

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09
Date: 11 September 2014

TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN***

Public

Warrant of arrest for Abdallah Banda Abakaer Nourain

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Julian Nicholls

Counsel for the Defence

Mr Karim A.A. Khan

Mr David Hooper

Legal Representatives of Victims

Ms Hélène Cissé

Mr Jens Dieckmann

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IV (“Chamber”) of the International Criminal Court (“Court”) in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, acting pursuant to Articles 58, 61(11), 63(1), 64(6)(a), 89, 91 and 92 of the Rome Statute (“Statute”) and Rules 134 *bis/ter/quarter*, 176(2) and 187 of the Rules of Procedure and Evidence issues (“Rules”), by Majority, Judge Eboe-Osuji dissenting, the following “Warrant of arrest for Abdallah Banda Abakaer Nourain”.

A. Background

1. On 20 November 2008, the Office of the Prosecutor (“prosecution”) requested for the Chamber to issue a warrant of arrest or, alternatively, a summons to appear for Mr Abdallah Banda Abakaer Nourain (“Mr Banda”).¹
2. On 27 August 2009, Pre-Trial Chamber I (“Pre-Trial Chamber”), in addition to finding that there are reasonable grounds to believe that Mr Banda committed certain alleged war crimes, concluded that a summons to appear was sufficient to ensure his appearance at trial.² The Pre-Trial Chamber reaffirmed its power to review the finding that a summons was sufficient “either *proprio motu* or at the request of the Prosecutor”.³
3. On the same day, the Pre-Trial Chamber issued a summons to appear for Mr Banda,⁴ reiterating that its conclusion that a summons to appear was sufficient was “without prejudice to the Chamber’s power to review its determination under articles 58(1) and 58(7) of the Statute, respectively”.⁵

¹ ICC-02/05-163-Conf-Exp (with annexes).

² Second Decision on the Prosecutor’s Application under Article 58, 27 August 2009, ICC-02/05-03/09-1-RSC, paragraph 34, page 18 (re-scanned on 28 June 2011).

³ ICC-02/05-03/09-1-RSC, paragraph 35.

⁴ SUMMONS TO APPEAR FOR ABDALLAH BANDA ABAKAER NOURAIN, 27 August 2009, ICC-02/05-03/09-3.

⁵ ICC-02/05-03/09-3, paragraph 20.

4. On 7 March 2011, the Pre-Trial Chamber confirmed the charges.⁶
5. On 6 March 2013, this Chamber issued the “Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings”, in which it set the trial date for 5 May 2014.⁷
6. Following the establishment of the trial date, this Chamber received a number of written submissions related to the feasibility of Mr Banda’s voluntary appearance before the Court⁸ and convened a Status Conference on 7 April 2014 with the parties and the Registry, whereby it received oral submissions on the topic.⁹ At the request of the Chamber,¹⁰ the defence¹¹ and the prosecution¹² filed additional written submissions.
7. On 15 April 2014, the defence requested that: (i) the trial start date of 5 May 2014 be vacated, (ii) a status conference be scheduled for September 2014 and (iii) a trial start date be set for March 2015.¹³
8. On 16 April 2014, the Chamber decided that the 5 May 2014 commencement date was clearly no longer feasible.¹⁴ As a result, it decided to vacate the trial date. In

⁶ Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red.

⁷ Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings, 6 March 2013, ICC-02/05-03/09-455, paragraph 25(ii).

⁸ Submission of the Registry pursuant to regulation 24*bis* of the Regulations of the Court on the trial preparation, 3 April 2014, ICC-02/05-03/09-543-Conf-Red (only available to the defence and the prosecution); Second Submission of the Registry pursuant to regulation 24*bis* of the Regulations of the Court on the trial preparation, 3 April 2014, ICC-02/05-03/09-550-Conf-Red (only available to the defence and the prosecution).

⁹ Order scheduling a status conference, 4 April 2014, ICC-02/05-03/09-551 (with confidential annex), ICC-02/05-03/09-551-Conf-Anx; Transcript of public hearing, 7 April 2014, ICC-02/05-03/09-T-24-ENG; Transcript of confidential hearing, 7 April 2014, ICC-02/05-03/09-T-25-CONF-EXP-ENG.

¹⁰ Decision subsequent to the status conference of 7 April 2014, 10 April 2014, ICC-02/05-03/09-553-Conf, paragraph 14.

