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Date: **6 January 2012**

TRIAL CHAMBER IV

Before: **Judge Joyce Aluoch, Presiding Judge**
Judge Fatoumata Dembele Diarra
Judge Silvia Fernandez de Gurmendi

SITUATION IN THE DARFUR, SUDAN

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

Public Document
with Public Annexures A, B, D, E, I, M and O, Confidential Annexures C, J, L and N, and Confidential and *ex parte* Annexures F, G, H and K available only to the Defence

Defence Request for a Temporary Stay of Proceedings

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

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I. Introduction

1. The Defence respectfully request the Trial Chamber to grant a temporary stay of proceedings. This extraordinary remedy is necessary because current circumstances make it impossible for Messrs. Banda and Jerbo to present an effective defence and preclude the Trial Chamber from adequately fulfilling its obligation to determine the truth.

2. This case is unique because it is the first case pending trial before any international criminal court in which both the Office of the Prosecutor ("OTP") and the Defence are entirely unable to enter the country in which the alleged crimes occurred. A Security Council referral of a non-State Party to the ICC is "fraught with procedural impediments" if the non-State Party refuses to cooperate with the Court.[1] In the current case, the Government of Sudan ("GoS") not only refuses to cooperate, but has made any cooperation with the Court a criminal offense, thus exponentially compounding the "procedural impediments" affecting the defence preparation.[2] The situation has also severely hindered the Defence team's ability to confer with the clients, as discussed below.

3. The Defence have made multiple but fruitless efforts through various routes – including the OTP - to secure witness testimony and evidence critical to the presentation of the Defence case.[3] Recognising the exceptional nature of the relief sought, the Defence request this temporary stay because no other option remains which will safeguard the fair trial rights of Messrs. Banda and Jerbo.

II. Severe Restrictions on Defence Investigations

(1) Impossibility of Investigations in Sudan

[1] The GoS representative made this point after the adoption of Resolution 1593/2005 (see Press Release SC/8351, 31 March 2005, p. 6). The situation in Darfur is distinct from that in Libya. The Libyan authorities are providing the OTP with "strong and essential cooperation" (see Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 2 November 2011, para. 11).
[2] See fuller discussion at paragraphs 4 – 9 and 12 – 15.
[3] See paragraphs 6 – 15, 17 and 21 – 23.

4. The "obstructionist efforts" of the GoS have been absolute.[4] From the beginning of this case to date, the GoS has refused to cooperate with the Court.[5] Specifically, the GoS has barred ICC personnel from speaking to Sudanese officials, has expelled NGOs accused of collaborating with the ICC,[6] and has criminalised cooperation with the Court. The OTP's own filings indicate that the GoS *"is actually harassing and attacking any person suspected of cooperating with the Court"* and submit that *"any form of cooperation [by a witness] would be considered a criminal act, punishable by the Government."*[7] Individuals have in fact been arrested for allegedly cooperating with the Court.[8] The OTP's continued efforts to seek arrest warrants against GoS officials[9] will inevitably aggravate these tensions.

5. Additionally, the security situation in Darfur remains dire.[10] As the Prosecutor himself put it in June 2011 *"crimes against humanity and genocide continue unabated in Darfur [...] millions of victims displaced are still subjected today to rapes, terror and conditions of life aimed at the destruction of their communities, constituting genocide."*[11] Ample evidence from the UN,[12] NGOs[13] and States[14] continues to justify this statement.

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[4] See *Prosecutor v Tadić,* IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 55, which states that the "obstructionist efforts of a State" may render a fair trial impossible.
[5] E.g. Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 5 December 2007, para. 4. For a more current report see Thirteenth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 8 June 2011, paras. 76–79.
[6] Congressional Research Service, "International Criminal Court Cases in Africa: Status and Policy Issues", 22 July 2011, p. 16 and related footnotes available at http://www.fas.org/sgp/crs/row/RL34665.pdf.
[7] ICC-02/05-01/07-48-Red, paras. 33–36. In this filing, Salah Gosh, the Sudanese Director of Intelligence, is quoted as saying on 22 February 2009 that "anyone who attempts to put up his hands to execute [ICC] plans we will cut off his hands, head and parts because it is a non-negotiable issue".
[8] Congressional Research Service, "International Criminal Court Cases in Africa: Status and Policy Issues", 22 July 2011, p. 16 (see link above in footnote 6).
[9] ICC-02/05-238, 2 December 2011.
[10] This Trial Chamber has recognised the "volatile security situation in Darfur in particular, and in the Republic of the Sudan ("Sudan") in general" in ICC-02/05-03/09-266-Conf at para 8.
[11] Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), 8 June 2011, para. 7.
[12] On 29 July 2011, the UNSC expressed "deep concern at the deteriorating security situation in some parts of Darfur" (2003/2011). In recent months, UNAMID has issued regular reports of aerial bombing by the GoS including of civilians (see "Update on fighting in North Darfur" (6 March 2011), "Air strikes confirmed in South Darfur" (28 March 2011), "UNAMID to verify separate incidents in North Darfur" (4 April 2011), "UNAMID Chief deeply troubled over recent air strikes in South Darfur" (16 May 2011), "Confirmed attacks in North Darfur" (22 May 2011) and "Airstrike confirmed in South Darfur" (27 July 2011). Current UN SLS travel advice for Darfur describes the threat posed by armed conflict as "high".
[13] On 29 September 2011, the International Crisis Group reported that "the situation remains unstable in Darfur. The NCP [GoS] has continued its current military push in the region, which has killed hundreds and displaced

