ANNEX A

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-03/09**
Date: **20 February 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
***Amicus Curiae* Brief**
Of
The Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia
On
Defence Request for a Temporary Stay of Proceedings

Sources: **Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia**

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

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I. Introduction

1. The issue before the Trial Chamber in this case is whether to invoke the extraordinary measure of staying the trial proceedings because current circumstances make it impossible for the Defence to conduct a pre-trial investigation within the territorial boundaries of Sudan, the *locus in quo* of the crimes charged against the Accused.[1]

2. The Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY) submits that an independent, competent and thorough pre-trial investigation by the Defence is pre-requisite to ensuring that the Accused right to a fair trial will be protected at the time of trial.

3. The Request for a Stay of the trial proceedings is an appropriate remedy given the unique facts of this case, as known to the ADC-ICTY. Those facts reflect that the Defence is presently foreclosed from conducting a pre-trial investigation in Sudan and that Sudan has made any cooperation with this Court, including with representatives of the Accused, a criminal offense.[2]

II. An independent and thorough pre-trial Defence investigation is essential to protect the right of the Accused to a fair trial

4. An independent, thorough pre-trial investigation by the Defence in a criminal case is essential to preserve the Accused right to a fair trial. The fact that the Prosecution has investigated the case, identified and selected witnesses, and gathered other forms of evidence which may be disclosed to the Accused does not obviate the need for a full and independent Defence investigation.

[1] *Prosecutor v Abdallah Banda Abakaer Nourian*, ICC-02/05-03/09, Defence Request for a Temporary Stay of Proceedings, 6 January 2012, paras 1-3 [hereinafter "Defence Stay Request"].
[2] Defence Stay Request, para 2.

5. Proceedings at the ICTY and ICC comprise a *sui generis* mix of both civil and common law traditions.[3] The pre-trial investigation of a case and the trial process itself are conducted in large part in a fashion comparable to common law, adversarial systems. Specifically, the parties are expected to investigate their own cases and to offer in evidence documentary or other evidence in support of their own cases. Witnesses may be called by both parties at trial and may be examined by both parties.[4]

6. The ICC (like the ICTY) has not adopted and does not follow the system found in many civil law jurisdictions of having a dossier for use at trial which was prepared by a *neutral* judicial officer required to seek out exculpatory and inculpatory evidence with equal determination, and who is expected not to favour either the Prosecution or the Defence.[5]

7. To the contrary, pre-trial investigations conducted at the ICTY and ICC are party-driven. Although the Prosecution at the ICC is required to investigate exculpatory as well as inculpatory evidence during its investigations,[6] the Prosecution is not in the position to anticipate the Defence case or to investigate potential defences on behalf of the Accused, nor would that be in keeping with the proper function of the Prosecution. Hence, competent Defence preparation for trial cannot depend solely on the Prosecution's pre-trial investigation and disclosure.[7] The duty to investigate the case for the Accused lies with the Accused.

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[3] See e.g. *Prosecutor v Blaskic*, IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay With No Inquiry as to its Reliability, 21 January 1998, para 5.

[4] ICC RPE rule 140(2)(a) and (b); ICTY Rule 85(A). The Trial Chamber may also question witnesses during trial. ICC RPE rule 140(2)(c); ICTY RPE rule 85(B).

[5] See *Prosecutor v. Slobodan Milosevic*, IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, 21 October 2003, para 6. And see "Disclosure of Evidence" K Gibson and C Lussiaa-Berdou, in K Kahn, C Buisman, C Gosnel *Principles of Evidence in International Criminal Justice* (Oxford Univ. Press 2010), pgs 307-312.

[6] Rome Statute, Article 54(1)(a). A similar rule does not exist at the ICTY, however Rule 68 of the ICTY-RPE requires disclosure of any exculpatory evidence which comes into the actual possession of the Prosecution "as soon as practicable."