¹¹ Defence Submissions pursuant to “Decision subsequent to the status conference of 7 April 2014” (ICC-02/05-03/09-553-Conf), 14 April 2014, ICC-02/05-03/09-560-Conf; ICC-02/05-03/09-561-Conf.

¹² Prosecution Response to “Defence Submissions pursuant to *Decision subsequent to the status conference of 7 April* (ICC-02/05-03/09-553-Conf)”, 15 April 2014, ICC-02/05-03/09-562-Conf.

¹³ Defence Request to Vacate the Trial Commencement Date, 15 April 2014, ICC-02/05-03/09-563-Conf-Red, paragraph 17 (confidential redacted version notified 16 April 2014).

¹⁴ Decision vacating the trial date of 5 May 2014, 16 April 2014, ICC-02/05-03/09-564-Red, paragraphs 10 to 13 (with partly dissenting opinion of Judge Eboe-Osuji; confidential version of decision filed on the same date).

addition, in order to decide what further steps to take, it requested legal and factual submissions from the Registry and the prosecution.¹⁵

9. On 6 May 2014, the prosecution and the Registry filed their submissions.¹⁶ On 23 May 2014, the defence filed a consolidated response addressing the submissions of the prosecution and the Registry.¹⁷
10. On 14 July 2014, the Chamber issued the “Decision as to the Further Steps for the Trial Proceedings” (“14 July Decision”).¹⁸ This decision’s confidential submissions and reasoning are incorporated by reference into the present decision.¹⁹ In the 14 July Decision, the Chamber: (i) considered it necessary to ensure the cooperation of Sudan with the trial proceedings against Mr Banda²⁰ and (ii) ordered the Registrar to inform the Government of Sudan (“GoS”) of the summons to appear against Mr Banda and to transmit to them a cooperation request to take all necessary steps to facilitate Mr Banda’s presence for his trial, including by providing him with travel documents and making all other necessary arrangements as may be appropriate.²¹
11. On 31 July 2014, the Registry notified this cooperation request to the GoS.²²
12. On 15 August 2014, the Registry confirmed that the envelope containing the cooperation request had been returned to the Court by the GoS without being opened.²³

¹⁵ ICC-02/05-03/09-564-Conf, paragraphs 11 to 13.

¹⁶ ICC-02/05-03/09-576-Conf and ICC-02/05-03/09-577-Conf.

¹⁷ ICC-02/05-03/09-583-Conf.

¹⁸ ICC-02/05-03/09-590-Red (with partly dissenting opinion of Judge Eboe-Osuji; confidential versions notified same day).

¹⁹ ICC-02/05-03/09-590-Conf, paragraphs 12 to 22, 26 to 33, 35 and 36. Bearing in mind the principle of publicity derived from Articles 64(7) and 67(1) of the Statute, the Chamber considers that the confidential information in the present decision can be publicly referenced in a manner which does not defeat the confidential classification used.

²⁰ ICC-02/05-03/09-590-Red, paragraph 36.

²¹ ICC-02/05-03/09-590-Red, page 10.

²² Corrected version of the “Request for assistance to the Republic of the Sudan” (ICC-02/05-03/09-593) dated 30 July 2014, 31 July 2014, ICC-02/05-03/09-593-Corr (with annex; notified on 1 August 2014).

13. On 9 September 2014, the prosecution submitted that, in its view, the accused has asserted a conditional willingness to attend trial and it appears that his conditions will not be met. Thus, the prosecution requests that confirmation from the accused that he will appear is necessary in the case,²⁴ since it is unclear whether he will appear for trial on 18 November 2014 voluntarily or whether an arrest warrant will need to be issued (“9 September 2014 Request”).²⁵
14. On 9 September 2014, the Common Legal Representative (“CLR”) filed her observations with respect to the Report of the Registry on the Request for assistance to the Republic of the Sudan.²⁶ The CLR requests, *inter alia*, that the means be put in place to alleviate the difficulties in ensuring the effective presence of the accused at his trial, including appropriate alternative measures and/or recourse to a warrant of arrest.²⁷
15. On the same date, the defence reiterated its submission that Mr Banda is willing and wishes to appear before the Court and presented a confidential request to the Chamber in view of the scheduled 18 November 2014 trial date.²⁸

B. Applicable law

16. The following legal considerations underlie the Chamber’s analysis, Judge Eboe-Osuji dissenting:

²³ Report of the Registry on the “The Decision as to the Further Steps for the Trial Proceedings”, 15 August 2014, ICC-02/05-03/09-598-Conf (with two annexes).