6. Nevertheless, the Defence have made multiple efforts to gain access to Sudan and to witnesses located in Darfur. On 1 September 2010, the Defence requested the Registry's assistance to arrange a mission to Sudan.[15] On 21 September 2010, the Registry replied that "taking into account the volatile security situation" it could not provide the requested assistance.[16] On 14 October 2011, the Registry confirmed that "ICC operations are currently not conducted in Darfur".[17]

7. The Defence then sought permission to visit Sudan directly from the GoS. On 24 September 2010, the Defence wrote to the Sudanese Embassy in The Hague to request permission to travel to Sudan. The letter was returned unopened.[18] Members of the Defence team visited the Embassy on 12 October 2010 and 21 April 2011. On both occasions the Defence were told that the Embassy had instructions not to accept any communications from the Court.[19]

8. Further, the Defence unsuccessfully applied to the Pre-Trial Chamber on 10 November 2010 and to the Trial Chamber on 11 May 2011, requesting the Court to transmit a request for cooperation to the GoS.[20] Further applications would be futile, until the GoS's approach to the Court changes. Further, even if the Defence

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thousands": "Sudan – Avoiding a New Crisis", International Crisis Group. Human Rights Watch have reported that the situation "sharply deteriorated" in January 2011 (Human Rights Watch, "Sudan: New Attacks on Civilians in Darfur," 28 January 2011) and in June 2011 noted "increased fighting in Darfur over the past six months and ongoing repression of civil and political rights of Darfuris" (*Darfur in the Shadows: The Sudanese Government's Ongoing Attacks on Civilians and Human Rights,* June 2011, p. 2).

[14] The current UK Foreign and Commonwealth Office Travel Advice, updated on 20 December 2011, advises against all travel to Darfur and assessed that "Banditry and lawlessness are widespread, and there are frequent violent confrontations between rebel and government forces" (see http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/sub-saharan-africa/sudan1). The Australian Department of Foreign Affairs and Trade issued an advisory on 7 October 2011, concluding that "Darfur remains dangerous". The US State Department reached a similar conclusion: Travel Warning 22 June 2011, current as of date of filing.

[15] See Annexure A.

[16] See Annexure B.

[17] See confidential Annexure C (classified as such because it contains confidential information from the United Nations). This is confirmed by the Registry's filings in this case: "the territory of Sudan, where the Court has no access" (ICC-02/05-03/09-217, para. 16).

[18] See Annexure D.

[19] An affidavit describing these events is attached to this application as Annexure E.

[20] On the last occasion, the application was rejected on the basis that it was insufficiently specific in that it requested to "undertake an open-ended expedition to the Sudan" (ICC-02/05-03/09-169, para. 22) and to be "unhindered and unmonitored by the GoS" (para. 23). The Trial Chamber also expressed concern about the security risks to the Defence team and to any potential witnesses contacted (paras. 29-30).

could enter Sudan, witness fears of monitoring by the GoS would have a chilling effect on any Defence investigation.[21]

9. The Defence have identified numerous potential defence witnesses who are believed to reside in Darfur.[22] But the Defence is unable to travel to Darfur to conduct interviews or to identify and locate other potential witnesses with knowledge of facts relevant to the case. Local resource persons cannot perform these tasks because by cooperating with the Court they would be committing a criminal offence in Sudan.

(2) Problems & Dangers of Interviewing Witnesses in Third Countries

10. While the Defence have been able to interview a number of potential witnesses outside Sudan at considerable risk to these individuals, this is not sufficient to ensure an adequate investigation for the following reasons.

11. First, an investigation carried out entirely outside Sudan can never be complete. The Defence will only be able to speak to witnesses who can be identified without entering Sudan and who are willing and able to risk travel to locations outside Sudan. It does not assist the Defence to identify or locate the many other potentially vital witnesses in Darfur.

12. Second, even contacting identified potential witnesses in Sudan by telephone may expose them to danger. Mr Jerbo and other witnesses told the Defence in November that they believe the GoS is monitoring Thuraya satellite telephones and is using the information to target users for attack. The Movements which oppose the GoS have responded by forbidding members from using Thuraya telephones and witnesses have asked the Defence not to contact them by Thuraya.[23] These fears were confirmed by the recent admission of the GoS that it

[21] See confidential and *ex parte* Annexures F and G (classified as such because they contain the declarations of potential Defence witnesses). This highlights that potential witnesses will not cooperate with the Defence unless their involvement can be kept secret from the GoS.
[22] See confidential and *ex parte* Annexure H (classified as such because it contains the names of and information on potential Defence witnesses).
[23] Radio Dabanga Hilversum, "Sudan: JEM leaders' trial begins in Khartoum", 18 October 2011, available at http://allafrica.com/stories/201110181202.html and see confidential and *ex parte* Annexure F at para 8.

was able to assassinate the leader of JEM on 23 December 2011 by targeting him though his use of a telephone.[24] Regardless of the validity of these concerns, the result is that potential witnesses are unwilling to speak to the Defence by Thuraya,[25] which is often the only means of direct communication between the Defence and its clients and potential witnesses in Darfur.