[7] Any Defence counsel who relied solely on Prosecution disclosure in preparing for trial and conducted no independent investigation of the underlying facts of a case may well be in violation of counsel's ethical obligation to represent the Accused competently and independently. See ICC-ASP/4 Res.1 Code of Professional Conduct for Counsel (adopted 2 December2005), Article 6 [counsel must act independently];

8. The substance of the Defence case is also a matter for the Defence to decide, not the Prosecution. In some instances the factual basis for potential challenges to the Prosecution case or for affirmative defences will be uniquely within the knowledge of the Accused. A thorough Defence investigation, independent of and in addition to that conducted by the Prosecution, is key to the proper and adequate preparation of the Defence case for trial and to the competent representation of the Accused.[8]

9. The broad purpose of the Defence investigation is to provide the Defence with the information it needs to insure the Accused's right to a fair trial is protected. An adequate defence investigation, therefore, may include a variety of activities, depending on the specific facts and circumstances of any given case. Certain essentials arise, however, in virtually all criminal cases tried in the international courts.

10. Review of information disclosed by the Prosecution under the applicable disclosure rules including witness statements, the identities of potential witnesses, documentary evidence, physical evidence and expert reports is the starting point for the Defence investigation. It is essential for the Defence to independently investigate the validity, credibility and accuracy of this Prosecution disclosure.[9]

11. The Defence must also have the opportunity to identify, locate and interview witnesses of its own whose testimony may be of importance to challenging Prosecution witnesses and/or presenting the Accused view of the charged events.[10]

Article 7(2) [professional conduct of counsel includes acting with a "high level of competence"]; ICTY Code of Professional Conduct for Counsel Appearing Before the International Tribunal (as amended 22 July 2009) Article 10 [counsel must act with competence, integrity and independence].

[8] See, *Manual on International Criminal Defence ADC-ICTY Developed Practices* (UNICRI, ADC-ICTY, OSCE-ODIHR 2011), Chapter IV, "Defence Investigations" by S Zecevic and T Savic, pg. 61. [Hereinafter "*ADC Manual* ". The *ADC Manual* is available in electronic form at http://wcjp.unicri.it/deliverables/manual.php]

[9] *ADC-ICTY Manual*, Chapter IV, pg. 59.

[10] *ADC-ICTY Manual*, Chapter IV, "Defence Investigations," pg. 55.

It would be incompetent for defence counsel to simply accept the Prosecution evidence on its face, relying on the statutory provision that the Prosecution investigate both inculpatory and exculpatory evidence, without conducting any independent investigation of its own.

12. As recently emphasized by the Confirmation Chamber in the *Mbarushimana* case:

> ". . . the Chamber wishes to highlight its concern at the technique followed in several instances by some Prosecution investigators, which seems utterly inappropriate when viewed in light of the objective, set out in article 54(1)(a) of the Statute, to establish the truth by 'investigating incriminating and exonerating circumstances equally.' The reader of the transcripts of interviews is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations. Suggesting that the witness may not be 'really remembering exactly what was said,' complaining about having 'to milk out' from the witness details which are of relevance to the investigation, lamenting that the witness does not 'really understand what is important' to the investigators in the case, or hinting at the fact that the witness may be 'trying to cover' for the Suspect, seem hardly reconcilable with a professional and impartial technique of witness questioning. Accordingly, the Chamber cannot refrain from deprecating such techniques and from highlighting that, as a consequence, the probative value of evidence obtained by these means may be significantly weakened."[11]

13. Similar concerns have arisen at the ICTY regarding Prosecution witness statements. In the *Milutinovic et al* case, for example, the Trial Chamber denied a Prosecution request that certain witness statements, prepared by the Prosecution during its investigation, be admitted in evidence solely in written form. The witnesses were subsequently called to testify in person. The Trial Chamber observed:

[11] See *Situation in the Democratic Republic of Congo in the Case of Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, para 51.

