacted]. He states that he [Redacted] but that [Redacted] a result of the attack on MGS Haskanita. Accordingly, the Prosecution submits that Applicant a/1647/10 has provided sufficient evidence establishing *prima facie* that he suffered [Redacted] as a result of the crimes allegedly committed in the attack on the MGS Haskanita on 29 September 2007.

Application a/1649/10⁴¹

28. Applicant a/1649/10 submits that he [Redacted]. He was not [Redacted]. The Applicant claims to have [Redacted] as a result of the attack on MGS Haskanita. Accordingly, the Prosecution submits that Applicant a/1647/10 has provided sufficient evidence establishing *prima facie* that he suffered [Redacted] as a result of the crimes allegedly committed in the attack on the MGS Haskanita on 29 September 2007.

Conclusion

29. For the foregoing reasons, the Prosecution requests the Single Judge to:

- grant the Applicants a/536/09, a/1646/10, a/1647/10, a/1648/10, and a/1649/10 authorization to participate as victims in the proceedings at the pre-trial stage in the *Abdallah Banda and Saleh Jerbo* case pursuant to Article 68(3).
- deny Applicants a/582/09, a/584/09/, a/585/09 authorization to participate.

⁴⁰ Unlike Applicants a/1646/10 and a/1648/10, this Applicant provides no evidence of [Redacted].

⁴¹ Unlike Applicants a/1646/10 and a/1648/10, this Applicant also provides no evidence of [Redacted].

30. The Prosecution reserves the right to file further observations on, and challenge the participation of applicants a/1646/10, a/1647/10, a1648/10, and a/1649/10 in pre-trial proceedings, should [Redacted].



Luis Moreno-Ocampo
Prosecutor

Dated this 28th day of September 2010
At The Hague, The Netherlands