13. Third, any interview outside Sudan requires witnesses to travel across a war zone, cross hostile borders, and then return home to live in Darfur, where the Court cannot offer any protection and where the very act of cooperating with the Court places them at risk of prosecution.[26] Faced with these risks, at least one potential witness fled before crossing the border.[27] Declarations are attached explaining the real risks that other potential witnesses ran in order to meet with the Defence.[28] Notably, the OTP does not carry out investigations in Sudan because, as the Deputy Prosecutor herself explained, *"We have an obligation that the people with whom we interact are protected. We will not be able to protect them if there is no cooperation from the government"*.[29] The Defence have similar obligations. The current situation puts Defence counsel in the impossible position of choosing between their clients' rights to a full investigation and witness safety.

14. Fourth, the logistics involved in organising witness interviews outside Sudan are prohibitive. The Registry is unable to assist potential witnesses to obtain travel documents from the GoS. Indeed, separate from cooperation with the ICC, legal travel across any Sudanese border is problematic because many potential witnesses are current or former members of opposition Movements. This means that to meet the Defence, potential witnesses must cross the Sudanese border illegally. This poses a particular problem regarding the interview of witnesses in

[24] See attached article from the Sudan Tribune (Annexure I).
[25] See apposite comments made by the ICTR Appeals Chamber in *Prosecutor v. Hategekimana*,, ICTR-00-55B-R11, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11, 4 December 2008 ("*Hategekimana* Decision"), para. 22.
[26] See paragraph 22 below for a fuller discussion on protective measures. See also confidential and *ex parte* Annexures F and G.
[27] See confidential and *ex parte* Annexure G at para. 4.
[28] See confidential and *ex parte* Annexures F and G.
[29] Rebecca Lowe, "Is Fatou Bensouda exactly what the ICC needs?", The Guardian, 5 December 2011, available at http://www.guardian.co.uk/law/2011/dec/05/fatou-bensouda-international-criminal-court.

Chad due to the regular joint Sudanese-Chadian border patrols.[30] The closure of the ICC Field Office in Chad in December 2011 will only exacerbate these difficulties.

15. Finally, the permission of a third country is required for the Defence to exercise even the most basic right of consultation between client and counsel. On 4 November 2011 the Defence requested the Registry to obtain permission from Chad for Mr Banda to enter that country to meet with the Defence on or around 5 December 2011. On 22 December 2011, after Mr Banda and seven potential witnesses had been waiting near the Sudan-Chad border for weeks, the mission was cancelled because permission had not been granted by the Chadian authorities and it was no longer possible for Mr Banda to be away from Sudan for the period necessary to conclude the mission.[31] Further, the GoS discourages other States' cooperation with the ICC. When Kenya issued an arrest warrant for President Al Bashir, the GoS responded by expelling the Kenyan ambassador to Sudan.[32]

(3) Deaths of Witnesses

16. The pool of evidence available to the Defence is further depleted by the deaths of a number of witnesses, many of whom had an intelligence background and likely would have possessed first hand information relevant to the contested issues.[33] Their deaths make Defence access to other witnesses even more critical.

(4) Inability to Access Documents

[30] For examples of the very real risks faced by former or current Movement members see "Sudanese-Chadian joint force arrests three men", Radio Dabanga, 18 December 2011, available at http://www.radiodabanga.org/node/22353, and "7 JEM members sentenced to death", Radio Dabanga, 29 November 2011, available at http://www.radiodabanga.org/node/21561. See also confidential and *ex parte* Annexure F.
[31] An affidavit evidencing these events is attached as confidential Annexure J (classified as such because it describes communications between the Defence and Mr Banda as well as the details of Registry interactions with the Chadian government).
[32] BBC News, "Sudan to expel Ambassador after Kenya's Bashir warrant", 29 November 2011, available at http://www.bbc.co.uk/news/world-africa-15932019.
[33] See list of names in confidential and *ex parte* Annexure K.

17. The Defence have been unable to obtain relevant contemporaneous documents from the African Union ("AU"),[34] UNSC, OCHA, UNMIS, the Government of Nigeria and the ICRC.[35] These documents are crucial to a proper investigation of the contested issues in the case.[36] For the reasons set out above, it would be futile to ask the GoS to provide documents. Further, even if the pending AU cooperation request were answered positively,[37] it only deals with one facet of this case and does not address the problems related to securing defence witness testimony. This application is still required.

(5) These Impediments to Investigations prejudice the Defence more than the OTP

18. The nature of this case means that the inability to investigate in Sudan benefits the OTP and prejudices the Defence.[38] Messrs Banda and Jerbo will be unable to obtain the attendance and examination of Defence witnesses under the same conditions as the witnesses against them. Of the 15 witnesses the OTP intends to call at trial, at least 12 are based outside Sudan.[39] This selection of witnesses allows the OTP to present a narrow view of MGS Haskanita, by putting forward the perspective of AMIS personnel who were within the base attacked. By contrast, the Defence intend to show why the attack on the base was not unlawful given the events that were taking place on the ground prior to, during and after the attack including intelligence activities by GoS agents at the base and its effects in furthering a criminal campaign by the GoS against the civilian population in Haskanita and Darfur generally. Gathering evidence of these key aspects of the