> "Trial Chamber**:** Well, can I say that the first reason strikes me as extraordinarily naïve because one thing that's absolutely clear from the way in which this case has been conducted so far is that there could have been the grossest miscarriage of justice if these witnesses had not been available for cross-examination.
>
> "Prosecutor**:** Your Honour, I understand your point. But I indicate to you it's not naïve on my part based on the experience in the other cases that I worked on in the Tribunal.
>
> "Trial Chamber: Well, all that's happened through – well, one thing that's become clear through cross-examination is that it was necessary. I shudder to think what might have happened without that opportunity being available."[12]

14. The ability to effectively test Prosecution evidence, and thereby protect the Accused right to a fair trial, pre-supposes the realistic opportunity for the Defence to fully investigate the case pre-trial. As pointed out by the ICTY Trial Chamber in *Delalic et al*:

> "In any criminal trial the testimony and examination of witnesses constitutes a crucial element of the case for both the Prosecution and the Defence. . . . Recognising the critical nature of witness testimony to the accused person, Article 21(4)(e) provides for witness examination as one of the minimum guarantees for a fair trial.
>
> ". . . The basic right of the accused to examine witnesses, read in conjunction with the right to have adequate time for the preparation of his defence, therefore envisages more than a blind confrontation in the courtroom. A proper in-court examination depends upon a prior out of court investigation. . . ."[13]

15. A Defence investigation may also require identifying and obtaining archival and other documents such as military orders, journals, daily duty logs and similar governmental and/or military archives. This type of investigation frequently requires travel to the *locus in quo* when the documents are located there and/or the cooperation of the appropriate

[12] *Prosecutor v. Milutinovic et. al., Case No. IT*-05-87-T, Trial Proceedings of 31 August 2006, pgs 2674-2675.

[13] *Prosecutor v Delalic et al*, IT-96-21-T, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses (D3130-D3122), 18 March 1997, paras 13; 19.

governmental entity in order to obtain permission to review and/or obtain copies of such records.[14]

16. In some instances the Prosecution case includes scientific evidence such as ballistics, DNA, fingerprint or handwriting analysis or other kinds of specialized evidence. In such cases a competent Defence investigation will necessarily require identifying and working with appropriate Defence experts who are qualified to evaluate the reliability of expert reports and conclusions. This may include, when necessary, experts able to travel to the scene of the charged crimes to investigate and evaluate physical evidence located at the scene .[15]

17. It is routine practice for defence investigations to include visits to the scene(s) of the crimes charged in any event, not only to locate potential witnesses but to examine the topography and physical layout of the scene(s) as a means of testing witness accuracy and credibility, eye-witness accounts, expert conclusions and other matters which may comprise part of the Prosecution evidence at trial.

18. In fact site visits are also "standard procedure" for Trial Chambers at the ICTY to enable them to gain needed insight regarding the scenes of the charged events as one means of acquiring an accurate understanding of the evidence produced at trial, including the credibility of witnesses. As explained by an ICTY spokesperson:

> "The site visit is a standard procedure at the ICTY. In general site visits are conducted by a Trial Chamber in order to get a proper impression—*which cannot be gained from photographs and videos*—of a geographic area in which the crimes are alleged to have been committed."[16]

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[14] *ADC Manual*, Chapter IV, "Defence Investigations," pg 60.

[15] *ADC Manual*, Chapter IV, "Defence Investigations," pg 58 ["Identifying and Working with Expert Witnesses"] and Chapter VII, "Witnesses," pgs 103-107 ["Expert Witnesses"].

[16] See http://www.rnw.nl/international-justice/article/karadzic-icty-line-fire [emphasis added]

19. This practice underlines the importance of the Defence having the opportunity to conduct similar visits for like purposes, prior to trial, as part of a competent investigation of the merits of the Prosecution case or a potential defence.[17] This is of particular importance when Defence counsel must be prepared to conduct adequate and competent examinations of witnesses who are from the geographic area or territory in question and/or are themselves familiar with the *locus in quo.*

20. It is also critical when the facts known to counsel indicate the existence of a potential affirmative defence and the witnesses or other evidence in support of such defences are located at the *locus in quo*.

