

**Cour
Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER IV

Before:

**Judge Joyce Aluoch, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Silvia Fernández de Gurmendi**

SITUATION IN THE DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR*

v.

ABDALLAH BANDA ABAKAER NOURAIN

&

SALEH MOHAMMED JERBO JAMUS

**Public Redacted Version of
“Prosecution’s Response to the “Defence Request for a Temporary Stay of
Proceedings” and to the “Defence Request for an Oral Hearing””, filed on 30
January 2012**

Sources: Office of the Prosecutor

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

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Introduction

The Prosecution hereby opposes the “Defence Request for a Temporary Stay of Proceedings”¹ (“Defence Request”) and, pursuant to a Trial Chamber IV (“Chamber”) order², to the “Defence Request for an Oral Hearing”.³

Pursuant to the parties’ agreement on facts,⁴ accepted by the Chamber,⁵ there are only three contested issues to be resolved at trial: whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations; whether the attack on the MGS Haskanita on 29 September 2007 was an unlawful attack on a protected peacekeeping mission; and if unlawful, whether the Accused persons were aware of the factual circumstances that established its unlawful nature. The agreement removes from the contested issues at trial the attack itself and the involvement of the two Accused persons. The Defence argument that it is unable to investigate and prepare must be viewed against the backdrop of this focused case and the limited issues that, pursuant to its own agreement, are to be proved at trial.

When properly viewed, the Defence claim that it is unfair to require it to proceed to trial because of its inability to investigate is excessive. Before the Chamber can determine that the Defence is irreparably prejudiced in its inability to obtain this evidence – and thus that the trial must be stayed -- it must determine that the evidence is relevant to the limited trial issues to which the parties and Chamber have already agreed. In the Prosecution’s view, to the extent that the desired evidence has been identified, it does not meet that test.

¹ ICC-02/05-03/09-274 + Anxs + Conf-Anxs + Conf-Exp-Anxs.

² Email communication by a Legal Officer of the Trial Chamber IV to the parties and participants dated 19 January 2012 at 18:36 hours.

³ ICC-02/05-03/09-280.

⁴ ICC-02/05-03/09-148.

⁵ ICC-02/05-03/09-227.

Moreover, the Defence Request reveals that Defence *have* been able to locate, meet with and interview potential witnesses,⁶ notwithstanding the difficulties in conducting investigative activities, including in the Sudan and Chad.

The record also reflects that the Defence has not exhausted international legal assistance or its own potential investigative leads. For example, it is unreasonable to stay the trial because requests made in late December 2011 did not produce results by early January 2012. The Defence also has apparently not pursued other possible measures. For example, it abandoned an effort to question witnesses because the process took longer than expected. And it has not asked the Chamber to request cooperation from the Government of Chad, and after the Chamber rejected its initial request for a similar request to the Government of the Sudan (GoS),⁷ as speculative and lacking the specificity required by the Rome Statute⁸ (“Statute”), the Defence did not apparently submit a more carefully tailored request.

I. Procedural History

1. The Pre-Trial Chamber issued summonses to the two Accused persons on 27 August 2009. The Pre-Trial Chamber confirmed all the charges on 7 March 2011.
2. On 10 November 2010, more than 14 months ago, the Defence requested the Chamber to seek the cooperation of the GoS to (a) grant visas to the defence team; (b) allow the defence team access to a number of named locations; and (c) permit defence investigations unhindered by the GoS.⁹ The Prosecution responded on 16 November 2010, noting the publicly declared refusal by the GoS to cooperate with the Court and suggesting alternatives to the Defence for accessing witnesses and collecting evidence, such as using local lawyers, investigators and interpreters, and identifying potential witnesses who can be interviewed outside of the Sudan.¹⁰

⁶ See paragraphs 9, 10 and 15 of Defence Request and Annexure J and *Ex Parte* Annexures F, G and H.

⁷ ICC-02/05-03/09-145.

⁸ ICC-02/05-03/09-169, paras 31-32.

⁹ ICC-02/05-03/09-95, pages 3-4.

¹⁰ ICC-02/05-03/09-101, para 9-12.