[34] The Defence's efforts on this matter are set out fully in ICC-02/05-03/09-146, paras. 5-12. See also ICC-02/05-03/09-234.
[35] On 14 August 2011, letters to these sources requesting disclosure of documents were given by the Defence to the Registry for onward transmission. On 6 December 2011, the ICRC indicated that it is "not in a position to positively respond". The Defence acknowledge the unique position of the ICRC and that it must operate in accordance with its fundamental principles of *inter alia* impartiality, neutrality and independence (see the Statutes of the International Red Cross and Red Crescent Movement at http://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf). The Defence reference this step simply to show the efforts it has taken to try to ensure a fair trial. More pertinently, no substantive responses have been received from any of the other sources to date.
[36] On the relevance of the AU documents, see ICC-02/05-03/09-234, confidential and *ex parte* Annexure C.
[37] ICC-02/05-03/09-268-Red.
[38] The Defence recalls that "the principle of equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case" (see *Prosecutor v. Renzaho*, ICTR-97-31-A, Judgement, 1 April 2011 ("*Renzaho* Appeal Judgement"), para. 191 (footnotes omitted)).
[39] ICC-02/05-03/09-189-AnxA. The OTP draws principally on witnesses who were part of AMIS, who were involved in assessing AMIS and who took part in the investigation which followed the attack.

case is impossible given the current security situation and active obstruction by the very government whose actions are the focus of the Defence investigation efforts. This evidence cannot be adequately investigated from outside Sudan, and without accessing, *inter alia,* witnesses and documents from the military and intelligence services.[40]

19. There are further crucial differences between Defence and OTP positions. First, the OTP, in its discretion, chose to proceed against Messrs Banda and Jerbo, notwithstanding the obvious investigative limitations. Messrs Banda and Jerbo have no such choice; they must answer the charges brought against them. Second, Article 67(1) of the Statute sets out rights and minimum guarantees that *"the accused shall be entitled to"*. These rights and minimum guarantees plainly apply to Messrs Banda and Jerbo and not to the OTP.

20. The Defence is also prejudiced by an inequality of arms between the Defence and the legal representatives of victims.[41] Unlike the Defence, the former legal representatives of victims A6046 and A6047 are able to travel to the *locus in quo*.[42] Although the Chamber has now appointed Common Legal Representatives,[43] the former legal representatives may still assist their clients in some capacity outside of the courtroom, or pass information to the Common Legal Representatives. The result is that there are likely to be witnesses at trial from the Haskanita area,[44] whose evidence may be determinative of crucial issues in the case,[45] in circumstances where the Defence have been unable to travel to the area to

[40] The situation is, thus, analogous to the *Tadić* case because the majority of possible Defence witnesses are in Darfur whilst the majority of OTP witnesses are not. See *Tadić* Appeal Judgement, 15 July 1999, para. 55. This Appeal Judgement is discussed more fully below.
[41] The principle of equality of arms applies between all parties and all participants. In the *Abu Garda* case, the Pre-Trial Chamber held that the principle prohibiting anonymous accusations applied not only to witnesses brought by the OTP, but encompassed victims who had been granted anonymity (see ICC-02/05-02/09-136, para. 22). See also *Renzaho* Appeal Judgement, para. 191.
[42] ICC-02/05-03/09-115, para. 14 and ICC-02/05-03/09-228, para. 56.
[43] ICC-02/05-03/09-215.
[44] Legal representatives of victims are entitled to lead evidence at trial, provided the victims' personal interests are affected (see ICC-01/04-01/06-1432, paras. 94–100). Such evidence would likely include the evidence of the victims themselves, said to be from Haskanita (see ICC-02/05-03/09-115, para. 14, ICC-02/05-03/09-228, Annex 3, paras. 6-7, Annex 5, p. 4).
[45] Such evidence may be probative of guilt against the accused (see ICC-01/04-01/06-1432, paras. 93–97). In these circumstances the Defence are doubly prejudiced. Unlike the OTP, these legal representatives have no duty to seek the truth, no duty to investigate exculpatory material and no duty to make disclosure.

investigate their evidence. It is no comfort that this evidence will be led by victims rather than by the OTP.

(6) Absence of Alternative Remedies

21. The Defence have considered a range of alternative approaches to secure the evidence necessary to the proper and full presentation of its case.[46] None are adequate,[47] because none tackle the fundamental problem; the Defence's inability to carry out investigations in Sudan, or to identify, locate and protect witnesses.

22. First, the Defence have discussed protective measures with the Court's Victims and Witnesses Unit ("VWU"). The Defence understand that no local protection is available within Sudan. In the last resort, a witness could be included in the Court's protection programme. But, in order even to be evaluated for this programme, a witness would have to leave Darfur for a third country (without any protection and with this very act exposing them to criminal sanction by the GoS) to be assessed by VWU. If the witness subsequently returned to Darfur, VWU is unable to provide any services in Sudan.[48] As a result, any witnesses who cooperate with the Defence or who choose to testify and return to Sudan, would be left to face the risk of retribution from the GoS entirely on their own.

23. On 6 June 2011 the Defence asked the OTP to facilitate interviews with ten OTP witnesses, in a further attempt to gain access to relevant evidence. Four witnesses told the OTP that they did not wish to be interviewed by the Defence at all, one said that he was unable to agree to an interview at that time and the OTP were unable to contact the remaining five.[49]

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[46] The Defence are cognisant of their obligation to exhaust all available measures to secure witness testimony (see e.g. *Renzaho* Appeal Judgement, para. 216).

[47] E.g. the Defence cannot rely on pre-recorded testimony or witness statements under Rule 68 of the Rules of Procedure and Evidence ("Rules") at trial. The Court has no facilities to pre-record testimony in Darfur. Also, if OTP witnesses give live oral evidence, there would be an inequality of arms if the only way for the Defence to counter that evidence is through pre-recorded evidence or witness statements. See *Hategekimana* Decision, para. 26.

[48] An email from VWU evidencing this statement is attached as confidential Annexure L. Out of an abundance of caution this annexure is classified as confidential as it contains the names of VWU staff members.