21. Finally, the fact that a thorough pre-trial Defence investigation--including access to the *locus in quo*--has occurred, significantly contributes to the efficient conduct of trial as well as the truth-seeking function of the trial process itself. It is indispensable to providing the Accused with a fair trial.

III. Remedial measures must be taken when the Defence is unable to conduct an adequate and independent investigation of the case prior to trial

22. The Rome Statute provides that a trial shall be "fair and expeditious" and "conducted with full respect for the rights of the accused."[18] To that end

[17] See, e.g. *Prosecutor v Karadzic,* IT-95-5/18-T, Decision on Site Visit, 28 January 2011, para 12 ["The purpose of the site visit will be to provide the Chamber with the opportunity to observe certain landmarks and locations referred to in the Indictment in order to get a tridimensional and first-hand impression of these locations and of the general geography and topography of the area."]; *Prosecutor v Perisic*, IT-04-81-T, Order on Site Visit With Annex Containing Rules of Procedure and Conduct During Site Visit, 21 May 2009",pg 2 ["it would be of assistance to the Trial Chamber to conduct a site visit, together with the Parties, to locations relevant to the present case in order to gain a better understanding of the facts at issue."]; *Prosecutor v Brdjanin*, IT-99-36-T, Judgement, 1 September 2004, paras, 45; 53-54 [describing extensive site visit undertaken by the Trial Chamber to all locations charged in the Indictment and pointing out that "the site visit to several locations charged in the Indictment has enabled the Trial Chamber to assess better the terrain, locations, distances and other topological aspects."]; *Prosecutor v Blagojevic and Jokic*, IT-02-60-T, Judgement, Annex Two: Procedural History, 17 January 2005, para 910 [Trial Chamber conducted on-siste visit to various locations in Srebrenica, Bratunac and Zvornik municipalities "to assist the Trial Chamber in familiarising itself with the sites mentioned in the Indictment and during the trial."]

[18] Rome Statute, Article 64(2).

the Rome Statute provides the following minimum guarantees, among others, to all Accused:[19]

(a) To have adequate time and facilities for the preparation of the defence.[20]

(b) 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 Statute."[21]

23. The right to present evidence clearly triggers the corollary right to investigate so as to obtain such evidence. Similarly the right to obtain the attendance and examination of witnesses on behalf of the Accused presumes the ability to independently identify such witnesses and obtain their statements.

24. The dilemma in this case is a fundamental one; central to the proper administration of justice. The Accused rights under Article 67(1) cannot be protected and enforced--as they must be--when it is impossible for the Defence to conduct an adequate, independent pre-trial investigation on behalf of the Accused for the reasons set forth in the Defence Stay Request.[22]

25. The circumstances in this case are unique and extreme. The Defence request for a Stay, until those circumstances change enough to permit the

[19] Rome Statute, Article 67(1).

[20] Rome Statute, Article 67(1)(b). And see Article 14(3) of the International Covenant of Civil and Political Rights [the Accused shall have "adequate time and facilities for the preparation of his defence"]; Article 6(3) of the European Convention on Human Rights [Accused entitled to have "adequate time and facilities for the preparation of his defence . . . ."]

[21] Rome Statute, Article 67(1)(e). And see Article 14(3) ICCPR [Accused will have the right to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"]; ECHR Article 6(3) [all Accused are entitled to "examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."]

[22] Defence Stay Request, paras 1-5; 9; 12-14.

Defence to perform its proper function, is both reasonable and in conformance with this Court's obligation to protect the Accused right to a fair trial. Trial Chambers have, in fact, granted temporary stays as a means to protect the Accused right to a fair trial in a variety of situations, far less egregious than that presented in this case.