3. On 11 May 2011, the Defence again requested the Chamber to seek the cooperation of the GoS pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, reiterating the specific requests it made on 10 November.¹¹ On the same date, the Defence also requested the Chamber to seek the cooperation of the African Union (“AU”),¹² for its access to purportedly essential information and documents.¹³
4. On 1 July 2011, the Chamber denied the Defence request regarding the GoS, finding that the Defence sought to undertake an “open-ended expedition” in order to find out whether there might be something potentially useful to the defence case.¹⁴ The Chamber also decided that only some of the documents that the Defence sought to obtain from the AU met the requirement of specificity and relevance,¹⁵ but even as to those it held that the Defence should first attempt to obtain the documents from the Prosecution before seeking the Court’s assistance.¹⁶
5. On 19 July 2011, the Defence asked the Prosecution for disclosure of (i) general materials, (ii) materials from the AU, (iii) [REDACTED].¹⁷
6. On 30 August the Prosecution disclosed some materials under category (i) and explained that its review regarding the requested items was still ongoing.¹⁸ With regards to category (ii), the Prosecution informed the Defence that it had identified certain materials that potentially fall under this category, but that an application needed to be made to the Chamber regarding relevance of some of them.¹⁹ With regards to category (iii), [REDACTED].²⁰

¹¹ ICC-02/05-03/09-145.

¹² ICC-02/05-03/09-146.

¹³ ICC-02/05-03/09-146, paras 29-32.

¹⁴ ICC-02/05-03/09-169, para 22.

¹⁵ ICC-02/05-03/09-170, paras 20-24.

¹⁶ ICC-02/05-03/09-170, paras 20-28.

¹⁷ Ref: D-AB/2011/18; D-SJ/2011/19, pages 1- 3.

¹⁸ Email communication from the Legal Assistant of the Office of the Prosecutor sent on 2 September 2011 at 18:44 hours.

¹⁹ Email communication from the Case Manager of the Office of the Prosecutor sent on 29 August 2011 at 17:59 hours.

²⁰ Email communication from the Legal Assistant of the Office of the Prosecutor sent on 2 September 2011 at 18:44 hours.

7. On 20 October 2011 the Defence again requested the Chamber to seek the cooperation of the AU, stating that it had exhausted all available steps to obtain the documents it sought.²¹ On 21 December, during the Court recess, the Chamber granted the Defence application for most of the documents sought and ordered the Registrar to transmit the requisite cooperation request to the AU.²²

II. Prosecution Submissions

(a) Appropriateness of a Temporary Stay of Proceedings

8. On 6 January 2012, slightly over two weeks after the Chamber granted the Defence's last application, the Defence applied for a temporary stay until such time as the minimum guarantees of a fair trial can be met, the Prosecution is able to fully discharge its duties under Article 54, and the Chamber is able to determine the truth. The Defence argues, *inter alia*, that current circumstances make it impossible for the Accused to present an effective defence due to the impossibility to investigate in Sudan, the problems and dangers of interviewing witnesses in third countries, the deaths of witnesses and the inability to access documents from sources such as the AU.²³
9. In this Court, a stay of proceedings is to be applied only when the rights of an accused have been irreparably violated and a fair trial has been irremediably compromised.²⁴ The defence has not shown that there exist – and will exist at trial -- “breaches of the rights of the accused”, much less that these purported breaches “are such as to make it impossible for him/her to make his/her defence within the framework of his rights”,²⁵ and consequently that “no fair trial can take place”.²⁶ The Defence Request does not demonstrate an irreparable infringement of the rights of the Accused persons to investigate and offer evidence in their defence (rights stipulated in Article 67(1) of the Rome Statute (Statute)).

²¹ ICC-02/05-03/09-234

²² ICC-02/05-03/09-268-Red, paras 25-30 and pages 12-13.

²³ ICC-02/05-03/09-274.

²⁴ ICC-01/04-01/06-1401, para. 91; ICC-01/04-01/06-1486, para. 75; ICC-01/04-01/06-2582, para. 61.

²⁵ ICC-01/04-01/06-772, paragraph 39.

