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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 with Public Annex A

**Application of
The Association of Defence Counsel Practicing Before the
International Criminal Tribunal for the Former Yugoslavia
To File an *Amicus Curiae* Brief on
The 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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Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

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Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. Pursuant to Rule 103(1) of the Rules of Procedure and Evidence of the International Criminal Court (ICC), the Trial Chamber is hereby requested to grant leave to the Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY) to file an *amicus curiae* brief in the case of *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*¹.
2. The amicus brief will be directed towards the exceptional circumstances raised in the Defence Request for a Temporary Stay of Proceedings currently pending before this Trial Chamber and, in particular, address the importance of the Accused having the realistic opportunity to conduct a thorough, pre-trial investigation of the Defence case so as to assure the Accused is provided with a fair trial.²
3. The ADC-ICTY submits that its status as an organization of defence counsel and the developed expertise of its members in representing accused in criminal trials before an international tribunal may assist the Trial Chamber by providing information, from an independent source, which may otherwise not be made available to the Trial Chamber.

II. The ADC-ICTY

4. The ADC-ICTY is an association of defence counsel practicing at the ICTY. It is recognized as the defence counsel organization serving the ICTY pursuant to Rule 44(A)(iii) of the Rules of Procedure and Evidence for the Tribunal.³ In its preamble, the ADC-ICTY Constitution states that it “is a partner, along with the organs of the International Tribunal, in promoting the fairness of the proceedings and the accomplishment of the mission of the International Tribunal pursuant to United Nations Security Council Resolution 827 (1993).”⁴

¹ Case No. ICC-02/05-03/09 [hereinafter cited as *Prosecutor v Banda and Jerbo*].

² *Prosecutor v Banda and Jerbo*, Defence Request for a Temporary Stay of Proceedings (Public) with Public Annexures A, B, D, E, I, M and O, 6 January 2012 [hereinafter “Defence Stay Request”].

³ ICTY Rules of Procedure and Evidence (RPE) rule 44(A) lists the minimum qualifications for counsel to practice before the ICTY. Rule 44(A)(iii) requires that counsel practicing before the ICTY must be “a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar.” The ADC-ICTY was established in 2002, as an independent, non-profit professional association to fulfill this requirement. In practice no counsel may represent an Accused at the ICTY unless counsel is a member in good standing of the ADC-ICTY at the time of that representation.

⁴ The Constitution of the ADC-ICTY is on file with the Office of the Registrar of the ICTY. It may also be found at: <http://adc-icty.org/adcdocuments.html>

5. A total of 126 trials and appeals have been completed to date at the ICTY, of the 161 indictments brought before the Tribunal since its inception. Trial proceedings are currently ongoing in 16 cases, appeals are currently pending in 17 cases, and 2 cases are currently still in the pre-trial stage.⁵ Members of the ADC-ICTY have served as defence counsel in these cases both as privately retained counsel and, in the majority of cases, as counsel assigned to the Accused by the Registry.
6. In 2011 the ADC-ICTY produced, with the assistance of the European Union, and under the auspices of the United Nations Interregional Crime and Justice Research Institute (UNICRI) and the OSCE Office of Democratic Institutions and Human Rights (OSCE-ODIHR) War Crimes Justice Project, its “*Manual on International Criminal Defence—ADC-ICTY Developed Practices*”.
7. The Manual recognizes, in its introduction, that the ADC-ICTY has developed a “unique expertise” arising from representation of the Accused in war crimes, crimes against humanity and genocide cases at the ICTY, including the development of a body of written work, practical experience and courtroom skills which translate to both domestic war crimes courts and other international courts.⁶
8. The ADC-ICTY has also previously appeared as *amicus curiae* in international criminal cases including, for example, *Prosecutor v Brdjanin* (on substantive law questions regarding the joint criminal enterprise doctrine);⁷ *Prosecutor v Prlic et al* (regarding whether conduct of counsel constituted contempt of court, violation of the Rules of Procedure and Evidence or misconduct),⁸ and *Prosecutor v Hadzihasanovic* (regarding the impact of the allocation of resources to the Accused on his right to a fair trial).⁹
9. The ADC-ICTY views, as part of its mission, the obligation to ensure that the rights of the Accused and the fairness of proceedings in the international courts are guaranteed

⁵ These statistics can be found at: <http://www.icty.org/sections/TheCases/KeyFigures>

⁶ *Manual on International Criminal Defence ADC-ICTY Developed Practices* (UNICRI, ADC-ICTY, ODIHR OSCE 2011), Introduction, pg. 3. The Manual can be found in electronic form at: <http://wcjp.unicri.it/deliverables/manual.php>

⁷ *Prosecutor v Brdjanin*, IT-99-36-A, Amicus Brief of Association of Defence Counsel—ICTY, 6 July 2005.

⁸ *Prosecutor v Prlic et al*, IT-04-74-T, Advisory Opinion of Amicus Curiae Disciplinary Council of the Association of Defence Counsel of the ICTY, 13 August 2009.

⁹ *Prosecutor v Hadzihasanovic*, IT-01-47-PT, Amicus Brief of the Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia in Support of Joint Defence Oral Motion for Reconsideration of Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial, 14 July 2003.

to the Accused in accordance with the applicable Statutes, Rules of Procedure and Evidence and other relevant international instruments.

10. The ADC-ICTY respectfully submits that the expertise it has gathered as an organization through its individual members in all phases of the trial process, including pre-trial investigation and preparation, could assist this honorable Trial Chamber in the resolution of issues raised in the Defence Stay Request by providing an overview of its experience regarding the fundamental importance of Defence pre-trial investigations in ensuring the Accused is provided with a fair trial.

III. Relief requested

11. The ADC-ICTY respectfully requests that the Trial Chamber grant it leave to file an *amicus curiae* brief addressing the issue of whether the fairness of trial is compromised when the Defence has no access, for purposes of pre-trial investigation, to the site of the crimes alleged in the Indictment and/or to witnesses to the relevant events including potential defence witnesses. The brief will discuss: (a) the fundamental importance of an independent pre-trial investigation by the Defence to (i) provide a basis to test the credibility and/or reliability of Prosecution evidence; (ii) to develop affirmative defences on behalf of the Accused, and (ii) to assist in the truth seeking function of the Trial Chamber; and (b) the need for remedial measures when the Defence is unable to independently investigate the Defence case, including the reasonableness of staying the proceedings.
12. The ADC-ICTY, in the interest of expediting this Request, is submitting its amicus brief contemporaneously with this Request, attached here as Annex A, so that if the Trial Chamber exercises its discretion to grant this Request, the amicus brief may be immediately filed and cause no delay in the proceedings.

Respectfully submitted,



COLLEEN M. ROHAN

Vice-President

Association of Defence Counsel Practicing 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