26. In *Prosecutor v Krajisnik,* for example, the Trial Chamber granted a temporary adjournment of proceedings and reduced the pace of the trial thereafter to compensate for the fact that there had been a change in Defence counsel, as a means to avoid prejudice to the Accused as a result of that change.[23]

27. Stays have been granted before trial as well as mid-trial when large amounts of new prosecution disclosure or the failure of the prosecution to timely disclose evidence in its possession could result in prejudice to the Accused ability to have the time and facilities to present his or her case or the Accused ability to be prepared to effectively cross-examine Prosecution witnesses.[24]

28. As one Trial Chamber held: "It is undoubtedly the case that a Chamber has the power to stay the proceedings in a case where the circumstances are such that a fair trial for the accused is impossible."[25]

29. A fair trial is impossible when the Defence, through no fault of its own, cannot conduct a thorough pre-trial investigation because it has been denied physical access to the place where the charged crimes are alleged

[23] *Prosecutor v Krajisnik*, IT-00-39-A, Appeal Judgement, 17 March 2009, para 47.
[24] See e.g. *Prosecutor v Karadzic*, IT-95-5/18-T, Decision on Accused's Motion for Fifth Suspension of Proceedings, 17 March 2011, para 9 [court suspended on-going trial proceedings for 6 to 8 weeks to provide Accused with reasonable opportunity to review large amount of newly disclosed Prosecution evidence]; *Prosecutor v Delalic et al*, IT-96-21-T, Decision on Application for Adjournment of the Trial Date, 3 February 1997 [trial date adjourned for 6 weeks due to Prosecution failiure to comply with its disclosure obligations and need for Accused to review that evidence]; *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, para 37; 39 [proceedings adjourned where circumnstances exist which make it impossible to piece together the constituent elements of a fair trial].
[25] *Prosecutor v Karadzic*, IT-95-5/18-T, Decision on Motion for Stay of Proceedings, 8 April 2010, para 4.

to have taken place.[26] It is also impossible when the Defence is prevented from identifying, interviewing or calling key witnesses due to the obstructionist efforts of a State,[27] or due to State interference.[28]

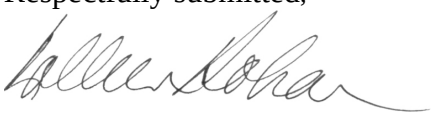
IV. Conclusion

30. It is for the Trial Chamber "to ensure that the trial is conducted in a manner that is fair to the Accused," having regard to all the circumstances of the case.[29] In light of that obligation it is well within the proper exercise of this Trial Chamber's discretion and authority to grant a stay of the trial proceedings when, as here, the Sudanese government has criminalized any cooperation with this Court including with representatives of the Accused, and when the Defence has been entirely precluded from conducting any independent investigation at the *locus in quo* because Sudan has denied it entry onto its territory.

31. The ADC-ICTY submits the temporary stay requested in this case is a reasonable, fair remedy to the problem posed in this case. It adopts an observation once made by Judge Patricia M. Wald: "A vigorous, un-intimidated, knowledgeable defence is the *sine qua non* of a fair trial.[30]

[26] See e.g. *Prosecutor v Milutinovic et al*, IT-05-87-T, Decision on Ojdanic Motion for Stay of Proceedings, 9 June 2006 [finding affirmative governmental cooperation in ensuring security and facilitating future visits did not make it impossible for the Accused to conduct future investigations at the scene of the charged crimes].
[27] *Prosecutor v Tadic*, IT-94-1-A, Appeal Judgement, 15 July 1999 [a fair trial is not possible where witnesses central to the defence case do not appear due to the obstructionist efforts of a State].
[28] *Aloys Simba v Prosecutor*, ICTR-01-76-A, Appeal Judgement, 27 November 2007, para 41 [fair trial is not possible when witnesses crucial to the Defence refuse to testify due to State interference].
[29] *Prosecutor v Milutinovic et al*, IT-05-87-PT, Decision on Ojdanic Motion for Stay of Proceedings, 9 June 2006, para 5.
[30] Patricia M. Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court' (2001) 5 *J of L and Policy* 87, 102

Respectfully submitted,



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Before the International Criminal Tribunal
For the Former Yugoslavia
On Behalf of the ADC-ICTY

Dated this 20th Day of February 2012

At The Hague, Netherlands