²⁶ *Ibid.*

10. The Prosecution also notes that the challenges cited by the Defence can be adequately resolved through other measures. The Defence has been slow to make alternative efforts, it has not shown that it has exhausted all other means to obtain the information sought, and it has not shown that the information it seeks is necessary to the fair trial rights of the Accused. Accordingly, the remedy it seeks is premature, excessive and unjustified. For that reason, the Defence Request should be denied.

(b) The Rights of the Accused Persons Have Not Been Violated

11. Contrary to the Defence assertion, none of the rights of the Accused persons identified under Article 67(1) of the Statute - specifically the rights contained in Article 67(1)(b) and (e) - have yet been violated or frustrated. Even assuming that the evidence the Defence claims it is unable to secure is relevant to the narrowed issues at trial, it is clearly premature to conclude that a fair trial will be impossible. Instead, that finding can only be made at the end of the trial (or at a minimum at the end of the Prosecution's case), not before its commencement. If there was unavailable essential evidence that the Defence could not have procured if it had acted with greater diligence, the Chamber then will be in a position to determine whether, and what, remedies might compensate. None of these determinations can be made now: only afterward can the Chamber assess "*whether the proceedings in issue, considered as a whole, were fair*"²⁷ or, contrarily, whether it is "*impossible to piece together the constituent elements of a fair trial.*"²⁸ An application to stay proceedings requires a showing that the individual minimum guarantees – but perhaps not any one of the "minimum guarantees", as the Defence argues²⁹ -- enshrined in Article 67(1)

²⁷ *Vidal v. Belgium*, Judgment of 22 April 1992, § 33, see also application of the principle in paras 34-35; *Krempovskij v Lithuania*, Third Section Decision as to the Admissibility of Application no. 37193/97, 1999, para. 7; Decision as to the Admissibility of Application No. 48297/99 by Audrius Butkevičius against Lithuania, para. 13. See also cases regarding the evidence obtained in violation of rights of the accused: *Case of Jalloh v. Germany*, Application no. 54810/00, Judgment of 11 July 2006, para. 95; *Case of Khan v. The United Kingdom*, Application no. 35394/97, Judgment of 12 May 2000 (final 04/10/2000), para. 34; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX, para. 76

²⁸ ICC-01/04-01/06-2582, para. 55 referring to ICC-01/04-01/06-772, para. 39; see also ICC-01/04-01/06-2582, para. 57.

²⁹ See Defence Request, para. 25: "*If any of these 'minimum guarantees' cannot be met, a fair trial is impossible.*"

of the Statute were restricted to such an extent that the fair trial is no longer possible. The Accused have not met that burden.³⁰

12. Even if there were merit to the Defence argument that the Accused persons' fair trial rights have already been violated by their inability thus far to secure evidence, only unfairness that cannot be resolved, rectified or corrected will trigger a stay of proceeding.³¹ A finding of that level of unfairness with respect to the purported inability to investigate or call defence evidence cannot confidently be made without a trial record. Once there is a record, the Chamber can determine what evidence was available, what evidence might have been available had the Defence acted with greater diligence, and what evidence is unavailable. As the Court explained in *Lubanga*, "the suggested breaches of the accused's rights [...] of the Statute would not constitute such a serious violation of the statutory safeguards as to make his trial *ipso facto* unfair. The Chamber is persuaded that it will be able, at the end of the case, to review in detail the instances in which it is suggested the prosecution failed in its duty to ensure that it was submitting reliable evidence".³²

(i) Article 67(1)(b) right to "have adequate time and facilities for the preparation of the defence"

13. The Defence has been able to prepare for this case for many months. The charges were confirmed on 7 March 2011.³³ There is, accordingly, no issue of a lack of time. If there were, however, the remedy is not a stay of proceedings, but delay of the start of trial.
14. Nor have the Accused Persons established that it lacks adequate facilities for the preparation of the defence.