[49] The OTP confirmed that it has lost contact with DAR-WWWW-0304, DAR-WWWW-0305, DAR-WWWW-0306 and DAR-WWWW-0312. It is still trying to contact DAR-WWWW-0439. Witnesses DAR-WWWW-

III. The Minimum Guarantees for a Fair Trial cannot be Met

24. The result of the severe restrictions detailed above is that the minimum guarantees required for a fair trial cannot be met. Article 67(1) of the Statute provides:

> *"in the determination of any charge, the accused shall be entitled to [...] a fair hearing conducted impartially, and to the following minimum guarantees in full equality:*
> *[...]*
> *b) to have adequate time and facilities for the preparation of the defence...*
> *e) to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statue [...]"*

25. If any one of these *"minimum guarantees"* cannot be met, a fair trial is impossible.[50] Protection of the right *"to a fair hearing"* may also require the Chamber to exceed the specific terms of Article 67(1).[51] The right to a fair trial also allows the Chamber to take a cumulative view so that a number of encroachments taken together may render a fair hearing impossible.[52]

(1) Article 67(1)(b) "adequate facilities for the preparation of the defence"

26. The minimum guarantee of *"adequate facilities for the preparation of the defence"* grants Messrs Banda and Jerbo the right to all resources and access which are

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0307, DAR-WWWW-0314, DAR-WWWW-0441 and DAR-WWWW-0466 declined to be interviewed by the Defence, and DAR-WWWW-0442 declined to be interviewed at that time. The relevant correspondence is attached as Annexure M.

[50] Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2005) p. 86 "This means that within the rather amorphous provision for the right to a fair trial, there are several, more concrete clear-cut guarantees. If any of these guarantees are not respected, the trial cannot be viewed as having been fair – and any further discussion becomes superfluous."

[51] ICC-01/04-01/06-102, para. 97. See also *Jespers v. Belgium* 27 DR 61, para. 54 "the term minimum clearly shows that the list of rights in paragraph 3 is not exhaustive and that a trial could well not fulfil the general conditions of a fair trial even if the minimum rights guaranteed by paragraph 3 were respected". Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, p. 246 "it [the right to a fair hearing] provides the opportunity for adding other particular right not listed in Article 6 that are considered essential for a fair hearing [...]"

[52] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (Verlag C. H. Beck, München 2008) p. 1253 "The general right to a 'fair hearing' provides defendants with a powerful tool to go beyond the text of the Statute, and to require that the Court's respect for the rights of an accused keep pace with the progressive development of human rights law [...] That the term 'fair hearing' invites the Court to go beyond the precise terms of article 67(1) in appropriate circumstances is confirmed by the reference within the chapeau to 'minimum guarantees'. The term 'fair hearing' also suggests that where individual problems with specific rights set out in article 67 do not, on their own, amount to a violation, the requirement of a fair hearing may allow a cumulative view and lead to the conclusion that there is a breach where there have been a number of apparently minor or less significant encroachments on article 67." *Barbera, Messegue & Jabardo v. Spain,* 10590/83 provides an example of where cumulative problems rendered a trial unfair.

necessary to prepare the defence for trial. This necessarily implies a right to carry out defence investigations at the scene of the alleged crimes.

27. The meaning of *"adequate facilities for the preparation of the Defence"* must be considered in the light of decisions on the meaning of analogous rights by the *ad hoc* tribunals and by regional human rights courts.[53] It is plain from these jurisdictions that this right is not limited to the provision of basic physical facilities like textbooks or computers.[54] Rather, it includes a right to all resources and access that is necessary to prepare for trial.[55] It incorporates a right to organise the defence case in an appropriate way and to place all relevant defence arguments before the court.[56]

28. Further, case law from the Special Court for Sierra Leone ("SCSL") clearly accepts that the right to *"adequate facilities for the preparation of the defence"* encompasses the right to carry out Defence investigations at locations relevant to the alleged crimes. Thus, in *Sesay et al* the SCSL ordered that the Defence be provided with *"a vehicle, to be used for the sole purpose of witness-related trips"* and *"a witness management officer dedicated to finding and locating witnesses"*.[57] The obligation to ensure adequate facilities to investigate at locations crucial to the crimes charged was also recognised in *Taylor*.[58]

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[53] The application and interpretation of Article 67(1)(b) must be consistent with internationally recognised human rights: Article 21(3) of the Statute.

[54] This is evident from the decisions of the regional human rights courts. Thus, the European Court of Human Rights (ECtHR), has recognised that the right to "adequate time and facilities" guaranteed by Article 6(3)(b) of the European Convention on Human Rights applies to diverse situations such as: the State monitoring confidential communications with the accused's lawyer (*Domenchini v Italy* 15943/90) unfair procedural rules (*Hadjianastrassiou v Greece* 12945/87, *Vacher v France* 20368/92) and disclosure (*Natunen v Finland* 21002/04). The Inter-American Court of Human Rights (IACtHR) has recognised that the right to "adequate [...] means for the preparation of his defense" set out in Article 8(2)(c) of the American Charter on Human Rights implies a right to access the case file (*Castillo Petruzzi v Peru* 30 May 1999), the right to know the identity of the judges (*Cantoral-Benavides v Peru* 18 August 2000) and the right to be present when a crucial test was carried out (*Chaparro Alvarez and Lapo Iniguez v Ecuador* 21 November 2007).