²⁴ ICC-02/05-03/09-603-Conf, paragraph 11.

²⁵ ICC-02/05-03/09-603-Conf, paragraph 4.

²⁶ Observations des représentants légaux communs sur le rapport établi par le Greffe suite à la décision rendue par la Chambre le 14 Juillet 2014, « The Decision as to the Further Steps for the Trial Proceedings », 9 September 2014, ICC-02/05-03/09-602-Conf.

²⁷ ICC-02/05-03/09-602-Conf, page 12.

²⁸ ICC-02/05-03/09-605-Conf, paragraphs 29 and 30.

- i. Subject only to provisions which do not presently apply, the Trial Chamber may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in the proceedings.²⁹
- ii. There are two available measures in the statutory framework for ensuring the appearance of a person before the Court. These are a warrant of arrest and a summons to appear.³⁰ Both measures require a finding that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.³¹
- iii. Subject to certain limited exceptions,³² an accused subject to a summons to appear or an arrest warrant shall be present during the trial.³³
- iv. A warrant of arrest shall be issued on application of the prosecution and must be premised on a finding that the arrest appears necessary: (i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings and/or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.³⁴
- v. A summons to appear is an alternative to seeking a warrant of arrest, and the Chamber must be satisfied that a summons is sufficient to ensure the

²⁹ Articles 61(11) and 64(6)(a) of the Statute.

³⁰ Article 58 of the Statute.

³¹ Article 58(1)(a) and (7) of the Statute.

³² Rules 134 *bis*, 134 *ter* and 134 *quater* of the Rules. See also Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 25 October 2013, ICC-01/09-01/11-1066, OA 5.

³³ Article 63 of the Statute.

³⁴ Article 58(1)(b) of the Statute.

person's appearance.³⁵ A Chamber can only issue a summons to appear if there are "sufficient guarantees that the person will appear before the Court".³⁶ The sufficiency of the summons is subject to ongoing review by the Chamber, not least in light of its overarching duty to ensure that the course of justice is not disrupted and brought to a halt. Where the circumstances so require, the Chamber may issue a warrant of arrest at any point in time prior to or even after the commencement of the trial.

C. Analysis

17. The Chamber's analysis and conclusions in this section are by Majority, Judge Eboe-Osuji dissenting.
18. As already indicated, in the current case, the prosecution requested the Chamber to issue a warrant of arrest or, alternatively, a summons to appear.³⁷ The Pre-Trial Chamber considered that a warrant of arrest did not appear necessary and found that a summons to appear was sufficient to ensure the appearance of Mr Banda at trial, indicating that this was without prejudice to its power to review the sufficiency of the summons "*under articles 58(1) and 58(7) of the Statute*".³⁸
19. By virtue of the transmission of this case to the Trial Chamber³⁹ and Articles 61(11) and 64(6)(a) of the Statute, the review authority reserved by the Pre-Trial Chamber currently rests with this Chamber. This Chamber has already determined that the accused is bound by the existing summons to appear,⁴⁰ and now considers that the

³⁵ Article 58(7) of the Statute.

³⁶ Pre-Trial Chamber I, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Al-Rahman ("Ali Kushayb")*, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-1-Corr, paragraph 118 (Corrigendum notified on 15 May 2007).

³⁷ ICC-02/05-163-Conf-Exp.

³⁸ ICC-02/05-03/09-3, paragraph 20. See also ICC-02/05-03/09-1-RSC, paragraph 35.

³⁹ Presidency, Decision constituting Trial Chamber IV and referring to it the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, 16 March 2011, ICC-02/05-03/09-124.

⁴⁰ ICC-02/05-03/09-590-Red, paragraph 34; ICC-02/05-03/09-455, paragraph 21 *et seq.*

sequence of events recounted in the Background Section above justifies a review of the sufficiency of this summons.