³⁰ *R v. Telford Justices, ex parte Badhan* [1991] 2 QB 78

³¹ ICC-01/04-01/10-264, page 5 referring to ICC-01/04-01/06-2582, para. 55

³² ICC-01/04-01/06-2690-Red2, para. 204

³³ ICC-02/05-03/09-121-Conf-Corr

15. In support of their claim, the Defence first identifies the absence of access to the “scene of the alleged crimes” and other unspecified “locations crucial to the crimes charged”³⁴ as justification for its assertion that the minimum guarantees for a fair trial cannot be met.
16. In this case, a site visit is not necessary. As noted previously, the parties have effectively removed as disputed issues the attack itself, including the acts committed by the Accused Persons. Moreover, the Prosecution disclosed numerous photographs taken at the MGS Haskanita³⁵ before and in the wake of the attack. These all show the layout of the scene of the crimes.³⁶ There are also numerous witnesses and potential witnesses located outside of Darfur who are able to provide ample information on the scene of the crime (though the Defence appears not to have interviewed any of them). As described in paragraph 12 above and paragraphs 28 and 29 below, there also exist other investigative options, some only partially pursued and others not at all. For instance, there is an outstanding “Request for Cooperation” to the AU which was issued by the Trial Chamber on 21 December 2011³⁷, approximately two weeks before the Defence application for a stay of proceedings.³⁸ It is plainly premature to conclude that the AU’s failure to immediately respond over the new year’s holiday demonstrates the futility of seeking that evidence.
17. There is also no legal support for the Defence position. None of the cases cited by the Defence support their assertion that the ability to visit Haskanita or the unidentified locations is a fundamental right, or that the inability to go there justifies a presumption that the trial is unfair. The cases the Defence cites refers to the need to have access to other items -- like textbooks, computers,³⁹ vehicles,⁴⁰ office space etc.⁴¹ -- that were required in the particular circumstances of those cases.

³⁴ Defence Request, paras 26, 28.

³⁵ The Prosecution has disclosed over 200 related photographs.

³⁶ See, for example, INCRIM disclosure package 14 disclosed on 14 September 2011

³⁷ ICC-02/05-03/09-268-Red, pages 12-13.

³⁸ The Prosecution notes that the Chamber gave the Registrar until 16.00 on 30 January 2012 to report on the implementation of the cooperation request (see of ICC-02/05-03/09-268, pages 12-13). Tellingly however, there is no indication in the Registrar’s report that the AU has declined the request for cooperation (see ICC-02/05-03/09-284, at page 4), and in fact further demonstrates that requests of this nature, for understandable reasons, take time.

³⁹ *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on Sesay Defence Application I – Logistical Resources, 24 January 2007 (hereinafter “*Sesay Decision*”)

18. In short, the Defence has not met its burden of showing how the site visits are relevant, much less essential to the preparation of the defence; that no alternative sources can provide the evidence; and that the inability to visit means that a fair trial cannot be had in this case.

19. The Defence also complains that it has been unable to obtain other unspecified information from other sources. It made requests to the UNSC, OCHA, UNMIS and the Government of Nigeria⁴² in August 2011. Since the Prosecution does not know the nature of the requests, it is not in a position to fully appraise their content so as to determine the likelihood of success. However, it is not unusual for international agencies, regional bodies and States to take time in responding to sensitive requests,⁴³ to require reminders and pressure before complying, and to offer narrowed or less sensitive information. There is no indication that the Defence has sent further letters to follow up on these requests. In short, the Defence cannot interpret the lack of a response from either of these sources as an outright refusal and consequently an exhaustion of all investigative avenues available to it.

(ii) Article 67(1)(e) right to “obtain the attendance and examination of witnesses”

20. Citing certain challenges it faced in carrying out its investigations, the Defence claims a breach of Article 67(1)(e) (the right “obtain the attendance and examination of witnesses”)⁴⁴. The challenges described included the lack of access to the Sudan, difficulties in locating witnesses in the Sudan, difficulties in arranging for travel of witnesses out of the Sudan, and the fact that the “logistics involved in organising witness interviews outside Sudan are prohibitive.”⁴⁵

⁴⁰ See Sesay Decision

⁴¹ *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 Jan 2007, para. 13; Sesay Decision

⁴² Defence Request, para. 17

⁴³ At footnote 35 of the Defence Request, the Defence indicates that it received a response from the ICRC on 6 December 2011 – approximately 4 months after the Defence letters were transmitted to them.