[55] See also *Mayzit v. Russia*, ECtHR, 20 January 2005, para. 78 and *Prosecutor v. Taylor*, SCSL-03-1-PT, Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr Taylor's Defence, 23 January 2007 ("*Taylor* Decision"), para. 13.

[56] *Can v. Austria*, European Commission on Human Rights 9300/81, para. 53, Series A Volume 96.

[57] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Defence Application I – Logistical Resources, 24 January 2007.

[58] *Taylor* Decision, paragraphs 17 - 18: The Defence argued that it did not have adequate facilities because it lacked office space or facilities in Monrovia, and, hence, was unable to carry out investigations in Liberia, a location crucial to the investigation of the crimes charged in the indictment. The SCSL rejected the Defence

29. Similarly, at the International Criminal Tribunal for Yugoslavia ("ICTY"), in *Milutinović*[59] the Odjanić defence team argued that their inability to conduct investigations at alleged crime sites in Kosovo interfered with the accused's right to adequate time and facilities for the preparation of his defence.[60] The Trial Chamber rejected these applications on the basis that the efforts made by UNMIK to facilitate investigations in Kosovo were sufficient to provide the defence with adequate facilities. Notably, the current situation in Darfur stands in stark contrast to that in *Milutinović*. Unlike Kosovo in 2006, there is no peace now in Darfur but a situation of active hostilities.[61] Moreover, in contrast to the UNMIK force which was obliged to facilitate defence investigations, there is no international force in Darfur with either the mandate or the capacity to provide protection for Defence investigations.

(2) Article 67(1)(e) "obtain the attendance and examination of witnesses"

30. A fair hearing is rendered impossible if the Defence are unable to obtain the attendance and examination of witnesses because of a government's non-cooperation or interference. In order for the right in Article 67(1)(e) to be practical and effective, it must necessarily imply a right to investigate: without first being able to investigate, and hence to identify and interview witnesses, the Defence would never be able to *"obtain the attendance of witnesses"*.

31. The *ad hoc t*ribunals have consistently held that a fair trial may be impossible where the Defence cannot obtain the attendance of relevant witnesses. Thus, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") held that: *"The Appeals Chambers can conceive of situations where a fair trial is not possible because witnesses crucial to the Defence case refuse to testify due to State*

application on the basis that the Principal Defender had already undertaken *"to facilitate the Defence team to undertake investigations in Liberia as necessary"*.

[59] *Prosecutor v Milutinović et al.*, IT-05-87-T, Decision on Ojdanić Motion for Stay of Proceedings, 9 June 2006; Decision on Second Ojdanić Motion for Stay of Proceedings, 19 October 2006 and Decision on Ojdanić Third Motion for Stay of Proceedings, 27 August 2007.

[60] Article 21(4)(b) of the Statute of the ICTY is also identical to the right enshrined in Article 67(1)(b) of the Statute.

[61] See paragraph 5 above.

interference. In such cases, it is incumbent on the Defence to, first, demonstrate that such interference has in fact taken place and, second, exhaust all available measures to secure the taking of the witness's testimony." [62]

32. In similar terms, the ICTY Appeals Chamber held in *Tadić* that: *"the Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings."*[63]

33. In *Hategekimana,* the ICTR Appeals Chamber confirmed that the accused would not receive a fair trial before the Rwandan national courts where Defence witnesses "may be unwilling to testify for the defence".[64] The Appeals Chamber held that witnesses' unwillingness to testify sufficed to show that the trial would be unfair regardless of whether or not the witnesses' fears were well founded.[65]

34. Article 67(1)(e) necessarily implies a right to investigate. The ICTR has recognised that where the Defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet the witness and assess his testimony.[66] It follows that where the

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[62] *Prosecutor v. Simba*, ICTR-01-76-A, Judgment on Appeal, 27 November 2007, para. 41. This decision is analogous because Article 20(4)(e) of the Statute of the ICTR entitles the accused, as a minimum guarantee *"to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."* The point of principle identified in *Simba* was re-affirmed recently by the ICTR Appeals Chamber in the *Renzaho* Appeal Judgement, para. 196. In this case the appeal was dismissed on the basis that the accused had not demonstrated any prejudice and had failed to exhaust all available measures to secure the taking of the witness's testimony.

[63] *Tadić* Appeal Judgement, para. 55. The Defence argued that the trial was unfair because, whilst many of the Prosecution witnesses resided in co-operative States in the West, witnesses relevant to the Defence resided in the Republika Srpska, which was not co-operating. The appeal failed for two reasons. First, the Defence should not have reserved this point for appeal, but should have applied for a stay. Second, the Trial Chamber had granted the Defence all the assistance that it sought in securing the attendance of witnesses, for example by granting protective measures and admitting written evidence. The Appeals Chamber also suggested *"other measures"* to ensure a fair hearing, including: witness protection measures; taking evidence by video-link or deposition; summonsing witnesses; issuing binding orders and requests for assistance to States. These "other measures" do not assist the Defence in this case (see paragraphs 21 – 23 above).

[64] *Hategekimana* Decision, para. 22.

[65] *Ibid.*

[66] *Prosecutor v. Ndindliyimana et al*, ICTR-2000-56-T, Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute, 7 June 2006, para. 8. The same result was reached in *Prosecutor v. Ngirabatware*, ICTR-99-54, Decision on Defence Motion Requesting an Order Directed at the Togolese Republic, 23 November 2010.

Defence is unable to meet potential witnesses to assess their testimony, no fair hearing is possible.