20. In conducting its review, the Chamber has taken into account the latest developments and the proceedings as a whole. As indicated in its 14 July Decision by Majority, the Chamber is neither in a position to effectively prevent or mitigate the risks associated with particular circumstances of the case nor is it able to find an appropriate solution to problems derived from such risks.⁴¹ For that reason, the Chamber pursued the cooperation of Sudan and requested its government to facilitate Mr Banda's presence at the trial.⁴² This cooperation, according to the information provided by the Registry, is not forthcoming. The Chamber will determine in due course the appropriate course of action in order to ensure compliance with the request of the Court.
21. In light of the above, the Chamber concludes that, regardless of whether Mr Banda wishes or not to be present at trial, there are no guarantees that in the current circumstances, he will be in an objective position to appear voluntarily. For these same reasons, the Chamber does not consider it appropriate to request an undertaking from the accused and accordingly, it is also unnecessary to receive the defence response to the 9 September 2014 Request.
22. In this regard, the Chamber recalls that the jurisprudence of the Court suggests that the summons to appear is intended for individuals that are not only personally willing to appear on a voluntary basis but are also in a position to do so. Indeed, in the *The Prosecutor v Harun and Kushayb*, Mr Kushayb was "reported to be in prison upon a warrant of arrest issued by the Sudanese authorities" and the Chamber found that, by reason of his detention, no sufficient guarantees had been provided

⁴¹ ICC-02/05-03/09-590-Conf, paragraphs 26 to 35 (Judge Eboe-Osuji dissenting).

⁴² ICC-02/05-03/09-590-Red, paragraph 36.

that he would appear before the Court.⁴³ Under these circumstances, the Pre-Trial Chamber declined to issue a summons to appear⁴⁴ and decided that a warrant of arrest was necessary to ensure Mr Kushayb's presence at Trial.⁴⁵

23. In the view of the Chamber, an individual can be obstructed in his willingness or freedom to appear at trial by means other than detention. If these obstacles are such that there are no longer guarantees that he will appear, the Chamber may issue a warrant of arrest.

24. As a result of its review, the Chamber finds that, in accordance with Article 58(1)(b)(i) of the Statute, a warrant of arrest now appears necessary to ensure Mr Banda's presence at trial. Pursuant to Article 89(1) of the Statute, the Registry is directed to transmit these new requests for arrest and surrender to any State, including the Sudan, on whose territory Mr Banda may be found.⁴⁶ Should Mr Banda nonetheless appear voluntarily before the Court, the Chamber will take the voluntary appearance into consideration and revisit accordingly the conditions of his stay in The Netherlands during trial.

25. As consequences of the present decision, the Chamber vacates the trial date of 18 November 2014 and suspends preparatory measures for the trial until Mr Banda's arrest or voluntary appearance. Until such date, no currently pending applications will be ruled upon unless good cause is provided to the Chamber by a party or participant.

⁴³ See ICC-02/05-01/07-1-Corr, paragraphs 118 to 124.

⁴⁴ ICC-02/05-01/07-1, paragraph 124.

⁴⁵ ICC-02/05-01/07-1, paragraph 133.

⁴⁶ See Article 89(1) of the Statute.

D. Conclusion

26. For the foregoing reasons, the Chamber hereby:

- (i) Rejects the prosecution's 9 September 2014 Request;
- (ii) Finds that the summons to appear is no longer sufficient to ensure Mr Banda's appearance at trial;
- (iii) Issues a warrant of arrest for Abdallah Banda Abakaer Nourain;
- (iv) Decides that, as soon as practicable, the Registry: (i) shall prepare a request for cooperation seeking the arrest and surrender of Mr Abdallah Banda Abakaer Nourain pursuant to Articles 89(1) and 91 of the Statute and Rule 187 of the Rules; (ii) shall transmit, in consultation and coordination with the prosecution, the request to the competent authorities of Sudan and any other state as may be appropriate in accordance with Rule 176(2) of the Rules;
- (v) Directs the Registry, pursuant to Articles 89(3) and 92 of the Statute, to prepare and transmit to any relevant state, in consultation and coordination with the prosecution, any request for transit and provisional arrest which may be necessary for the surrender of Abdallah Banda Abakaer Nourain;
- (vi) Orders the prosecution to transmit to the Registry, as far as its confidentiality obligations allow, and to the Chamber all information available to it that may be of assistance in the execution of the request for arrest and surrender, as well as any information relevant to assessing any risks to persons which are associated with the transmission of the request for arrest and surrender; and

- (vii) Vacates the trial date of 18 November 2014 and suspends preparatory measures for the trial as well as rulings for pending filings until Mr Banda's arrest or voluntary appearance before the Court.

Judge Eboe-Osuji will append a dissenting opinion in due course.

Done in both English and French, the English version being authoritative.



Judge Joyce Aluoch



Judge Silvia Fernández de Gurmendi



Judge Chile Eboe-Osuji

Dated this 11 September 2014

At The Hague, The Netherlands