⁴⁴ ICC-02/05-03/09-274, paras 30-34.

⁴⁵ ICC-02/05-03/09-274, paras 4-16.

21. There is no trial scheduled. Clearly, it cannot be said that the Defence right to call witnesses on its behalf has been frustrated or violated. Moreover, nothing in the Defence Request points to critical defence witnesses being prevented or unable to testify, or that the Defence exhausted all available measures to secure their evidence. And there is no showing that the allegedly unavailable witnesses are “crucial” to the case.⁴⁶ It is thus clearly premature to conclude that the Accused Persons have been irreparably prejudiced by an inability to call witnesses in their defence and to invoke the first limb of Article 67(1)(e), at this pre-trial stage, as a basis for requesting a stay of the trial.

22. In any event, the right to “obtain the attendance and examination of witnesses” pursuant to Article 67(1)(e) is not absolute. In defining the scope of the right enshrined in Article 6(3)(d) of the European Convention on Human Rights analogous to Article 67(1)(e) of the Statute, the European Court of Human Rights has held that: “it does not give the defence an absolute right to question any witnesses it wishes to call”⁴⁷ and “does not require the attendance and examination of every witness on the accused’s behalf: its essential aim, as is indicated by the words ‘under the same conditions’, is a full ‘equality of arms’ in the matter”.⁴⁸

23. It is also unreasonable to conclude now that the Defence has been thwarted in “right to investigate” – a “right” not specified in the Rome Statute – so as to require the Chamber to order a stay of proceedings. There is no showing of “serious prejudice” owing to the alleged anticipatory violation of their fair trial rights.⁴⁹ The evidence (in

⁴⁶ See, e.g., *Prosecutor v Simba*, ICTR-01-76-A, Judgement of 27 November 2007, paragraph 41, cited in paragraph 31 of the Defence Request, noting that “witnesses crucial to the Defence case refuse to testify [...]”. See also *Prosecutor v Tadić*, Judgement of 15 July 1999, Case No. IT-94-1-A, para. 55, cited by Defence in paragraph 32 of the Defence Request

⁴⁷ *Krempovskij v Lithuania*, Third Section Decision as to the Admissibility of Application no. 37193/97, 1999, para. 7.

⁴⁸ *Vidal v. Belgium*, Judgment of 22 April 1992, para. 33; Decision as to the Admissibility of Application No. 48297/99 by Audrius Butkevičius against Lithuania, para. 13; *Solakov v. The Former Yugoslav Republic of Macedonia*, Judgment of 31 Oct 2001 (final - 31/01/2002), para. 57.

⁴⁹ *R v Felham Magistrates’ Court ex parte Ebrahim; Mouat v DPP* [2001] 2 Cr App R 23; *R v. Mid Sussex Justices ex parte Adams* ILR 17th February 1992; *DPP v. Meakin* [2006] EWHC 1067; see also Attorney General’s Reference (No 1 of 1990). *Prosecutor v. Milutinović et al*, IT-05-87-T, Decision on Second Ojdanić Motion for Stay of Proceedings, 19 October 2006, para. 11. See also *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-T, Judgement of 14 July 2009 (*hereinafter* “Renzaho Trial Judgement”), paras 66-68, 72-74, 76 in which the Trial Chamber found that Renzaho did not suffer prejudice from the absence of certain witnesses (the relevant paragraphs have been upheld by the Appeals Chamber - see

this case the information and material that the Accused Persons claim to be unable to secure) must be relevant, it must relate to the heart of the case,⁵⁰ such that its absence will have “a decisive impact” on the outcome of the case.⁵¹ In substantiating alleged prejudice, the Accused Persons also must particularise the unavailable evidence.⁵² In this instant case, the Defence has done no more than speculate as to whether witnesses might provide information likely to assist the preparation of the defence.