(3) Article 67(1)(e) "the accused shall also be entitled to [...] present other evidence"

35. International human rights law recognises that a hearing is not fair if important pieces of evidence cannot be adduced. Thus, in *Genie-Lacayo v. Nicaragua,*[67] the IACtHR held that Article 8(1) had been breached in a criminal investigation where that the deceased's clothing had been burnt, relevant vehicles had been sold and a series of military witnesses refused to testify. Further, in *Papageorgiou v. Greece,*[68] the Defendant was accused of using false cheques to withdraw large sums of money. The original cheques were destroyed. The ECtHR concluded that there had not been a fair trial because "essential pieces of evidence were not adequately adduced and discussed at trial in the applicant's presence". Thus, where the Defence is unable to access critical evidence, such as the intelligence records of the GoS, no fair hearing is possible.

IV. Inability of the OTP to fully discharge its Article 54 obligations

36. Within the ICC regime, any investigative difficulties experienced by the Defence should, in part, be ameliorated by the Prosecutor's duty under Article 54(1) of the Statute to investigate incriminating and exonerating circumstances equally and to ensure that such investigations are effective.[69]

37. The obligation to investigate exonerating circumstances equally was deliberately imposed.[70] The Appeals Chamber has explained that the OTP has a positive duty

[67] *Genie-Lacayo v. Nicaragua*, Judgment, 29 January 1997. The case is also interesting in that it concerns the rights of victims and not defendants.
[68] *Papageorgiou v. Greece*, (2004) 38 EHRR 30, 9 May 2003, Application 59506/00.
[69] This duty arises from the combined effect of Article 54(1)(a) and (b) of the Statute. While the Defence would argue that the OTP's Article 54 duties apply at all stages of the investigation, the implication of the OTP's submissions in *Muthaura et al.* is that these duties must be fulfilled by the trial stage of proceedings (see ICC-01/09-02/11-361, paras. 29-31).
[70] The Prosecutor's role is to be contrasted with that of his other international counterparts. However, the Statute's drafters deliberately imposed the obligation to investigate exonerating circumstances in order to redress the imbalance in power and resources which is often experienced by the Defence (see M. Bergsmo P. Krueger, "Duties and Powers of the Prosecutor" pp. 715-725 in Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft, p. 716, para. 2).

to identify information which could be useful for the defence.[71] This Trial Chamber recently directed the Defence to the OTP as a possible source of information material to defence preparation.[72] However, it is clear that because of the GoS' stance towards the Court and the OTP's inability to investigate in Sudan,[73] the OTP has only been able to discharge part of its Article 54 obligations by focussing its investigations on a limited part of the incriminating circumstances of this case without undertaking any investigations into the exonerating circumstances. None of the evidence disclosed to date adequately investigates the many leads from exonerating evidence.

38. The starkest example is the failure of the OTP to properly investigate the activities of the GoS representatives present in MGS Haskanita, or the GoS' use of MGS Haskanita as an intelligence tool in its campaign of violence against the civilian population in Darfur. The OTP has not interviewed any of the GoS representative(s) or their superiors or any of the local civilian personnel who were working in the base and who might have evidence concerning the activities of the GoS representatives or spies in the base. Such interviews should have been the first step in any investigation of exculpatory material.

39. Further, the OTP has been unable to obtain any of the contemporaneous documents produced by the AMIS force at MGS Haskanita which is referred to extensively in the OTP's disclosed evidence.[74] This would assist *inter alia* in establishing what AMIS knew about the GoS representatives' activities in the base, the advice and/or orders given to the force at the MGS Haskanita, the steps AMIS took to address the GoS representatives' activities and the affect the GoS' intelligence and military offensive had on the civilian population in the area. Further, the AU documents will likely provide important information about the

[71] ICC-01/04-01/06-1433, para. 36. See also ICC-01/04-01/06-1486, para. 41.
[72] ICC-02/05-03/09-170, para. 28.
[73] In its response to a request for disclosure the OTP confirmed that it had not visited Haskanita (see confidential Annexure N, classified as such because it contains details of a Defence disclosure request).
[74] See ICC-02/05-03/09-234-Conf-Exp-AnxC, which identifies categories of documents and links these documents to references in disclosed OTP witness statements.

warnings issued by the Movements to AMIS about the GoS representatives' activities.

V. The Chamber may Order a Stay if a Fair Trial is Impossible

40. In these circumstances, this Trial Chamber has the power to grant a temporary stay. The Appeal Chamber has specifically held that:

> *"A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped...* [75]
>
> *"where the breaches of the rights of the accused are such as to make it impossible for him / her to make his / her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed."*[76]

41. The power to stay proceedings in these circumstances flows directly from Article 67(1).[77] The logical corollary of the right to a fair trial is that if a fair trial is not possible, proceedings must be stayed.[78]

42. Trial Chamber I held, upon reviewing the above jurisprudence, that the test for granting a stay of proceedings in the present circumstances is: *"have the accused's rights been breached to the extent that a fair trial has been rendered impossible."*[79] To establish *that a fair trial is impossible, the Defence does not need to produce "clear and convincing evidence"* but need only "properly substantiate" the factual basis for the