24. At the same time, a careful reading of the Defence Request reveals that in spite of the challenges faced by the Defence, they have been able to identify, locate, meet, and interview potential witnesses.⁵³ The Prosecution observes, for instance that the two Accused Persons are able to move within the Sudan, where both live, and identify and meet with potential witnesses in Sudan – something that the Prosecution has been unable to do. Mr Banda is able to move through the Sudan.

25. In addition, the relationship between the Accused Persons and the GoS is also apparently in flux. None of the Accused persons have so far been arrested by the GoS; in fact the main reason that Mr Banda aborted the mission to Chad in December 2011 (see below) was to return to Darfur [REDACTED].⁵⁴ The Prosecution also notes that Mr Abu Garda, who also publicly cooperated with the Court and is part of the same rebel movement as Mr Banda, was appointed Minister of Health by President Al Bashir.⁵⁵

Tharcisse Renzaho v. The Prosecutor, Case No. ICTR-97-31-A, Judgement of 1 April 2011 (*hereinafter* “Renzaho Appeal Judgement”), paras 194, 211-222, 234-236).

⁵⁰ DPP v S [2002] EWHC 2982. *See also* Renzaho Trial Judgement, para. 61. *Perna v. Italy*, Judgment of 6 May 2003, para. 32.

⁵¹ *Krempovskij v Lithuania*, Third Section Decision as to the Admissibility of Application no. 37193/97, 1999, para. 7; *Perna v. Italy*, Judgment of 6 May 2003, para. 29. *See also* Renzaho Appeal Judgement, para. 229.

⁵² *See* Renzaho Appeal Judgement, paras 190, 192. In *Nahimana et al*, dealing with the defence request to stay proceedings due to the lack of cooperation on the Rwandan authorities in granting access to certain material, Trial Chamber took into account the Defence’s lack of precise knowledge of the existence of that material and among others, on that ground dismissed the defence request (*see The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza*, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003, para. 13).

⁵³ *See* paragraphs 9, 10 and 15 of the Defence Request, for example. *See also* Confidential and *ex parte* Annexure H, which includes a list of potential defence witnesses.

⁵⁴ [REDACTED].

⁵⁵ *See* <http://www.arabstoday.net/en/sudan-is-committed-to-the-doha-agreement.html> (last consulted on 30 January 2012).

26. The two Accused persons also can travel to and within Chad. [REDACTED]. The Defence has also screened potential witnesses⁵⁶ and made informed decisions to interview them [REDACTED]. In addition, it has had the opportunity to travel to Chad to interview seven witnesses: [REDACTED].⁵⁷ This caused delay and Mr Banda, of his own volition, aborted the mission because he had another engagement [REDACTED]. That they were able to travel to Chad to interview witnesses contradicts the claim that future investigative missions will be futile. In the ICTY case of *Milutinović*, cited in the Defence Request, the Chamber admonished the Defence for prematurely breaking off cooperative efforts that could have assisted its investigative activities and denied the request for a stay of proceedings; instead, it urged the Defence to resume cooperative efforts to facilitate its investigation.⁵⁸ If there is recalcitrance, however, the Defence has the option of applying to the Chamber to request cooperation, as it did with the African Union.⁵⁹ This has not been done, therefore all available measures have not been exhausted in this regard.⁶⁰

27. The Defence situation here also falls far short of the situation in *Renzaho*, in the ICTR. There, the Trial Chamber was faced with similar defence arguments that they were unable to obtain evidence from witnesses in Rwanda given the political climate of threats and intimidation and the inadequacy of the Tribunal's protective measures.⁶¹ Recalling that "*no judicial system can guarantee absolute witness protection*",⁶² the Trial Chamber held that that "*The Defence's challenges concerning the difficulties of securing witnesses from Rwanda, when viewed in light of the entire record, fails to convince the Chamber that this proceeding has been rendered unfair.*"⁶³ In coming to that assessment, it considered that Renzaho managed to

⁵⁶ See paragraph 15 of the Defence Request.

⁵⁷ [REDACTED].

⁵⁸ *Prosecutor v Milutinović et al*, IT-05-87-T, Decision on Second Ojdanić Motion for Stay of Proceedings, 19 October 2006, paras 10-12.

⁵⁹ ICC-02/05-03/09-146.

⁶⁰ Such an application would be in compliance with the case law advanced by the Defence in paragraph 34, footnote 66 of the Defence Request – *Prosecutor v Ndindiyimana et al*, ICTR-2000-56-T.

⁶¹ *Renzaho* Trial Judgement, para. 75.

⁶² *Renzaho* Trial Judgement, para. 76 citing Munyakazi, Decision on Prosecution's Appeal Against Decision on Referral under Rule 11bis (AC), 8 October 2008, para. 38.

⁶³ *Renzaho* Trial Judgement, para. 76 (upheld on appeal, see *Renzaho* Appeal Judgement, paras. 193, 223-230).

mount a Defence that involved the attendance of 27 witnesses, five of whom came from Rwanda.⁶⁴

28. Nor is the Defence team unfairly prevented from investigating in Darfur or elsewhere in the Sudan. The Defence seem to have [REDACTED].⁶⁵ The Defence has not exhausted the possibility of a judicial request to the GoS for cooperation. The Chamber refused in the past because of the inadequacy of the Defence application. If the Defence submits a specific and tailored request, the Chamber may seek assistance on its behalf. In addition, the Defence identifies other investigative steps it has undertaken that demonstrate its ability to locate and identify witnesses in the Sudan. For example, *ex parte* Annexures F, G, and H presumably contain Defence witnesses' personal details, security concerns and declarations. Annexure L also suggests the ability of the Defence to conduct investigative activities and contact potential witnesses. Furthermore, [REDACTED].

29. Additionally, potential Defence witnesses in the Sudan could be interviewed in a third country. That one prior effort ended when Mr Banda grew impatient does not indicate that further efforts would be futile. To the contrary, the Defence can explore investigative practices to that end, and can seek assistance if necessary from the VWU and the Chamber. While the Defence made one effort, [REDACTED].

30. The Prosecution also notes that the witnesses possibly identified in *ex parte* Annexures F and G apparently agree to cooperate with the Defence if their identity is not divulged to the GoS. It appears also that the Defence is already in possession of the witnesses' declarations. Once it is determined whether to interview them as witnesses, there are a wide range of procedural protective measures listed in Rule 87(3) coupled with [REDACTED]. While "it is impossible to eliminate all danger because the operations of the Court carry an inherent risk", the Court can take steps

⁶⁴ Renzaho Trial Judgement, para. 76; see also Renzaho Appeal Judgement, paras. 226-227. See also *The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze, Jean Bosco Barayagwiza*, Case No. ICTR-99-52-T, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003, para. 17.

⁶⁵ [REDACTED]. See also [REDACTED]. [REDACTED]

to manage that risk “starting by mitigating it to an acceptable level by good practices and protective measures”.⁶⁶

31. In sum, there are options available, thus it is premature and excessive to hold that fairness to the Accused is impossible at this stage.

Article 67(1)(e) right to “present other evidence”

32. The Defence argument that it has been unable to obtain relevant contemporaneous documents from the African Union, UNSC, OCHA, UNMIS, the Government of Nigeria and the ICRC as well as the GoS is without merit. The Defence states that these documents are crucial to a proper investigation of the contested issues in the case,⁶⁷ and consequently that Article 67(1)(e) has been breached, rendering a fair hearing impossible.⁶⁸

33. As discussed above, however, the Prosecution notes that on 21 December 2011, the Trial Chamber ordered the Registrar to transmit a cooperation request pursuant to Article 87(6) of the Statute asking for the African Union to provide the documents sought by the Defence.⁶⁹ The Chamber further invited representatives of the African Union to consult with the Chamber in case it identifies problems.⁷⁰ While there is no indication that any follow-up requests have been transmitted to any of the other organisations on behalf of the Defence since August 2011, there is nothing that would foreclose that possibility.

34. Since the above request for cooperation is pending (and has been pending only for a very short time), and since similar requests could be made via the Chamber to several entities that may potentially be willing to cooperate, it is manifestly premature to conclude that investigation will be fruitless.

⁶⁶ ICC-01/04-01/06-1311-Anx2, paragraph 42.