[75] ICC-01/04-01/06-772, para. 37.
[76] *Ibid.*, para. 39.
[77] The right to a fair hearing assumes overarching importance in the Statute. Thus, Article 67(1) is supplemented by Article 21(3) which provides that "the application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights [...]" and Article 64(2) which obliges the Trial Chamber to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused". This led the Appeals Chamber to conclude that "human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court." See ICC-01/04-01/06-772, para. 37.
[78] The approach defined by the Appeals Chamber is consistent with internationally recognised human rights, as interpreted by the *ad hoc* Tribunals *Tadić* Appeals Judgement, para. 58: "the Appeals Chamber said that it could *"conceive of situations where a fair trial is not possible [...] In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings."* It is also consistent with national law, which the Court may take into account pursuant to Article 21(1)(c). In England, the power to stay criminal proceedings can be exercised in two circumstances: where the court concludes that the defendant cannot receive a fair trial and where the court concludes that it would be unfair for the defendant to be tried: *R v Beckford* (1996) 1 Cr App Rep 94; *R (Ebrahim) v Feltham Magistrates Court* (2001) 1 WLR 1293. In Canada, criminal proceedings may be stayed pursuant to section 24(1) of the Canadian Charter of Rights, where the Defendant's right to make full answer and defence is violated: *R v Jewitt* [1985] 2 SCR 128; *R v Carosella* [1997] 1 SCR 80. In Scotland, where an accused is subject to such prejudice that he will not obtain a fair trial, he may make a plea of oppression in bar of trial: *Mitchell v Her Majesty's Advocate* 2003 JC 89. In the USA, a stay of proceedings may be available where due process rights are violated: *California v Trombetta* 467 US 479 (1984).
[79] ICC-01/04-01/06-2690-Red2, para. 166.

application.[80]

43. Where no other remedy exists, it is the duty of the Defence to make this application now rather than proceeding through a flawed trial and reserving the issue for appeal.[81]

VI. No Fair Trial is Currently Possible and a Temporary Stay is Required

44. The Defence do not make this Application for a temporary stay lightly. Messrs Banda and Jerbo voluntarily surrendered from a country which refuses, indeed criminalises, all cooperation with the ICC. In this situation, Messrs Banda and Jerbo's recognition of the Court should not place them at a disadvantage. Their willingness to submit to the Court's jurisdiction is predicated on the understanding that they will be given a fair trial. Such a trial should allow them adequate facilities to investigate and to obtain the attendance of witnesses in order to present the reality of what is happening in Darfur and an explanation of why MGS Haskanita was attacked. Neither is possible, due to the present situation in Darfur. Messrs Banda and Jerbo's fair trial rights must be no less than those accorded to any other accused before this Court[82]. The Court must be vigilant to see that their right to a fair trial is respected, rather than forcing them to submit to flawed proceedings simply because of the non-cooperation of the government whose actions are the true cause of the loss of life at the AMIS base.

45. This unique and exceptional situation necessitates this "drastic" and "exceptional remedy".[83] Other accused in the same conflict, those from the GoS, such as President Al-Bashir, do not share the same constraints, as they obviously have access to Sudan, witnesses in Sudan and records of the GoS. Even counsel

[80] *Ibid*, para. 169.
[81] E.g. *Tadić* Appeal Judgement, para. 55: "The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial de novo, as the Defence seeks to do in this case."
[82] The Defence note that in other cases before the Court, the defence have called a similar number of witnesses to the Prosecutor in order to rigorously contest the charges. In *Lubanga*, ICC-01/04-01/06-T-236-Red, p. 23, line 1 to 24), the defence were able to call 19 witnesses compared to 28 called by the Prosecutor. Similarly in *Katanga*, the Defence understand that the Prosecutor called 26 witnesses compared to 17 for Katanga defence team and 8 for Ngudjolo (ICC-01/04-01/07-2057-Conf, 11 March 2011, ICC-01/04-01/07-2057-Red, para. 3).
[83] ICC-01/04-01/06-2582, para. 55.

instructed by the Sudan trade union group (SWTUF) to represent victims on this case have access to Sudan, unlike the Defence.[84]

46. Further, there is no lesser remedy that can ensure that Messrs Banda and Jerbo receive a fair trial.[85] The Defence append as Annexure O to this filing a letter in support of the Defence Application from Hon. Richard J. Goldstone.[86] However, the Defence do not seek to terminate proceedings through a permanent stay. Rather, Mr Banda and Mr Jerbo hope that the political and security situation in Darfur and other parts of Sudan will improve. Therefore, a temporary stay is appropriate, with regular review of the situation to determine when the Defence can properly exercise its rights so that the stay may be lifted.

47. Accordingly, on the basis of the above submissions, the Defence invite the Chamber to stay proceedings until such time as the minimum guarantees of a fair trial can be met, the Prosecutor is able to fully discharge his Article 54 duties, and this Trial Chamber is able to determine the truth.

Respectfully Submitted,

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Dated this 6th Day of January 2012
At The Hague, Netherlands

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[84] As discussed above, the prejudice to the Accused caused by the inability of their Defence team to go to Sudan is further amplified by the fact legal representatives of two of the victims in this case, Messrs. Nice and Dixon, have been able to travel to Haskanita. The link between Messrs. Nice and Dixon and the GoS is made clear by ICC-02/05-03/09-228-ANN4, para. 8: "SWTUF is close to the Government of Sudan".

[85] As Trial Chamber I observed "this undoubtedly drastic remedy is to be reserved strictly for those cases that necessitate, on careful analysis, taking the extreme and exceptional step of terminating the proceedings (as opposed to adopting some lesser remedy)." See ICC-01/04-01/06-2690-Red2, para. 168.

[86] Justice Goldstone is a Justice of the Constitutional Court of South Africa (Retired) and former Prosecutor of the ICTY and ICTR.