⁶⁷ ICC-02/05-03/09-274, para. 17.

⁶⁸ ICC-02/05-03/09-274, para. 35.

⁶⁹ ICC-02/05-03/09-268-Red, pages 12-13.

⁷⁰ ICC-02/05-03/09-268-Red, page 13.

(c) The Principle of Equality of Arms Has Not Been Breached

35. The Defence stated that “[t]he nature of this case means that the inability to investigate in Sudan benefits the OTP and prejudices the Defence”.⁷¹ This argument is spurious.

36. Even assuming the accuracy of the Defence claim, the Prosecution is also restricted in its ability to investigate in the Sudan, so in that respect “equality of arms” is preserved. However, the prejudice to the Prosecution from this restriction is at least as significant as that alleged by the Defence. The Prosecution bears the sole burden of proof and must moreover prove guilt to the highest legal standard, beyond a reasonable doubt; in contrast, the Defence has no burden at all. The refusal of the Sudan to allow investigations within its territory affects the Prosecution’s ability to meet its singular burden of proof.

37. That said, in fact the record shows that the Accused persons clearly have access to, and can travel within the Sudan. The Defence submission [REDACTED] have the ability to [REDACTED] muster witnesses within the Sudan. They also presumably have contacts within rebel movements and civilian communities in the Darfur liberated areas, including in/around Haskanita, the Prosecution has no such access. And the Defence has the same access to evidence in third States as does the Prosecution.

38. The Defence stated additionally that it is prejudiced by an inequality of arms between the Defence and the legal representatives of victims, since, unlike the Defence, the former legal representatives of victims a/6046/10 and a/6047/10 are able to travel to the *locus in quo*.⁷²

39. But equality of arms is a doctrine that applies only to the *parties* to the trial - i.e. the Prosecution and the Defence. The victims do not have an automatic right to lead evidence. Their participation is allowed to express their views and concerns. But that

⁷¹ ICC-02/05-03/09-274.

⁷² ICC-02/05-03/09-274, para. 20.

they may have access to information that is unavailable to the Defence or the Prosecution does not demonstrate a breakdown in equality of arms.

III. Justification for Confidential Filing

40. The Prosecution files this Response “Confidentially” because it refers to the contents of Annexures to the Defence Request that were filed as “Confidential Annexures”. The Prosecution will file a Public Redacted Version of its Response.

IV. Defence Request for an Oral Hearing

41. On 18 January 2012, the Defence filed the “Defence Request for an Oral Hearing” requesting the Trial Chamber to grant an oral hearing on the Defence Request.⁷³ According to the Defence, the request was made “[d]ue to the importance and novelty of the issues addressed in the Request and to assist the Trial Chamber in resolving the mixed questions of fact and law which arise therein [...]”.⁷⁴

42. In the Prosecution’s view, the issues in this case are straightforward. Nor does the Prosecution agree that argument would assist in addressing the “mixed questions of fact and law”. Though the legal determination may be based on the factual underpinnings, the critical facts themselves are not seriously in dispute. In this case, the Defence and the Prosecution each have had the opportunity to set out the facts critical to their positions in their submission and to provide factual support in attached annexes.

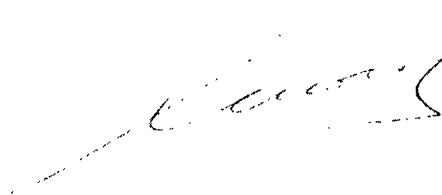
43. That said, whether to hold a hearing is a matter within the Court’s discretion, which best knows if a hearing will help the Chamber to understand and decide. The Prosecution requests only that if a hearing is scheduled, the Chamber not allow the parties to present facts as to which the other party lacks notice.

⁷³ ICC-02/05-03/09-280.

⁷⁴ ICC-02/05-03/09-280, para. 2.

Conclusion

44. For the reasons set out above, the Prosecution submits that a stay of the proceedings is not warranted in this case and the Defence Request should be denied.



Luis Moreno – Ocampo
Prosecutor

Dated this 1st Day of February 2012

At The Hague, The Netherlands